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

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INTRODUCTION

Each year, the Westway and Imperium proposed projects would ship millions of barrels of crude oil through Washington's coastal and ocean waters, storing and transferring that oil on Washington's fragile coastal shoreline. That's the very purpose of the Westway and Imperium oil shipping terminals: to transfer crude oil and other liquids from trains to ocean-going vessels that would transit Washington's coastal ocean on route to refineries on the West Coast and abroad. Ocean shipment of oil is a fundamental and integral component of these facilities' planned operations—there is no other reason for their permitting and construction.

Astoundingly, Respondents contend that oil shipment across the ocean is not a use of the ocean, and they urge a reading of the Ocean Resources Management Act ("ORMA") that is so narrow it would render most of the statute meaningless. ORMA is not so hollow. ORMA ensures that risky ocean-related projects only move forward if they are justified, and, if justified, that they proceed in the most environmentally sound manner possible. ORMA has long been dormant only because there has been no opportunity for a court to examine the applicability of ORMA's protections to such substantial threats to Washington's ocean and coastal resources as they face today.

Similarly, in lieu of a sufficiently early demonstration of financial

responsibility, Respondents propose a wait-and-see approach that gives the relevant decision-makers neither financial data nor meaningful assurance to show that the project proponents will be able to pay for a catastrophic spill before project approval. Such an approach is neither viable nor legally permissible where, as here, the demonstration of financial responsibility is included as part of the mitigation package for the very projects that will adversely impact Washington's coastal waters.

The legislative history and the context in which the Legislature passed both ORMA and RCW 88.40.025 demonstrate that the Legislature intended these statutes provide meaningful protection, not to be mere exercises in legal theory. They are important components of Washington's strong system of checks and balances for environmentally risky projects and cannot be left on the sidelines. Quinault Indian Nation and Friends of Grays Harbor *et al.* respectfully ask the Court to reverse the Shorelines Hearings Board's decision as to the applicability of ORMA and RCW 88.40.025 (financial assurances).

ARGUMENT

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

The plain text of ORMA demonstrates that it applies to <u>all</u> uses that would adversely affect the covered coastal waters. In passing ORMA,

the Legislature placed a special emphasis on protecting against oil spills along Washington's ocean coast—banning extraction outright and regulating activities, such as the projects at issue here, that pose a substantial risk to Washington's fragile coastline.

A. ORMA Regulates More than Extraction Activities.

ORMA's plain language and legislative history demonstrate that ORMA regulates more than oil and resource extraction activities. The Shorelines Hearings Board ("Board") erred when it narrowed ORMA's application to extraction, finding that the projects were not covered by ORMA because they would not "extract or otherwise service the extraction of crude oil or any other resources from Washington waters or transport oil from beneath the ocean." AR 2418-19 (Shorelines Hearings Board Order on Summary Judgment (As Amended on Reconsideration) at 40-41) ("SHB Order"). As Ecology argues in its briefing, the Board found that "ORMA is limited to resource extraction activities such as oil and gas development." Joint Response Br. of Washington Dept. of Ecology and City of Hoquiam at 24 ("Ecology Resp.").

Imperium concedes that ORMA is more than an extraction only statute, but characterizes the Board's ruling as merely "inartfully-worded."

Imperium Resp. at 18 & n.72.[1] As Imperium readily acknowledges, *id.* at 19, the resources ORMA regulates and protects include Washington's coastal waters generally; the word "resources" does not only refer to any fossil fuel resources that may be located in Washington waters. For the reasons discussed in Quinault's opening brief, limiting ORMA to extraction activities would result in incoherence and superfluity. For example, if ORMA only regulated extraction, it would be redundant to have an entire subsection in ORMA's implementing regulations, WAC 173-26-360(8), related to such activities, since ORMA would by default only cover that category. Likewise, as the Legislature immediately banned the leases required for oil extraction as part of ORMA, RCW 43.143.010(2), it would be nonsensical for the Legislature to have imposed review criteria on those banned activities alone, which would be the case if ORMA only applied to extraction. Finally, the Legislature temporarily exempted certain commercial and recreational uses of Washington's ocean waters from ORMA. RCW 43.143.010(5). This exemption clarifies that ORMA's reach includes recreational and non-extraction commercial uses other than those that existed at the time of

[1] Imperium refers to Quinault's characterization of the Board's order as having limited ORMA to extraction activities as "hyperbolic." Imperium Resp. at 19. Quinault's understanding of the Board's erroneous order, however, is apparently shared by Ecology and Westway. Ecology Resp. at 24; Westway Resp. at 2.

ORMA's passage, not only extraction.

B. ORMA Regulates the Westway and Imperium Proposals Specifically.

Not only does ORMA cover more than extraction related ocean uses, but it regulates the crude oil shipping proposals at issue here. The plain language of ORMA and its regulations, along with ORMA's legislative history and the context in which the Legislature passed it, demonstrates that these projects fall squarely within ORMA. *See* Quinault Opening Br. at 21-36.

To protect Washington's "valuable and fragile" coastal resources from "unacceptable environmental and social risks," RCW 43.143.005(1), (3), the Legislature banned leases that would allow oil extraction and simultaneously established review criteria for risky activities it did not ban, RCW 43.143.010(2), 43.143.030(2). The review criteria provide meaningful and necessary protection, allowing permits only if "[t]here will be no likely long-term significant adverse impacts to coastal or marine resources or uses." RCW 43.143.030(2)(b).

1. Westway's and Imperium's proposals are "ocean uses" under ORMA and ORMA's regulations.

These oil shipment proposals fall within the plain language of ORMA, which regulates "[u]ses or activities that require federal, state, or local government permits or other approvals and that will adversely

impact renewable resources." RCW 43.143.030(2). Imperium (at 19) acknowledges that Washington's coastal waters are a "renewable resource," and no party has contested that these projects will adversely impact Washington's coastal waters.

Instead, Respondents seek to expand ORMA's limited exemption to allow it to swallow the rule. Imperium argues that ORMA's limited exemption of activities that already existed when ORMA was enacted in 1989 includes these oil shipment proposals, even though they are the first of their kind in Washington and were proposed decades after ORMA's passage. Imperium Resp. at 29-30. Imperium goes even further, asserting that any activity involving non-extraction marine transportation should be exempted. *Id.* This tremendous expansion of ORMA's limited exemption would leave ORMA with little or nothing to regulate since all uses of the ocean likely include some marine transportation. Imperium's proposed broadening of ORMA's exemption would leave ORMA to nominally regulate many activities (all those involving marine transportation), but it would simultaneously exempt all of them. There is no indication the Legislature would enact such a bizarre statute, one that regulates much in theory but nothing in practice. Imperium's reading leaves ORMA a dormant shell of a statute with no application in practice and no ability to carry out its mandate to protect Washington's ocean waters.

ORMA's regulations define "ocean uses" to include the land-based facilities associated with "activities or developments involving renewable and/or nonrenewable resources that occur on Washington's coastal waters." WAC 173-26-360. Despite this clear regulatory definition, Respondents suggest that the proposals are not "uses" of the ocean because the shipping terminals themselves are mainly on land.[2] Imperium goes as far as conceding that the hundreds of vessel transits that would result from its project are a "marine transportation use," Imperium Resp. at 15, but it then describes the vessel transits as if they would be somehow incidental to the shipping terminal proposals and not the sole reason for their existence. Imperium and Ecology describe the projects as if they would be land-only facilities with some incidental, hardly-related vessel shipments. Imperium Resp. at 15-16; Ecology Resp. at 25 (characterizing these proposals as "land-based projects that have associated with them some marine transportation"). To be clear, these projects would exist to receive huge volumes of crude oil by train and to ship it out by vessel; the marine transportation of crude through Washington's ocean waters is not happenstance or indirectly related but is the very purpose of these projects. Whether these are land-based projects with associated ocean uses or ocean

[2] They do not discuss or acknowledge the parts of the facilities, including docks and oil-loading infrastructure, that would be over- or in-water.

uses with associated land-based projects is a game of philosophical hairsplitting not contemplated by ORMA or its regulations.

The marine transportation these projects would generate has been analyzed as part of these projects at every step of the review process and is directly regulated by Ecology and Hoquiam. AR 124 (Westway Mitigated Determination of Nonsignificance ("MDNS") at 2) (describing vessel transits); *id.* at 130 (Westway MDNS at 8) (describing required mitigation for prevention of spills along the vessel route); AR 237 (Imperium MDNS at 11) (table showing vessel transits of Westway and Imperium proposals); *id.* at 238 (describing required mitigation for prevention of spills along vessel route). Regardless of where these projects fall within Respondents' formalistic taxonomy, Westway's and Imperium's crude shipping projects—requiring and resulting in the ocean transportation of millions of barrels of crude oil each year—are uses of the ocean.

Lastly, no party has been able to point to any instance in which a court or Ecology has evaluated ORMA's application to a specific project prior to this appeal. Imperium argues that there have been numerous such opportunities, but provides no citation to when or where. Imperium Resp. at 22. The doctrine of "silent acquiescence," *id.* at 20, simply cannot apply where there has been no agency action to which the Legislature could have silently acquiesced.

2. Westway's and Imperium's proposals are "transportation" under ORMA's regulations.

While these projects are ocean uses generally, they also fall into a specific subset of ocean uses: "transportation." These projects fall within the transportation use category because the ocean transportation will "originate or conclude in Washington's coastal waters." WAC 173-26-360(12). Respondents argue that because these projects would transport crude oil that would have already traveled from North Dakota, the transportation does not "originate" in Washington under the regulation. Imperium Resp. at 17-18. Such an interpretation would put a misplaced restriction on a category regulating ocean transportation—particularly where shipment of oil is explicitly mentioned, WAC 173-26-360(12). Here, all relevant marine transportation activities will begin in Washington waters: loading vessels from a Washington-regulated facility over the fast-moving Chehalis River, transiting through Grays Harbor via its difficult-to-navigate bar and along the shoreline of the Grays Harbor National Wildlife Refuge, and passage through Washington's coastal ocean.

Imperium argues that Quinault misinterpret the transportation regulations by adding the word "marine" before "transportation." Imperium Resp. at 23-24. The regulation, however, says "[o]cean transportation includes such uses as: Shipping, transferring between

vessels, and offshore storage of oil and gas . . . ." WAC 173-26-360(12). The ocean transportation resulting from the Westway and Imperium facilities "originates" in Washington's waters because the relevant transportation activities for the purpose of ORMA must be ocean-going vessels, not the railcars that begin in the landlocked state of North Dakota. This requirement of "originating in" exempts vessels merely passing through or along Washington's coast en route to and from other locations. But it is meant to capture projects like these with strong and substantial ties to regulated activity in Washington waters and with ocean shipping that begins in Washington.

Imperium and Ecology continue to argue that because ORMA has not yet been applied in this way, it should never be. Imperium Resp. at 24-25; Ecology at 27-28. As a federal appellate court noted many years ago when faced with a similar argument, "it is our firm belief that a line must be drawn between according administrative interpretations deference and the proposition that administrative agencies are entitled to violate the law if they do it often enough." *Wilderness Soc'y v. Morton*, 479 F.2d 842, 865 (1973). This Court should not defer to inaction; ORMA and its regulations should be applied as written, even if this is the first appropriate occasion in the statute's history. These projects are far from a mere "stop on Washington's coast," Imperium Resp. at 24, and ORMA should

certainly regulate projects such as these in which all relevant ocean-related origination of the transportation occurs in Washington and is carried out by a Washington-regulated facility.

Regulation of transportation ocean uses—along with regulation of ocean uses in general—is sufficiently limited by ORMA and its regulations to avoid the limitless application Respondents hypothesize. First, ORMA is limited to activities causing an adverse impact. *See* RCW 43.143.030(2). Assessing whether a project involving transportation originating in Washington will cause an adverse impact to Washington's coast is a sufficient limitation and is the sort of assessment Ecology and local jurisdictions routinely make in State Environmental Policy Act ("SEPA") analyses. Even if recognizing ORMA's long-delayed application results in the regulation of additional types of activity, it would not be the absurd scenario Imperium fears.

Among other limitations, it is important to recall that ORMA only applies to projects that require federal, state, or local permitting. RCW 43.143.030(2). Likewise, ORMA's scope is limited geographically to four counties in Washington, none of which involve the major ports in Puget Sound. *See* RCW 43.143.020(2). And finally, ORMA's review criteria would likely be wrapped into the SEPA analysis already carried out routinely, and it is hard to imagine the minor projects envisioned by

Imperium would result in any more analysis than such projects already receive. Yet the difference would be substantial for oil shipment proposals like Westway's and Imperium's that threaten tremendous impacts to Washington's coast—they would have to show that they will not involve "likely long-term significant adverse impacts," among other criteria. *See* RCW 43.143.030.

3. ORMA's legislative history demonstrates that ORMA covers these projects.

ORMA's legislative history shows that the Legislature was broadly contemplating spills at the time of ORMA's passage, both in the context of resource extraction and spills generally. At the time the Legislature passed ORMA and the financial responsibility requirements for oil transporting vessels as a comprehensive bill to address oil spill risks, ORMA was broadly characterized as relating 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.

Respondents argue that because the Legislature was clearly contemplating oil and gas leasing extraction at that time, ORMA could only have been applied to that subject. *See* Imperium Resp. at 26-28; Ecology Resp. at 30-33; Westway Resp. at 3-7. While obviously true that the Legislature contemplated oil and gas extraction when enacting ORMA,

the Legislature did not limit the statute to extraction activities only. *See supra* Argument Section I.A. Instead, the context in which ORMA was passed—along with its related financial assurances legislation for oil-laden vessels—demonstrates that the Legislature was contemplating oil spills generally along with extraction and leasing.

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

As mitigation for these proposals, Ecology and Hoquiam required that Westway and Imperium create spill response plans, a part of which would include demonstrating the financial ability to pay cleanup costs for a worst-case-scenario spill. In approving that mitigation measure, however, Ecology and Hoquiam required and received no evidence that Westway and Imperium would be able to comply with such a requirement, even though the relevant specifics of the projects had been public and sufficiently definite for months. SEPA requires more than speculative future compliance for mitigation measures. It requires that mitigation measures be capable of accomplishment, and the public and permitting agencies should not have to take on faith that companies responsible for the transportation of millions of barrels of oil each year through Washington waters can cover the costs of spills. Moreover, these questions are not moot and are ripe since they are certain to arise in the

next round of Westway and Imperium permitting and are equally applicable to the nearly-identical US Development project also proposed in Grays Harbor.

A. This Appeal Is Properly Before the Court.

While the Shorelines Hearings Board vacated the specific Mitigated Determinations of Nonsignificance at issue for Westway and Imperium, a full Environmental Impact Statement ("EIS") process is proceeding for both projects. *See* 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. Likewise, the long anticipated application for a third crude oil shipping terminal in Grays Harbor was submitted earlier this year. US Development SSDP Application; US Development SEPA Checklist.[3]

The Court's decision regarding the timing of the demonstration of financial assurances will remain relevant through these three Environmental Impact Statement processes. As Imperium notes, "the question of when financial assurances are required under RCW 88.40.025

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

and related authorities is still relevant to the ongoing EIS process for the projects." Imperium Resp. at 30. Ecology's response reads as if the EIS process is separate and unrelated, rather than recognizing that many of the issues that surfaced in the appeal of the Mitigated Determinations of Nonsignificance before the Board will remain unresolved through the EIS process unless addressed by this Court.

Even if this issue were moot (which it is not), the Court could still reach it. Washington courts may decide a moot issue if it "involves matters of continuing and substantial public interest." *Thomas v. Lehman*, 138 Wn. App. 618, 622 (2007). To determine whether an issue involves matters of continuing and substantial public interest, courts consider "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur." *Id.*

First, the question presented in this appeal is clearly public—the applicability and timing of state statutes and the use of and impact to state resources.[4] Likewise, as the Court determined when deciding to take

[4] While Ecology argues that this appeal is private in nature since it involves private terminal companies, Ecology Resp. at 11, it is difficult to imagine how one can construe a case involving the interpretation of state statutes and regulations, public permitting, and risks to public resources as a "private" matter. These issues are relevant to the public at large and will affect any similar projects in the future, in addition to the three currently

direct review of this appeal, a definitive determination on these issues now is highly desirable. *See* Ruling Accepting Direct Review at 4 (June 11, 2014). The criteria for accepting direct review bears striking similarity to the public interest mootness test, and in accepting direct review the Court found that

> the SHB concluded that delay in obtaining a final and prompt determination of the issues would be detrimental to the public, that the appeal raises fundamental issues of regional importance, and that resolution of the appeal will likely have significant precedential value. This court concurs in the SHB's rationale . . . .

Id. (emphasis added). The same reasoning applies now. Finally, these issues are likely to recur, the third prong of the public interest test, since Environmental Impact Statements are in development for the three proposed crude-by-rail facilities in Grays Harbor, and they will almost certainly require decisions about the timing of any demonstrations of financial responsibility.

B. Ecology and Hoquiam Should Have Required Westway and Imperium to Demonstrate Financial Responsibility Prior to the Issuance of the Shoreline Permits.

An important component of the mitigation measures Ecology and Hoquiam relied on in permitting the Westway and Imperium Projects was a spill response plan. AR 127 (Westway MDNS at 5); AR 231 (Imperium

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undergoing environmental review.

MDNS at 5). Ecology and Hoquiam, however, failed to ensure that the spill response plan was "capable of being completed" in that it did not have any evidence that Westway and Imperium would ever be able to demonstrate financial responsibility. Because of the tremendous financial assurances that will be required to prepare for a worst-case-scenario spill for these two oil shipping terminals,[5] the spill plan could not be properly invoked as mitigation without data demonstrating that Westway and Imperium could actually comply with it. No party has argued that Westway and Imperium have shown this evidence; instead, Respondents take the position that Westway and Imperium can be trusted to provide the required assurances at some unspecified future point before they begin operation, but after permitting.

In passing the financial responsibility requirement, 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. This requirement is an integral component of the State's network of regulations to protect against and mitigate oil spill catastrophes, and it must be applied early in the environmental review process to have meaningful effect.

[5] Up to $27.2 billion each, based on Ecology's high cost estimate *See* Quinault Opening Br. at 45.

1. SEPA requires data demonstrating compliance with financial assurances at the threshold determination stage for spill plans to be used as mitigation.

Without inquiring into whether Westway and Imperium would actually be able to comply with the spill plans (specifically their financial assurances component), Ecology and Hoquiam accepted the future development of those plans as mitigation. Mitigation must be capable of being accomplished. RCW 43.21C.060; WAC 197-11-660(1)(c). It would be hollow mitigation to include a measure the companies ultimately may not be able to meet, and Quinault and FOGH have raised substantial doubt about Westway's and Imperium's ability to demonstrate such compliance since the amounts involved are so substantial. *See* Quinault Opening Br. at 45-47. The simple fact is that Ecology and Hoquiam could not have known at the time they issued the MDNSs whether Westway and Imperium would be able to comply with the financial responsibilities requirement because neither company had provided any relevant data.

Yet, the financial assurances requirement was included as a SEPA mitigation measure as part of the oil spill response plan requirement. That plan, and the included financial responsibility requirement, is not merely an "economic" consideration as Ecology and Imperium argue. Imperium Resp. at 33; Ecology Resp. at 21. Rather, as the financial responsibilities statute demonstrates, in passing that requirement, the Legislature viewed it

as a protection against "oil and hazardous substance spills and other forms of incremental pollution." RCW 88.40.005. The Legislature's pronouncements clarify that it is very much an environmental requirement and appropriate for consideration during the SEPA process.

Imperium argues that the spill response plan itself will serve as mitigation and that there is no need to consider the constituent parts of the plan such as the financial responsibility requirement. Imperium Resp. at 33. But the spill response plan would be composed of many individual components, and a questionable ability to comply with any of those components calls into question the effectiveness of the entire plan and whether it is capable of being accomplished as required by SEPA.

While SEPA mitigation measures must be reasonable and capable of being accomplished, RCW 43.21C.060; WAC 197-11-660(1)(c), Imperium urges a lenient reading of this requirement. Imperium Resp. at 35 (arguing that "capable of completion" means "susceptible to being accomplished"). SEPA demands more than susceptible compliance; mitigation measures must actually be carried out in the real world, particularly where the mitigation goes to a fundamental environmental safeguard such as oil spill response. There was simply no way Ecology and Hoquiam could have been assured of the effectiveness of the spill plan as a whole with no evidence showing one of its parts—the financial

responsibility requirements—could be accomplished.

The projected amount of oil to be shipped out of the Grays Harbor crude shipping facilities is clear and known, along with the number of arriving trains and departing vessels. *See* Quinault Opening Br. at 7-8. In determining the amount of financial assurances, Ecology must consider "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." RCW 88.40.025. Ecology has offered no explanation as to why the project specifications provided would not allow a determination as to the amount of financial assurance that would be required, instead arguing generally that the projects could change in some unspecified way. Ecology Resp. at 18. These same project contours allowed Ecology and Hoquiam to develop other mitigation measures, and there is no reason that same information could not have been used to develop full and meaningful financial responsibility requirements.

These proposed oil shipping terminals are unusual in the magnitude of possible damage an accident could cause to Washington's fragile coastline. Quinault and FOGH described in their opening brief the possible costs associated with a spill from these projects. Quinault and

FOGH Opening Br. at 42-47.[6] While the costs of potential mitigation are rarely discussed, *Solid Waste Alternative Proponents v. Okanogan Cnty.*, 66 Wn. App. 439, 447 (1992), that general presumption should not be applied here where the magnitude of harm and possible financial responsibility that will likely be required is so great as to call into question the applicants' ability to comply. For this same reason, Ecology and Hoquiam should not have presumed Westway and Imperium could comply with the financial assurances requirements in the future, contrary to Westway's argument. Westway Resp. at 14.

Finally, these projects—each responsible for hundreds of vessel transits each year—are not analogous to the individual vessels the statute allows to show financial responsibility only twenty-four hours before entering Washington waters. *See* Imperium Resp. at 30-31 (citing RCW 88.40.030). Unlike an individual vessel transit, these projects have been in development for years, and the numbers of anticipated vessel transits and amounts of crude oil to be transported are known.

[6] Imperium and Ecology misconstrue that section of Quinault's Opening Brief as a policy discussion about the propriety of financial assurances or an attempt to pinpoint the amount that should be required. Rather, that section discusses generally the high costs associated with such spills and questions Westway and Imperium's ability to pay such staggering damages; certainly they have made no demonstration of such ability.

III. THE EXTRA-RECORD MATERIALS SHOULD BE CONSIDERED AND ARE PROPERLY BEFORE THE COURT.

The additional materials Quinault and FOGH included in their opening brief and appendix provide useful background information and should be considered by the Court. Imperium objects to all new information, as does Ecology, despite citing some of that new information itself. Imperium Resp. at 11-12; Ecology Resp. at 7 n.3. The materials to which Respondents object are mainly newspaper articles published at the time of ORMA's passage.

Even in the case of an ambiguous statute, a court's primary objective is to discern the legislature's intent. *State v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). In so doing, a court may look to the legislative history which includes 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), as well as the historical context within which the statute was passed to identify the problem the legislature intended the statute to solve. *Washington State Nurses Ass'n v. Bd. of Med. Exam'rs*, 93 Wn.2d 117, 121 (1980). Respondents are incorrect to reject contemporaneous newspaper accounts

of ORMA's passage and meaning.

While Respondents attempt to discount summaries of the bill from contemporaneous newspaper accounts, such accounts of the legislation are important to the Court's analysis of how the Legislature, Governor Booth Gardner, and the public were thinking about oil spill issues at the time. Further, a contemporaneous journalistic account of legislation at the time of ORMA's passage would likely be a more accurate reflection of what the legislation meant than most efforts to reconstruct the meaning after ORMA has been dormant for many years.

The historical newspaper articles point in the same direction as the official legislative history and the text of ORMA itself: the Legislature sought to protect Washington's coast from extraction-related activities in addition to other oil spill risks in the wake of the Exxon Valdez spill in Alaska, which had nothing to do with oil extraction. For example, several senators complained about an initial decision not to hear the ORMA bill as a "public-relations disaster since it came on the heels of the Alaska spill." App'x 78. Clearly that spill was on the minds of the public, and there was a perception that ORMA would address similar threats.[7]

[7] Moreover, both Ecology and Westway make use of these materials, as Ecology cites Quinault's opening briefing for background information, Ecology Resp. at 6, and Westway relies on the newspaper articles published at the time ORMA. Westway Resp. at 7.

Similarly, the Court can take judicial notice of the more recent newspaper articles cited in Quinault's background section. While those articles are not necessary to Quinault's argument or the Court's decision, they provide pertinent information about recent crude oil disasters and risks and were provided to orient the Court to the controversy.

CONCLUSION

For the reasons stated above and in their opening brief, Quinault Indian Nation and Friends of Grays Harbor *et al* ask the Court to reverse the Board's decision as to the applicability of ORMA and RCW 88.40.025 and declare that the responsible officials for the Westway and Imperium proposals must address both ORMA's requirements and financial assurances in any future environmental reviews under SEPA.

Respectfully submitted this 27th day of October, 2014.

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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 October 27, 2014, I served a true and correct copy of the following document(s) on the parties listed below:

1. Joint Reply 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 27th day of October, 2014, at Seattle, Washington.

CATHERINE HAMBORG