Reducing Impacts from Fossil Fuel Projects
Report to the Whatcom County Council
February 12, 2018
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1 Introduction

The Whatcom County Council, with the concurrence of the Prosecuting Attorney, retained Cascadia Law Group to assist with reviewing options for ordinances to protect the local community from the impacts of proposed fossil fuel transshipment facilities in Whatcom County.

This project is intended to implement the following provision in the Whatcom County Comprehensive Plan:

The County shall undertake a study to be completed if possible by December of 2017 to examine existing County laws, including those related to public health, safety, development, building, zoning, permitting, electrical, nuisance, and fire codes, and develop recommendations for legal ways the County may choose to limit the negative impacts on public safety, transportation, the economy, and environment from crude oil, coal, liquefied petroleum gases, and natural gas exports from the Cherry Point UGA above levels in existence as of March 1, 2017.

To provide clear guidance to current and future county councils on the County’s legal rights, responsibilities and limitations regarding interpretation and application of project evaluation under Section 20.88.130 (Major Projects Permits) of the Whatcom County Code.

The County should consider any legal advice freely submitted to the County by legal experts on behalf of a variety of stakeholder interests and make that advice publicly available.

1. Based on the above study, develop proposed Comprehensive Plan amendments and associated code and rule amendments for Council consideration as soon as possible.

2. Until the above-mentioned amendments are implemented, the Prosecuting Attorney and/or the County Administration should provide the County Council written notice of all known pre-application correspondence or permit application submittals and notices, federal, state, or local, that involve activity with the potential to expand the export of fossil fuels from Cherry Point.
On September 26 and October 17, 2017, we gave preliminary oral reports to the Council focused on two topics:

- A summary of legal issues, constitutional and otherwise, the Council must bear in mind in considering such an ordinance, in light of efforts by, and litigation in, other jurisdictions around the country.
- A review of the legal issues surrounding the already-enacted moratorium ordinance 2017-011 and previous versions of that moratorium.\(^1\)

In this written report, we provide the following research and analysis:

- We describe in more detail legal issues Whatcom County may face in undertaking any regulation to reduce impacts of fossil fuel facilities. We have conducted a review of similar efforts by other jurisdictions, some of which have resulted in litigation. We outline two of the most significant of those in the section below entitled “Lessons from Review of Activity and Litigation in Other Jurisdictions,” and Appendix 1 of this report includes a more complete listing of our survey results.
- We include as Appendix 2 selected articles reporting on some of the recent activities in several jurisdictions involved in similar fossil fuel export reviews.
- We summarize options for the Council giving the pros and cons of each.
- We make recommendations regarding some of those options.

## 2 Legal Issues

The legal issues generally fall into two categories: constitutional (mainly federal constitutional issues) and state land use.

\(^1\) In preparing the presentations to the Council, we noted, in part from experience in other jurisdictions, that litigation over any such ordinance is reasonably probable, and public discussion of potential litigation and legal risks is likely to result in adverse legal consequences to the County. Accordingly, it was appropriate that the presentations were conducted in executive session.
2.1 Federal & State Constitutional Issues

2.1.1 Commerce Clause

Article I, section 8, clause 3 of the United States Constitution lists one of the enumerated powers of Congress as the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This is probably the constitutional issue of greatest concern to local governments attempting to protect their local interests in the face of proposed fossil fuel-related developments.

The Supreme Court has determined that this is more than just an enumeration of federal powers. It has found that there are “negative implications” to this assignment of power that serve as limits on state and local power. It has articulated a three-prong test for use in reviewing state or local laws under the Commerce Clause. If a state or local enactment violates any of these, it would be invalid:

**Discrimination.** First, the ordinance may not discriminate against interstate commerce. Essentially, this means that the ordinance may not treat out-of-state business interests less favorably than in-state interests. Typical of suspect legislation challenged under this prong are tax preferences for businesses located within a state. The discrimination may either be “facial,” meaning that the text of the ordinance favors in-state interests, or the ordinance can have a “discriminatory purpose or effect.”

**Regulation of Extra-Territorial Conduct.** Second, the ordinance may not regulate extra-territorial (out-of-state) conduct. State and local enactments are rarely invalidated on this basis, but every circuit court of appeals, except for the 5th Circuit, has included this prong in its dormant Commerce Clause analysis. Arguments of extraterritorial effect are often made by challengers to state and local laws.

**Balancing of Local Benefits and Impact on Commerce.** Third, if the ordinance regulates interstate commerce, such regulation may not be “clearly excessive in relation to the putative local benefits.” This is called the “Pike balancing test” after a Supreme Court case with that name. This last prong is where facts become important. It is

\[2\] This latter issue was significant in the City of Portland litigation discussed below.
important to focus on traditional land use and environmental considerations (e.g., public health and safety, compatibility of uses) to minimize exposure to claims that an ordinance is about restricting commerce. A clear record needs to be built around these traditional land use and public safety considerations and the Council must avoid findings, statements, or justifications that would lead to Commerce Clause concerns.

An example of how federal courts deal with land use context in Commerce Clause challenges is *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023 (E.D. Cal. 2007). The *Wal-Mart* court granted summary judgment in favor of the City in a facial challenge to zoning regulations that prohibited “discount superstores,” defined as stores of over 100,000 square feet containing both a warehouse store and a grocery store. The rationale for prohibiting superstores was based on traffic flows, air quality and prevention of “blight.” The City cited independent studies that found discount superstores were detrimental to the viability of existing small shops and could lead to their failure and resulting urban blight. The court found that the ordinance did not violate Commerce Clause restrictions or run afoul of substantive due process concerns, because the City created a detailed record of a well-stated “rational basis” for the regulations. The Commerce Clause analysis held that the City’s regulation applied equally to both in- and out-of-state businesses and did not discriminate. *Wal-Mart* is attached to this report as Appendix 3.

2.1.2 Supremacy Clause (Preemption)

Article VI, clause 2, of the United States Constitution establishes that federal laws and treaties are “the supreme law of the land.” Federal law “preemption” may be either “express” in that the federal statute prohibits certain state or local regulation, or it can be implied in one of two ways. It can “conflict” with local regulation, meaning that both the federal and the state regulatory provisions cannot co-exist, or it can be “field preemption,” meaning that the federal regulatory program is so pervasive that there is no room for state regulation to operate.

A number of federal statutes that regulate aspects of transportation or safety could preempt state or local regulation relating to fossil fuel projects. These include:
**Federal Railway Safety Act (49 U.S.C. §20106(a)).** The relevant language includes:

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

**Interstate Commerce Commission Termination Act (49 U.S.C. §10101 et seq.).** The ICCTA preempts laws that prevent or unreasonably interfere with railroad transportation, including matters regulated by the Surface Transportation Board (STB), such as the construction, operation, and abandonment of rail lines.

**Natural Gas Act (15 U.S.C. §717).** The NGA preempts state and local regulation of pipelines approved by FERC. However, this does not preempt states from applying federal laws that are delegated to the states, such as the Clean Water Act’s Section 401 water quality certification or the Coastal Zone Management Act (CZMA). Note that the CZMA incorporates local Shoreline Master Programs.

**Pipeline Safety Act (49 U.S.C. §60104(c)).** The Pipeline Safety Act preempts states from regulating interstate pipelines. It states: “A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” However, a state may adopt more stringent safety standards for intrastate pipelines if the standards are compatible with the federal standards.
Hazardous Materials Transportation Act (49 U.S.C. §5125(a)-(b)). The HMTA preempts acts of states or localities that are inconsistent with federal regulations, would be an obstacle to carrying out the federal act, or, for a defined set of requirements, are not “substantively the same” as federal requirements.


In addition, one recent court challenge to various state actions surrounding the proposed Millennium Bulk Terminal for coal export argues that the General Agreement on Tariffs and Trade (GATT) has a preemptive effect, since GATT Article XI states that “[n]o prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party . . . on the exportation or sale for export of any product destined for the territory of any other contracting party.” See Lighthouse Resources, Inc. v. Inslee, No. 3:18-cv-05005-RJB (W.D. Wash. Filed Jan. 3, 2018), the Complaint in which is attached to this report at Appendix 4. However, GATT’s own Article XX does provide for exceptions where such restrictions may be necessary to protect human, animal or plant life, or health.

2.1.3 Equal Protection Clause

The Equal Protection Clause of the 14th Amendment to the United States Constitution requires that no person be denied equal protection of the laws. Its counterpart in Article I, Section 12 of the Washington Constitution requires that no law grant to any citizens or corporation any privilege or immunity not also granted equally to other citizens or corporations. This is similar to the limitation in the Commerce Clause against discrimination against out-of-state interests.

2.1.4 Due Process Clause and the Takings Clause

The Due Process Clause of the 14th Amendment to the United States Constitution and its counterpart in Article I, Section 3 of the Washington Constitution have both a procedural and a substantive component.
Any state or local law regulating land use must provide procedural protections for those regulated. These procedural due process protections are typically met through notice, hearing, and public participation requirements of the Growth Management Act, the Shoreline Management Act, and the procedural provisions of local zoning and shoreline ordinances.

“Substantive Due Process” is more amorphous, but it has been applied to limit the reach of government regulation. State or local land use regulations must further some legitimate public purpose. In the context of land use and zoning cases the substantive due process requirement is met by establishing a police power or public health and safety purpose.

An ordinance must be a “reasonable” exercise of the county’s police power in order to pass muster under Article 11, § 11 of the Washington Constitution. A law is a reasonable regulation if it promotes public safety, health or welfare and bears a reasonable and substantial relation to accomplishing the purpose pursued. The wisdom, necessity, and expediency of the law are not for judicial determination, and an enactment may not be struck down as beyond the police power unless it is shown to be clearly unreasonable, arbitrary, or capricious. Weden v. San Juan County, 135 Wn 2d 678, 692, 958 P.2d 273, (1998) (upholding a San Juan County ordinance banning jet skis on certain waters); see also Edmonds Shopping Center Associates v. City of Edmonds, 117 Wn.App. 344, 71 P.3d 233 (2003) (upholding an Edmonds ordinance banning new cardrooms and phasing out existing cardrooms over a five-year period).

The Fifth Amendment of the United States Constitution also prohibits “taking” of property without just compensation. The Supreme Courts of both Washington and the United States have established a multi-part test for determining whether a taking has occurred. See Guimont v. Clarke, 121 Wn 2d 585, 854 P.2d 1 (1993), Edmonds Shopping Center Associates v. City of Edmonds, 117 Wn. App. at 362; Lucas v. South Carolina Coastal Council, 505 US 1003, 112 S.Ct. 2886 (1992). There are two threshold questions. First, a court will determine whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable
use of the property. If the landowner claims less than a physical invasion or total taking and if a fundamental attribute of ownership is not otherwise implicated, the court proceeds to the second question. That question is whether the challenged regulation safeguards the public interest in health, safety, the environment, or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.

If the answer to both questions is no, there is no taking. If the answer to one or both questions is yes, then additional analysis is required. The additional analysis includes consideration of two additional points. First, the court must determine whether the regulation advances a legitimate state interest. Second, the court would apply a balancing test to determine if the state interest in the regulation is outweighed by its adverse economic impact to the landowner, with particular attention to the regulation’s economic impact on the property, the extent the regulation interferes with investment-backed expectations, and the character of the government action.

Though a takings issue can likely be avoided in local regulation of fossil fuel facilities, it remains a frequently used argument in Washington land use litigation. To overcome a takings challenge, it will be important to ensure that there are other reasonable uses of the properties subject to new zoning. Accordingly, it is important to pay particular attention to allowing existing uses to continue, or to making sure the properties have reasonable alternative future uses under the zoning and shoreline codes.

These takings issues are discussed further in the section below on state land use issues.

2.2 Other Federal Issues

The County should consider other federal issues as possible limitations to its authority, but also perhaps to defend against Commerce Clause or preemption claims.

2.2.1 Treaty Fishing Rights

The treaties with Pacific Northwest Indian Nations protect a right to fish at usual and accustomed fishing grounds. See United States v. Washington, 443 U.S. 658
In “Phase II” of that litigation, the right to take fish has been interpreted by the Ninth Circuit Court of Appeals to limit actions by the State of Washington and its local governments that may adversely impact fisheries habitat. While the parameters of such limitations on state and local action are still unclear, the Ninth Circuit’s decision may be applied to impose an affirmative duty on state and local governments to protect habitat.

The State of Washington has asked the United States Supreme Court to review a recent Ninth Circuit decision regarding treaty fishing rights violations caused by culverts the State built. See United States v. Washington, 853 F.3d 946 (9th Cir. 2017), rehearing denied and rehearing, en banc, denied 864 F.3d 1017, cert. granted Jan. 12, 2018 (Sup. Ct. No. 17-269). The case has now been accepted by the Supreme Court for review and may further refine the extent of the treaty fishing rights as applied to the facts presented by the culverts case. The State has argued, unsuccessfully so far, that the treaties do not create an affirmative duty in Washington to remedy defective culverts. The Western Washington Treaty Tribes can only bring such an action through a lawsuit initiated by the U.S. Department of Justice on their behalf as federal trustees. The U.S. and the Tribes have successfully asserted, up through appeals to the Ninth Circuit, that Washington does have an obligation under the treaties to remedy culverts that block fish passage. If their arguments prevail, then it may be possible that the treaty-rights rationale could be extended to other State actions impacting fisheries habitat.

To the extent that state or local action is taken to protect fisheries habitat, the treaty rights decisions may be used as a defense to preemption. Certainly, in the context of any application of the Pike balancing test, the benefits of protection of fisheries habitat can be useful. For example, should the County decide to prohibit additional piers in its new shoreline or land use regulations, it might make a strong and justifiable rationale for that land use decision by citing treaty fishing rights as interpreted by the federal government in past decisions. As another option, the County could also defer to Federal interpretations of treaty rights in the context of necessary federal permits such as those of the Corps of Engineers. The treaty rights of the Lummi Nation were the basis for a Corps permit denial of the Northern Gateway project’s proposed pier. The County could decide not to change its land use and shoreline permitted uses
and make a reference to having federal decisions made prior to a final county decision on new projects, or could make County decisions contingent on receiving federal approvals wherever treaty rights are considered as a matter of federal law.

2.2.2 The Magnuson Amendment

Enacted to protect Puget Sound from adverse impacts of oil imports, the late Sen. Warren Magnuson’s 1977 amendment to the Marine Mammal Protection Act likely would apply to exports of oil as well. It reads:

Notwithstanding any other provision of law, on and after October 18, 1977, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.

It limits federal authority to grant or issue permits that would result in an increase of the volume of crude oil handled at any given facility. If a local ordinance imposed a similar limit, the Magnuson Amendment could be used to defend it from any Commerce Clause or preemption claim, in that the local ordinance would not conflict with the federal law. The Amendment is attached to this report at Appendix 9.

This issue has been raised regarding proposed developments at Cherry Point in the past, and is still before the Corps of Engineers and the courts with respect to a BP pier addition that was previously constructed. *See Ocean Advocates, et al. v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005).* We understand from discussions with the County Prosecutor’s Office that a prior settlement agreement may have some bearing on the County’s ability to impose limitations on additional docks within the Cherry Point Industrial District and adjacent shorelines. The Council should analyze this issue and seek advice from the County Prosecutor’s Office regarding the intent, effect, and current applicability of the settlement agreement.
2.3 State Land Use Law Issues

Washington land use law provides multiple grounds for challenges. These include substantive and procedural due process claims, takings challenges, failure to maintain consistency with the Growth Management Act or the Shoreline Management Act, and failure to comply with the State Environmental Policy Act. We discuss each of these below.

2.3.1 Procedural Issues

Under Constitutional due process requirements and state land use laws, state and local actions regulating land use must provide procedural protections for those regulated and the public being impacted. These reflect the need to provide notice and an opportunity to be heard where there is a property interest at stake. These procedural due process protections are typically met through notice, hearing and public participation requirements of the Growth Management Act, the Shoreline Management Act and the procedural provisions of local zoning and shoreline ordinances. Failure to comply strictly with these procedural requirements can lead to a successful challenge. Here, adoption and extensions of the existing moratorium present this issue and any final ordinance provisions must also comply. These process issues are a melding of constitutional and statutory law. The procedural protections of the GMA and SMA, though generally intended to satisfy constitutional due process concerns, may go beyond what the constitution actually requires.

2.3.2 Takings Issues

Takings law remains one of the more confusing and difficult areas of land use law. The Fifth and Fourteenth Amendments of the United States Constitution prohibit “taking” of property without just compensation. The Growth Management Act incorporates these constitutional restrictions into state statute; among its development “goals” is RCW 36.70A.020(6): “Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.”
2.3.3 SEPA Compliance

The State Environmental Policy Act (SEPA), Chapter 43.21C RCW, requires state and local governments to review environmental impacts of proposed actions, including those under the Growth Management Act. Governments must make a threshold determination of whether the impacts of the proposed action are “significant adverse effects” that require preparation of an Environmental Impact Statement. The RCW was modified after adoption of the Growth Management Act to allow integration of SEPA analysis with GMA planning processes and documents. As it takes any final action, the County will need to carefully consider compliance with SEPA. See, e.g., Spokane County v. E. Wash. Growth Mgmt. Hearings Bd., 179 Wn. 2d 1015, 318 P.3d 279 (2014). This could involve either the adoption of a Declaration of Nonsignificance or the preparation of an Environmental Impact Statement. Following the proper procedures under SEPA and filing a timely “Notice of Action Taken” can limit County exposure to a SEPA challenge.

2.3.4 GMA & Shoreline Consistency Requirements

Washington case law and statutes require consistency of comprehensive plans, development regulations, and shoreline regulations with the enabling statutes and regulations. See, e.g., Olympic Stewardship Foundation v. Environmental and Land Use Hearings Office, 199 Wn. App. 668, 399 P.3d 562 (2017) (interpreting the provisions of the Growth Management Act, RCW 36.70A). The County will have to make a careful effort to ensure there are adequate findings to establish that a new development regulation is consistent with the goals of the Growth Management Act, the county’s adopted comprehensive plan, and the Shoreline Management Act and guidelines.

2.3.5 Protection of Fish Habitat Under State Law

Extending beyond treaty rights, the County could certainly identify protection of fisheries and habitat as a legitimate state and local interest. Policies of both the Shoreline Management Act and the Growth Management Act identify protection of valuable shoreline and aquatic resources and habitat as legitimate state and local
interests. See, e.g., RCW 90.58.020, Legislative findings – State policy enunciated – Use preference; RCW 36.70A.172(1):

In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

3 Lessons From Review of Activity and Litigation in Other Jurisdictions

In recent years many local governments have attempted to impose some type of limitation on facilities relating to fossil fuels. Here, we discuss how actions in two jurisdictions highlight the most important legal principles: in the City of Portland, Oregon, and in the City of Benicia, California. (In Appendix 1 we also discuss actions in a number of other communities.) Finally, we offer some “lessons learned” from these experiences in other jurisdictions.

3.1 Portland, Oregon

In December 2016, the Portland City Council adopted an ordinance that identified “Bulk Fossil Fuel Terminals” as a regulated land use, characterized (1) by marine, railroad, or pipeline access and (2) either (a) storage capacity in excess of 2 million gallons or (b) trans-load facilities. It prohibited new Bulk Fossil Fuel Terminals in base zones and the expansion of existing terminals. The record before the Council contains substantial articulations of local environmental and safety concerns, particularly regarding seismic risks.

The Columbia Pacific Building Trades Council, the Portland Business Alliance, and other business groups challenged the ordinance before the Oregon Land Use Board of Appeals (LUBA) on a number of constitutional and statutory grounds. As part of a Commerce Clause argument, the challengers cited oral statements made by council members as evidence that the ordinance was intended to discriminate against interstate commerce. The LUBA invalidated the ordinance on Commerce Clause grounds and for inconsistency with Oregon’s Growth Management Act. Note that only
one member of the LUBA decided the case; the other two members recused themselves. See LUBA Decision 2017-001, Columbia Pacific Building Trades Council v. City of Portland, attached as Appendix 5.

Regarding the Commerce Clause claim, the LUBA held that the ordinance was not discriminatory on its face. However, because the LUBA determined that the fossil fuel terminals also served as a regional hub for such fuels, it stated: “Under these circumstances, we do not believe the city can adopt zoning amendments that restrict FFTs to their existing number and capacity, without at least considering the impact of the amendments on the flow of fossil fuel to the region and the state.” The LUBA also held that the ordinance did not satisfy the Pike balancing test, stating “[r]educed to essentials, the FFT amendments represent the city’s attempt to isolate itself to some extent from the national and international economy in fossil fuels.”

The LUBA also addressed issues regarding consistency with the Oregon Growth Management Act. Normally, the LUBA would decide state law issues first, and if there were violations, remand the matter without reaching constitutional issues. However, here, the LUBA decided it was more efficient to reach the Commerce Clause issue. However, it also gave what it termed “somewhat advisory” decisions on the state land use issues.

Accordingly, it held that the City did not demonstrate, through appropriate findings, that the Ordinance was consistent with the Portland Comprehensive Plan and various state planning requirements and goals, and was not “coordinated with the plans of affected governmental units” as required by a statewide planning goal.

The City appealed the LUBA decision to the Oregon Court of Appeals, which recently reversed the LUBA rulings on dormant Commerce Clause grounds and consistency with the transportation goals of the Oregon Growth Management Act. However, the Court upheld the LUBA finding that the City of Portland had not presented substantial evidence to support a finding that fossil fuel use is likely to plateau and decline in future years. See Columbia Pacific Building Trades Council v. City of Portland, 289 Or. App.739 (2018), included in Appendix 6. The dormant Commerce
Clause analysis in this case is helpful to understand how a similar challenge can be anticipated if Whatcom County adopts limits on fossil fuel terminals.

The Oregon Court indicated that the first step in the analysis is to determine whether the law regulates evenhandedly with only incidental effects on interstate commerce, or instead discriminates against interstate commerce. The Court states that discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. The Building Trades Council and the Western States Petroleum Association (WSPA) contended that the zoning amendments disfavored out-of-state sellers and advantaged in-state interests by creating exceptions for local terminal operators. However, the Court held that the in-state and out-of-state entities here were not similar entities, and that in the absence of actual or prospective competition between them there could be no local preference. The local entities were providers of petroleum products to in-state end users, but the possible newly prohibited facilities would cater to export and out-of-state markets. The Court further found that there could not be discrimination against large out-of-state refiners and exporters because Oregon has none of those in the state to favor.

The Court also rejected the argument that the zoning amendments illegally sought to prevent “unwanted commerce.” The Building Trades Council and WSPA contended the Portland zoning regulations were similar to what had been found unlawful by the U.S. Supreme Court in a New Jersey landfill case where the state had excluded importation of out-of-state waste. See Philadelphia v. New Jersey, 437 US 617, 98 S. Ct.2531 (1978). The Court distinguished the New Jersey case by holding that the Portland zoning amendments do not bar importation of fossil fuels into the state but merely place restrictions on the size of terminals that may be used for exports. The Court further held that the burden was on the challengers to demonstrate that any burden on interstate commerce is clearly excessive in relation to the putative local benefits. The City of Portland had made numerous findings regarding the local benefits of the restrictions, and the Court held that local zoning ordinances have a presumption of validity.
The challengers to the Portland ordinance have filed a motion with the Oregon Court of Appeals asking it to reconsider its decision. Assuming that motion will be denied, an appeal to the Oregon Supreme Court is possible. However, even while that case continues, its rulings to date demonstrate several important legal principles. One is that setting forth the context for local regulations and making clear findings regarding the local police power rationale behind an ordinance can be important in overcoming a Commerce Clause challenge. Second, while it is crucial that local zoning regulations not be designed to protect substantially similar local interests over out-of-state competitors, courts will likely consider carefully whether entities that claim discriminatory effect actually are in fact competitors. And, finally, a presumption of validity is given to local zoning regulations, so it is the challenger to the regulations who bears the burden of proving discriminatory effect.

3.2 Benicia, California

The Benicia Planning Commission denied a conditional use permit for a crude oil off-loading facility proposed to serve an existing Valero refinery that historically received crude oil from Alaska and foreign sources. The environmental study found that the transport of crude oil by train on the 70 miles of track leading to the refinery was hazardous, although an accident was predicted only once every 110 years. The study also found that the crude intended to be shipped from North Dakota and the Canadian tar sands area was more flammable than most other crude oils.

Valero challenged the local land use decision before the federal Surface Transportation Board (STB) arguing that the local action was preempted by the Interstate Commerce Termination Act. The STB upheld the Planning Commission’s land use decision. Though the STB recognized the broad preemptive effect of 49 U.S.C. §10501, it held that the local decision did not attempt to regulate transportation by a rail carrier. The STB noted that federal preemption could extend to off-loading facilities if the activities are performed or controlled by the rail carrier, but Valero “made no allegation that it is a rail carrier or that it would be performing off-loading under the auspices of a rail carrier.”
The STB also provided guidance for future cases, finding that state and local regulation is permissible where it does not unreasonably interfere with rail transportation (such as generally applicable electrical or fire codes), and that if the off-loading facility were to be built, any mitigation conditions unreasonably interfering with the railroad’s operations would be preempted.

After the STB ruled, the City Council adopted the decision of the Planning Commission. Valero informed the City that it would not be taking further action to challenge the City’s decision.

### 3.3 Some Preliminary Lessons Learned

After reviewing these actions and ensuing litigation, those described in Appendix 1, and our earlier analysis of legal issues here, the following lessons emerge:

➢ Where there is a project opponent to a given ordinance, litigation challenging it is likely.

➢ Whatcom County would need to build a strong factual record to support any ordinance. It should focus on local environmental and health impacts. Such findings are important in defenses against Commerce Clause challenges and to support compliance with state land use laws.

➢ The County should emphasize truly unique impacts. Portland tried this by focusing on the seismic sensitivity of its industrial area where the fuel terminals would be located. (Though this apparently was not enough for the LUBA decision, Portland officials believe that this was important to justify its ordinance.) Here, the County could consider fisheries and other unique characteristics that the County is trying to protect. (And under Ninth Circuit treaty rights cases, it is possible that the County may have an affirmative obligation to protect fish habitat.)

➢ The County should consider making a “fair share” argument in order to justify restrictions on future projects without imperiling existing operations in the County. In other words, the County is happy to accept its fair share of impacts from fossil fuel facilities, but the new projects create impacts that are more than what is fair.

➢ The County may not “intend” to discriminate or otherwise regulate interstate commerce. Accordingly, county officials should avoid making public comments on any “purpose” that goes beyond protection of local impacts,
such as need to limit use of fossil fuels in other countries. Those comments can find their way into a court record and could support a Commerce Clause claim. An example is the City of South Portland, Maine litigation (described in Appendix 1) where the trial court was unable to grant a summary judgment in favor of the City on dormant Commerce Clause grounds because there were statements on the record that made it unclear whether the purpose of local zoning regulations was based on a police power rationale or another impermissible purpose.

➢ The County should avoid any regulation of rail traffic, or at least should evaluate rail regulations very carefully. So many federal statutes govern rail that a limited legal area is left in which states and localities can properly regulate.

➢ Because the State has powers that are not preempted by federal law, the County should work with the Governor’s Office and the Department of Ecology to reach agreement on the applicability of the State’s authority under the Clean Water Act Section 401 and Coastal Zone Management Act. Note that these State powers have led to the recent denials of major coal and oil projects.

➢ Future decisions in pending litigation, such as decisions in any further appeal regarding the City of Portland’s ordinance and the South Portland, Maine zoning provisions (outlined in Appendix 1), will likely give more guidance to Whatcom County.

4 Recommendations

In the paragraphs below, we outline the key options we recommend the County Council take under consideration. Each has differing policy implications, and the County must decide which best meet its overall objectives. The options range from bolstering the discretionary authority of the County Council with respect to approving and mitigating the impacts of proposed uses, to possibly prohibiting certain uses.

4.1 Bolster County Authorities Under the Major Projects Permit Review Process

The current Cherry Point Heavy Industrial District requires new projects to undergo a County Council review under the provisions of Chapter 20.88 for Major Project Permits. We suggest that the current code provisions be substantially bolstered by making it clearer that this is a discretionary review that must meet key decision-
making criteria. We also recommend providing clearer authority in the process for requiring mitigation of project impacts on the community and the environment. One new element would be adding a requirement that a “Development Agreement” be negotiated with project proponents to agree on the required mitigation. The code could also provide authority for bonding and insurance to ensure that any agreed-upon community improvements are installed on a timely basis, and that a liability insurance requirement for potentially hazardous activities guards against risks to the community. While there would still be a legal requirement that a rational nexus exist between any project impacts and required mitigation, establishing clearer authorizing language in the Major Project Permit process would create clearer expectations from the County for project applicants.

Codes of other jurisdictions offer many examples for the kinds of discretionary decision-making criteria that could be added to the Major Project Permit process. The list below is provided as a generic set of example discretionary provisions for consideration, paraphrased from other Western Washington local zoning codes:

➢ Any use established shall be consistent with the Comprehensive Plan, the Shoreline Master Program, and all standards established under zoning and shoreline regulations.

➢ Any use shall be located, planned and designed in such a manner that it is consistent with the health, safety, convenience, and general welfare of citizens residing or working in the community.

➢ A use shall not be approved if it would generate excess noise, noxious or offensive emissions or other nuisances that may be injurious or to the detriment of a significant portion of the community.

➢ A use shall only be approved after a clear demonstration that public services necessary or desirable for support of the use are available or will be provided by the project developer. These may include, but shall not be limited to, the availability of utilities to serve the site, transportation systems including vehicular, pedestrian and public transportation systems, educational, police and fire facilities and necessary social and health services.

➢ There shall be a demonstrated need for the use within the community at large which shall not be contrary to the public interest.
➢ Any use will be designed, constructed, operated, and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity.

➢ Any use must demonstrate that it will not be hazardous or disturbing to existing or future uses of the neighborhood.

➢ Any use must demonstrate that it will be serviced adequately by essential public facilities such as highways, streets, police and fire protection, drainage facilities, refuse disposal, water and sewers, and schools or that the persons or agencies responsible for the establishment of the proposed use shall be able to adequately provide for any such services.

➢ Any use must demonstrate that it will not create excessive additional requirements at public cost for public facilities and services and will not be detrimental to the economic welfare of the community; alternately, the applicant must provide mitigation for such added public costs.

➢ Any use must demonstrate that it will not result in the destruction, loss, or damage of any natural, scenic, or historic feature of major importance.

The list above provides only generic examples of what some other local codes have included. The Major Project Permits criteria here could also include provisions tailored to Whatcom County and to the issues the Cherry Point Heavy Industrial District presents. A decision-making criterion could be added that requires any necessary state leases to have been already acquired for any piers or aquatic lands improvements, and to have already met any federal permitting needs, including properly addressing tribal treaty rights or the provisions of the Magnuson Amendment. This would not have the County enforcing the provisions of state or federal law; it would merely have the County requiring a demonstration in advance of County approvals that all federal and state approvals have been completed. Alternatively, the County could make acquisition of such state or federal approvals a condition of perfecting any local approval. The County could add other specific decision-making criteria too, for such issues as requiring it to be established that a new use would create no adverse effects on the endangered Cherry Point herring stocks or salmon fisheries, or other such specific concerns the County may wish a discretionary review to address.
4.2 Require a Conditional Use Permit for Certain Identified Uses

This option would require amending the County’s Cherry Point Heavy Industrial District and the Shoreline Master Program regulations to require that a conditional use permit be acquired for uses such as new petroleum tank farms, fossil fuel distribution facilities, additional piers, and other uses that can be further defined. As set forth previously, the Council will need to consult with the County Prosecutor’s Office regarding the potential effect of prior settlement agreements on further regulation of additional piers. For the land use code amendments, the decision-making criteria for a conditional use discretionary process could be the same, or nearly the same, as the type identified above for a discretionary Major Project Permit process. The conditional use criteria would need to focus on traditional police power concerns such as public health and safety, environmental impacts, and compatibility of the proposed use with the community. However, under the Shoreline Management Act requiring a conditional use permit for shoreline uses has special status. Shoreline Conditional Use Permits must be reviewed and approved by the Department of Ecology’s shoreline permit review staff, and must meet the state rule criteria found at WAC 173-27-160:

Review criteria for conditional use permits. The purpose of a conditional use permit is to provide a system within the master program which allows flexibility in the application of use regulations in a manner consistent with the policies of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use and/or to assure consistency of the project with the act and the local master program.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided the applicant demonstrates all of the following:

   (a) That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
   (b) That the proposed use will not interfere with the normal public use of public shorelines;
   (c) That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
   (d) That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
(e) That the public interest suffers no substantial detrimental effect.

(2) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.

(3) Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.

(4) Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

Requiring certain defined uses to obtain a land use code conditional use permit and a shoreline conditional use permit can be an effective means for the County to exercise its discretion when hard and fast “one size fits all” criteria may be difficult to apply. Affirmative findings of consistency with the decision-making criteria must be made, and the potential for denial of a use inconsistent with the criteria is implicit. Of course, the record must demonstrate a rational basis for such a decision. This would also create solid arguments that a legal challenge to the provisions would be premature prior to a specific application of the regulations to a specific project.

Requiring a shoreline conditional use creates the opportunity to make a decision on the basis of impacts to the important aquatic uses of the shoreline areas adjacent to Cherry Point. These include the herring fishery and other treaty fisheries that have been the subject of recent Corps of Engineers decision making. (The 2016 Corps denial of the Gateway Pacific permit in favor of Lummi Nation treaty fishing rights is attached at Appendix 7; at Appendix 8 is the seminal court decision underlying the Corps’ *de minimis* analysis, *NW*). This also would allow consideration of the analysis contained in documents completed by the State Department of Natural Resources for the Cherry Point Aquatic Reserve, which has been extensive. (The 2017 Commissioner’s order enlarging the Reserve is attached at Appendix 9, and a PDF of the Reserve’s amended 190-page Management Plan for the Reserve may be downloaded from DNR at
And finally, since the Department of Ecology must review shoreline conditional use permits, this would allow another state agency to consider the impact of the leasing restrictions DNR recently adopted for the Reserve.

This option will require amendments to the land use code and to the shoreline master program. Amendments to the shoreline master program are needed in any event, as it currently establishes a priority for marine terminals with oil and gas transfer within the Cherry Point shoreline area.

4.3 Prohibit Certain Uses

Another powerful option that would create immediate certainty would be to prohibit a defined set of uses in the zoning code and the shoreline regulations for the Cherry Point Heavy Industrial Zone and the adjoining shoreline areas. Such an option is similar to what has been done in Portland, Oregon, and in South Portland, Maine. This option would require a thoughtful discussion of the specific uses that could be prohibited. A clear record about why any uses are prohibited would be necessary to demonstrate that the regulations do not burden interstate commerce, and are consistent with substantive due process and other grounds such as consistency with Growth Management Act policies and the comprehensive plan, the State Shoreline Management Act, and the local Shoreline Master Program. The basis for such provisions should rely on concerns about local health and safety, land use compatibility, and environmental impacts of the prohibited uses, including considerations under the Growth Management Act and the Shoreline Management Act. Should the County decide to pursue this option, it should bolster the record by citing the desire for consistency with the DNR’s adjoining Cherry Point Aquatic Reserve, recent decisions by the Corps of Engineers regarding treaty fishing rights, and the provisions of the Magnuson Amendment. See Appendices 7 through 10. The record could also make clear that the County wishes to allow the continued use of the Cherry Point area by the existing two refineries and the aluminum smelter and could even make clear that expansions of the existing facilities is viewed positively. There could even be findings made that the County has accepted its fair share of such facilities in the state and
region and wishes to limit the impacts on the community of a further concentration of such facilities.

While prohibiting a defined set of uses would create certainty, it might also provide an opportunity for an immediate facial challenge to the validity of the regulation from a property owner or litigant who could meet standing requirements. This is why it would be important to have a strong record showing why zoning certain uses out is rational and is based on legitimate land use and environmental considerations. Because the state and federal governments have made past decisions that limit the uses that they will allow, a good argument can be made about the need or desirability for consistency between County regulations and those past land use decisions at the state and federal level. It might also be possible to prohibit uses beyond those denied by the State and Federal governments, though this should be evaluated very carefully before proceeding.

4.4 A Hybrid Approach

The County could also choose to combine elements from each of the above options into a new ordinance. The paragraphs above create a menu of options that can be mixed and matched. For instance, the Major Project Permit provisions could be modified to provide additional discretionary criteria and the Shoreline regulations could be amended to require a shoreline conditional use for certain types of facilities. Either of these could be combined with making some uses prohibited as well. The County could also be explicit about how its policies protect existing uses and limit (or not) the expansion of existing uses under any of these options as well. Any final option will require findings that are clear about the basis for the County’s actions and must take into account the legal tests for consistency with the Commerce Clause and adoption of land use regulations as set forth more completely in the Legal Issues section of this report.

4.5 Adopt Franchise Ordinances

Finally, the County Council could also adopt a franchise ordinance relating to interstate pipelines. Other jurisdictions have adopted franchise ordinances aimed at interstate pipelines, but the courts have usually limited the local government’s ability to
impose conditions beyond those relating to construction and maintenance. In other words, any attempt to impose safety conditions beyond those required by the federal government for interstate pipelines likely would be preempted. We have included further discussion of franchise authority in Appendix 11.

5 Overarching Recommendations

In this section, we make several overarching recommendations to the County regardless of which zoning and shoreline code amendments are selected.

5.1 Conformity and Internal Consistency

The Washington State Growth Management Act (GMA) requires consistency with the policies of the GMA and local comprehensive plans and land use regulations. An effort needs to be made to ensure that whatever option is chosen is consistent with GMA policies and that the various provisions are internally consistent. That is, the Shoreline Master Program, the zoning ordinance provisions, and any procedural requirements must be consistent with each other and with the applicable provisions of Whatcom County’s land use ordinances. An amendment process must ensure that the final option chosen is consistent throughout Whatcom County’s various Comprehensive Plan, Shoreline Master Program policies, and shoreline regulations and zoning regulations.

5.2 Major Project Permit Review Provisions

We recommend that the County develop new Master Site Planning provisions that would be applicable to the Cherry Point Heavy Industrial District. These would include a number of elements that would be applicable under several of the options discussed above. These include:

- Require an application fee covering the County’s review costs including costs for EIS preparation be paid up front or in increments as the process proceeds.
- Provide for a Development Agreement that obligates the developer to pay costs of all traffic and other environmental impact mitigation identified in the SEPA review and discretionary project review by the Planning Department, Hearing Examiner, or County Council, should a Master Site Plan or
conditional use be approved. When such decisions are made, however, any mitigating conditions would need to be proportional with the impacts identified for the development in an Environmental Impact Statement or discretionary decision documents prepared by the County as the record would need to show appropriate justification for such mitigation.

➢ Amend the Code to give the Planning Department, the County’s Hearing Examiner, or the County Council the discretion to require a bond or insurance policy (or combination of these) to ensure that all development commitments for transportation or other improvements and mitigation are followed through to completion and that any special safety hazards to the community are insured against.

5.3 SEPA Policy Revisions

We recommend the County review its current SEPA policies to be sure they provide a clear basis for mitigating environmental impacts of a major facility the County may approve, and just as importantly a clear basis for denial if the County determines key environmental impacts cannot be mitigated. The State Environmental Policy Act does provide that a project may be denied after an EIS is completed where it is decided that unacceptable adverse impacts cannot be mitigated. However, clear SEPA policies must be adopted by local ordinance to provide a basis for such a denial or even appropriate conditioning of a project. See WAC 197-11-660, attached to this report as Appendix 12.

5.4 Provisions for Change of Use or Change of Occupancy

Many jurisdictions’ ordinances provide a process so that any proposed change of use or occupancy at existing facilities is reviewed for consistency with current codes and ordinances, for flagging needed discretionary land use permits, and for ensuring SEPA review where needed to address adverse environmental impacts. We recommend the County consider adopting a provision to allow a simple, ministerial planning staff approval of a change of occupancy or use where such new use remains consistent with current code provisions and is below SEPA review thresholds. This same provision should also create a clear obligation to review and properly address or mitigate impacts of change of occupancy or use that are above SEPA thresholds or otherwise require a discretionary review.
5.5 Consistency Provisions Regarding DNR Aquatic Reserve, the Magnuson Amendment and Tribal Treaty Rights

While the County is not charged directly with enforcing state or federal laws and treaty obligations, the County can provide in its reviews that there be evidence showing that project applicants have taken appropriate steps to address state and federal requirements. For instance, as part of a discretionary review, one element that could be required is that state leases must have been acquired and federal permitting requirements must have been met, including those that require properly addressing tribal treaty rights. For example, the Corps of Engineers recently denied an additional pier for the Gateway Pacific project because the Corps concluded that the project would violate treaty fishing rights. See Appendix 7. The County could expend substantial time and resources to go through a complete project review and approval process only to find out later that a state tideland lease or Corps permit could not be obtained. In addition, the County could make clear that a State Section 401 Water Quality Certification and a Coastal Zone Management Federal Consistency Determination must be issued by the state prior to any County action. See: https://apps.oria.wa.gov/permithandbook/permitdetail/43 and https://apps.oria.wa.gov/permithandbook/permitdetail/46.

Accordingly, while the County would not be directly enforcing a federal or state law or obligation, the codes can be written to require a showing that necessary state and federal permits and certifications have been acquired and that there would be no adverse impact on treaty fishing rights. An alternative would be a clear provision that any County permits are issued conditionally upon acquiring all necessary state and federal permits. In addition, the County’s SEPA policies should make more clear that SEPA documents are required to contain analysis of and demonstrate consistency with state and federal laws and obligations, such as consistency with tribal treaty rights.
6 Appendices

Appendix 1: Additional issues in other jurisdictions

Appendix 2: Additional media reports regarding current status of fossil fuel actions in other jurisdictions


Appendix 4: *Lighthouse v. Inslee* complaint, No. 3:18-cv-05005-RJB (W.D. Wash.)

Appendix 5: LUBA Decision 2017-001, *Columbia Pacific Building Trades Council v. City of Portland*

Appendix 6: Oregon Court of Appeals Decision, 289 Ore. App. 729

Appendix 7: U.S. Corps of Engineers 2016 Memorandum for Record: Gateway Pacific Terminal Project and Lummi Nation’s Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County

Appendix 8: DNR Commissioner’s January 2017 Order Expanding Cherry Point Aquatic Reserve

Appendix 9: Magnuson Amendment, 33 USC 476

Appendix 10: Franchise Authority

Appendix 11: WAC 197-11-660, Substantive authority and mitigation

Appendix 12: Cascadia Law Group and the attorneys responsible for this report
Appendix 1

Additional issues in other jurisdictions
6.1 Appendix 1: Additional Issues in Other Jurisdictions

In this appendix, we outline a number of actions taken in other jurisdictions and summarize any related litigation.

6.1.1 South Portland, Maine

6.1.1.1 Overview

After a failed initiative measure the City Council put a moratorium in place that prohibited the loading of oil sands/tar sands products onto marine tank vessels docking in South Portland. The Ordinance replaced the moratorium in late 2014.

South Portland had been the site of three existing pipelines constructed at various times since 1941. They were used to transport fuel northward during World War II and afterwards. As oil supplies from Canadian tar sands became available the demand for crude transport northward from the pipelines diminished. Newspaper reports indicate the pipelines have largely been shut down for the last year or so.

The pipeline company had made proposals in the past to reverse flow in the existing pipeline to allow it to be used to bring oil from Canada south to be exported from the harbor.

The City contends that no vested proposals were before it to reverse flow in the pipeline at the time the Ordinance was adopted and that it is exercising its police powers to “protect the health and welfare of city residents and visitors and traditional land use authority to promote future development consistent with the comprehensive plan”.

Recent court filings show that as many as 100,000 barrels (4,200,000 gallons) per day of Canadian crude oil could be brought in through the pipeline for export. However, the pipeline has sufficient capacity to pump more than 4 times that amount of oil, or 160 million barrels of oil per year, which is the volume it previously transported northward.
In February 2015, the Portland Pipeline Company (a subsidiary of ExxonMobil and Suncor Energy) and the American Waterways Operators Association brought suit in federal court.

6.1.1.2 Status

The City of South Portland sought to have the suit dismissed as premature, but the Court denied their motion and a hearing was recently held on the merits of the case. There has been no final resolution of the case as yet, however, dicta in the opinion on the City’s Motion to Dismiss contains language that is problematic for the City going forward. See http://www.pressherald.com/2017/12/12/federal-judge-again-denies-south-portlands-plea-to-dismiss-pipeline-lawsuit/

Most recently, the trial court hearing the case has made several important rulings on summary judgment motions. In a very dense, over 200-page decision, the Court dismissed a broad variety of preemption challenges, but the Court decided that dormant Commerce Clause challenges should proceed to trial because of disputed facts in the record regarding the motivations and intentions behind the restrictions. Importantly, the Court pointed to statements in the record from both the City Council and a City advisory committee regarding climate impacts and prevention of export of Canadian tar sands as reasons for requiring further resolution at trial.

6.1.1.3 Issues

The challengers to the South Portland ordinance alleged preemption on a number of grounds, including the federal Pipeline Safety Act, the President’s foreign affairs power, the federal Ports and Waterways Safety Act and the Constitution’s “embedded principle of federal maritime governance.” They also raised Commerce Clause and due process issues, as well state land use issues.

6.1.1.4 Analysis by the Trial Court

Preemption. The court rejected each of the preemption claims:
Foreign Affairs Power. The Court found there was an unambiguous intent to protect the health and welfare of the city’s residents and visitors and not to impose its own foreign policy.

International Treaties and Related Permits. The Court found a number of express provisions retaining authority for state and local environmental and land use protections.

Federal Pipeline Safety Act. The Court concluded that the local zoning provisions prohibiting export facilities were not designed as safety standards and therefore were not in direct conflict with federal safety standards. Importantly, the Court found that there is a presumption against preemption and the burden is on challengers to establish a direct conflict with federal safety standards. The court analogized federal provisions regulating automobiles such as CAFÉ standards establishing federal fuel economy requirements not being in direct conflict with local parking requirements or ordinances banning cars from certain towns or streets.

In analyzing preemption arguments regarding the Port and Waterways Safety Act, the Court found it persuasive that the zoning ordinance did not provide any duties or restrictions related to vessel navigation or traffic in ports. The Court further stated that while the PWSA does preempt a field of regulation the zoning ordinance was not within that field.

Citing case law, the Court found that there is a principle of “cooperative federalism” that allows both federal laws and traditional local health and land use authority to operate in harmony as long as they don’t directly conflict.

The Court held that state and local police powers are only to be displaced by clear Congressional intent.

In discussing arguments of preemption by the Federal Foreign Affairs Power, the Court found no direct conflict with a “consistent policy” of the federal government and that the Presidential Permit for the pipeline facility that would serve export facilities had express language contained in the permit requiring the permittee to obtain requisite local permits from relevant state and local governments.
Regarding preemption arguments under Federal Maritime Law, in dismissing plaintiff's claims, the court found that there has been a narrow application of the “harmony and uniformity” standard set forth in *South Pacific Company v. Jensen*, 244 U.S. 205, 215 (1917). The Court cited cases such as *Huron Portland Cement Company v. City of Detroit, Michigan*, 362 U.S. 440 (1960), where a local smoke prevention ordinance was upheld and *Pacific Merchant Shipping Association v. Goldstene*, 639 F.3d 1154, 1158 (9th Cir. 2011) where California’s vessel fuel rules extending beyond the state’s 3-mile limit was upheld as exemplary of applications of case law allowing federal, state and local rules to operate in harmony.

*Commerce Clause.* For dormant Commerce Clause analysis, the trial Court held that statements by City Council Members and members of an advisory committee regarding their intentions made in deliberations of a moratorium and zoning restrictions were admissible but that statements of the general public in meetings were not.

Finally, in ruling that the summary judgment claims related to the dormant Commerce Clause must proceed to trial, the Court stated that “the Council’s primary purposes and intent in enacting the Ordinance as well as its primary practical effect, will have to be resolved by a fact finder.” In the South Portland, Maine context, this highlights that conflicting statements on the record by City Council members and advisory committee members regarding the actual intent of the City Council could be problematic. The Court highlighted several statements in the record from City Council members regarding their concerns about export of Canadian tar sands crude. The lesson in this is that what is said regarding the purpose and intent of a regulation can be important in a court’s view of Commerce Clause analysis. Here the Court is looking beyond the findings in the ordinance, to a record of what was said in various meetings; Whatcom County should keep that in mind while deliberating a new ordinance. The South Portland Maine court looked to the record of statements made by City Council Members and advisory board members much earlier than just during consideration of a final ordinance. The Court considered statements made during Council discussion of a moratorium, and even of an advisory board making recommendations to the City Council prior to crafting new zoning regulations. They did not consider statements made by citizens at meetings, however. Strong arguments can be made that in Whatcom
The relevant record would be only the record around a new proposal for zoning amendments, but the South Portland case shows that some courts will open the record more expansively.

6.1.2 Oakland, California

6.1.2.1 Overview

On June 27, 2016, the City of Oakland adopted an Ordinance prohibiting the export of coal or petroleum coke from marine terminals in the City.

The City had previously signed a Development Agreement in July 2013 with Oakland Bulk and Oversized Terminal to redevelop an old Army base on the City’s waterfront for a bulk commodities terminal. As plans for the site were developed, four counties in Utah that produce coal disclosed that they had agreed to contribute $53 million dollars toward construction of the new terminal. A lawsuit was filed on December 7, 2016 challenging the Ordinance.

6.1.2.2 Status

The Court denied the City’s motion to dismiss the suit, and the case went to trial on January 16, 2018. See https://www.courthousenews.com/oakland-coal-ban-trial-wraps-with-debate-over-pollution-levels/

6.1.2.3 Issues

- Commerce Clause
- Preemption by the Interstate Commerce Termination Act and the Hazardous Materials and Transportation Act
- Breach by City of the 2013 Development Agreement

6.1.3 Vancouver, Washington

6.1.3.1 Overview

- Prohibition on new crude oil storage and handling facilities. Moratorium enacted in September and extended several times; final action taken in July 2016.
Moratorium did not affect the Tesoro/Savage crude oil terminal application that had likely vested under Washington’s liberal vesting rules.

Would transship average of 360,000 barrels of crude oil per day, making it the largest crude oil terminal in the United States.

Congress has repealed the ban on foreign exports of US crude.

6.1.3.2 Status

The Energy Facility Site Evaluation Council unanimously recommended disapproval of the project as there were impacts identified in the State Environmental Policy Act Environmental Impact Statement that could not be mitigated. See http://www.columbian.com/news/2017/nov/28/vancouver-port-oil-terminal-efsec/

On January 29, 2018, the Governor informed EFSEC that he agreed with that agency’s decision, stating:

The Council has conducted a thorough evaluation of this application, consistent with the requirements and intent of Chapter 80.50 RCW. After considering all of the evidence in the record, the Council found that the risks of siting the proposed project at the Port of Vancouver exceeded the project's potential benefits and determined that the application is not in the public interest.

He continued, focusing on seismic issues and the potential for an oil spill:

I find ample support in the record for the Council's recommendation, but several issues in particular compel me to this decision. First, I am persuaded by the Council's finding that, in the event of an earthquake, seismic conditions at the site present an unacceptable and potentially catastrophic risk to the public. Given the likelihood of a large magnitude earthquake occurring in the region, the public expects Washington's critical infrastructure to be designed to be resilient to such risks. I am not convinced that this project, as proposed, meets those expectations.

Second, given the proposed location of the facility, I am concerned about the likelihood of an oil spill impacting the Columbia River or reaching the Pacific Ocean. The Council found that the impacts of a Columbia River oil spill on water quality, wetlands, and fish and wildlife would be significant and cannot be sufficiently mitigated. To the extent these risks cannot be sufficiently mitigated, they must be avoided.
6.1.4 Spokane, Washington

“Safer Spokane” proposed an initiative that would impose a $261 per car civil penalty on transporters of uncovered coal cars and certain volatile oils through Spokane.

On July 24, the City Council voted 5-1 to move the initiative to the November 7 ballot.

Ballot measures may be challenged before going to the voters on constitutional grounds, but generally courts have been reluctant to act on pre-enactment challenges.

The Spokane Hearing Examiner is required to provide a legal analysis. He concluded that the proposed measure would be preempted under the Interstate Commerce Commission Termination Act, which gives the Surface Transportation Board exclusive jurisdiction “with respect to rates, classifications, rules . . ., practices, routes, services, and facilities” of rail carriers and over “the construction, operation, abandonment, or discontinuance of [tracks] . . . or facilities, even if the tracks are located . . . entirely in one state.” 49 U.S. C. §10501.

The initiative proponents argue that the measure is supported as a protection of public health and safety.

Spokane voters rejected the initiative at the November election. See: http://www.spokesman.com/stories/2017/nov/07/spokane-voters-reject-fines-for-coal-oil-trains-tr/

6.1.5 Tacoma, Washington

The Tacoma City Council and Port of Tacoma have agreed to initiate a “subarea plan” for the tideflats area. The Tacoma Planning Commission has proposed interim land use controls.
Currently, Puget LNG is constructing a liquefied natural gas facility in the tideflats, but they say it is not to be used for fossil fuel exports. There was also a proposal to construct a methanol production plant to create methanol for export to China that has been withdrawn after significant public controversy.

Another proposal is pending for modifying an existing terminal (Targa Terminals) to receive, store and ship up to 151,500,000 gallons per year of natural gasoline, a liquid that comes from natural gas wells and is often blended with gasoline. The Puget Sound Clean Air Agency held a public hearing on September 14 in Tacoma to receive public input on the proposal.

The Tacoma Planning Commission held a public hearing regarding adoption of interim land use controls on September 13, and on October 4 issued Findings of Fact and Recommendations.

The City of Tacoma attached the Commission’s Findings as Exhibit E to the Ordinance it passed to adopt interim land use controls that allow expansion of existing uses during the pendency of the subarea planning process. (Ordinance attached to this report as Appendix 13; see also: http://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=132602 and http://www.thenewstribune.com/news/local/article186117598.html)

6.1.6 Hoquiam, Washington

Proposals have been made to expand Westway Terminal and Imperium Terminal. Oil would come to sites by train and truck, with increases to vessel traffic of 520 transits per year and increased train traffic by 973 transits per year

This resulted in litigation over mitigated declarations of non-significance issued by the City and Department of Ecology.

In *Quinault Indian Nation v. Imperium Terminal Services*, 187 Wn. 2d 460 (2016), the Washington Supreme Court reversed the opinions of the Court of Appeals and the Growth Management Hearings Board, holding that further review under ORMA was required. ORMA only applies to “ocean or transportation uses” and “coastal uses”,

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which had previously not been defined by the courts. ORMA also only applies to ocean coastal counties and not to Puget Sound waters. See: http://www.thedailyworld.com/news/oil-case-tribe-and-environmentalists-win-major-victory-in-state-supreme-court/

The permits have been remanded back to the city and the Department of Ecology for further review to determine whether the uses should be permitted under ORMA, which requires balancing the economic benefits and need for projects against the environmental risks of the projects. One of the project developers has been quoted in the press as committed to continue pursuing the project. Several commentators have suggested that should the projects be denied using ORMA that there is likely to be a court challenge raising federal preemption and Commerce Clause claims.

Recently, it was reported in the Aberdeen Daily World that both proposals have been abandoned, and the proponents are “pursuing other directions for their sites.” See http://www.thedailyworld.com/news/port-officials-crude-oil-no-longer-in-plans/

6.1.7 Aberdeen, Washington

Aberdeen passed Ordinance 6594 prohibiting bulk oil handling and storage facilities.

6.1.8 Coos County, Oregon

A proposal was made for a liquefied natural gas export facility and 231-mile feeder pipeline at Jordan Cove. Jordan Cove indicated it would file an application with the Federal Energy Regulatory Commission in August 2017 with the goal of receiving approval by the end of 2018. FERC rejected earlier proposal because of lack of demand.

Under FERC’s pre-filing process, FERC has indicated it will prepare an environmental impact statement for the project.

Recently the Oregon State Geologist raised earthquake safety issues and Oregon Senator Jeff Merkley announced his opposition to the project. See:
http://www.mailtribune.com/opinion/20171214/editorial-jordan-cove-project-suffers-two-setbacks

Voters rejected a ballot measure in May 2017 that would have barred the project. One issue, reported in the Oregonian, was that voters feared paying legal expenses for defense of a measure that may be unconstitutional. See:
http://www.oregonlive.com/politics/index.ssf/2017/05/coos_county_voters_reject_ban.html
Appendix 2

Additional media reports regarding current status of fossil fuel actions in other jurisdictions
6.2 Appendix 2: Additional media reports regarding current status of fossil fuel actions in other jurisdictions


Appendix 3
Wal-Mart Stores, Inc. v. City of Turlock
6.3 Appendix 3: Wal-Mart Stores, Inc. v. City of Turlock

Positive

As of: January 28, 2018 11:35 PM Z

Wal-Mart Stores, Inc. v. City of Turlock

United States District Court for the Eastern District of California

March 12, 2007, Decided ; March 13, 2007, Filed

1:04-CV-05278 OWW DLB

Reporter

483 F. Supp. 2d 1023 *; 2007 U.S. Dist. LEXIS 22661 **

CITY OF TURLOCK, et al., Defendants.


Core Terms

Ordinance, discount, district court, superstores, frivolous, retail, Supercenter, vagueness, City's, discount store, neighborhood, as-applied, attorney's fees, defending, outset, equal protection claim, citations, supermarkets, challenges, prevailing, developer, blight, shopping center, classification, meritless, traffic, billed, zoning, state court, invalidating

Case Summary

Procedural Posture
Defendants, a city and a city council, prevailed in a civil rights action brought against them by plaintiffs, a corporation and a trust, based on an ordinance relating to the establishment of a store. The court entered summary judgment in defendants' favor. Defendants then moved for an award of attorney's fees under 42 U.S.C.S. § 1988.

Outcome
The court held that defendants were entitled to a fee award for expenses incurred defending against the vagueness claim and for 20 percent of its fees-on-fees request.

LexisNexis® Headnotes

were pretextual and that defendants' true motive underlying the ordinance in question was to protect local retailers from competition in violation of the Commerce Clause and Equal Protection Clauses of both the United States and Cal. Const. art. I, § 7. In ruling on the motion, the court held that (1) defendants were not entitled to fees based on plaintiffs' "as-applied" claim because, although the court ultimately found that no as-applied claim had been asserted, whether any such claim could be maintained was a debatable question; (2) with respect to the equal protection challenges, defendants were not entitled to fees because it could not be said that the theory underlying the claims were totally without merit; (3) defendants were not entitled to fees with respect to the Commerce Clause claim as that claim was not totally unreasonable from the outset; and (4) defendants were entitled to fees with respect to plaintiffs' vagueness challenge because the vagueness claim was meritless as plaintiffs had not asserted an as-applied challenge to the ordinance.

Overview
Plaintiffs alleged that defendants' expressions of concern for air quality, traffic flows, and urban blight...
Basis of Recovery, Statutory Awards

42 U.S.C.S. § 1988(b) provides, in part, that in any action or proceeding to enforce 42 U.S.C.S. § 1983, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. A prevailing defendant in a § 1983 action is entitled to an attorneys fee award under 42 U.S.C.S. § 1988 only if the plaintiff's claims were frivolous, unreasonable, or without foundation.

Costs & Attorney Fees, Attorney Fees & Expenses

Because Congress intended to promote vigorous enforcement of civil rights laws, a district court must exercise caution in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may not be "airtight." Accordingly, a prevailing defendant is not entitled to attorney's fees merely because the defendant prevailed on the merits. Courts should be cautious when considering an award to a prevailing defendant where the lawsuit was initiated by a party with limited financial resources or one who is appearing pro se. Courts have expressed more willingness, however, to award attorneys fees against corporate-type plaintiffs who present meritless civil rights claims, because said group of plaintiffs is certainly well equipped to finance a civil rights suit. The chilling effects of an award of attorney's fees to prevailing defendants as against a corporate-type plaintiff is de minimus. At the very least, courts should not hesitate to award attorney's fees against corporate civil rights plaintiffs when the appropriate standard has been met.
Where an ordinance involves social and economic policy, and neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the "rational basis" standard. Under this test, statutes are generally presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. A legislative classification under rational basis review must be wholly irrational to violate equal protection. The challenger bears the burden of negating every conceivable basis which might support the legislative classification, whether or not the basis has a foundation in the record. A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.

It is well established that a legislative choice is not subject to courtroom fact-finding on rational-basis review, and may be based on rational speculation unsupported by evidence or empirical data. Judicial review is at an end once the court identifies a plausible basis on which the legislature may have relied. All that is needed to uphold the state's classification scheme is to find that there are plausible, arguable, or conceivable reasons which may have been the basis for the distinction. The federal courts do not sit as arbiters of the wisdom or utility of economic legislation.

Even an improper motive, without more, does not affect constitutional review of legislation. It is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

While courts may look to legislators' motives where a suspect or quasi-suspect classification is subjected to discrimination or a fundamental right is infringed, absent these circumstances, courts will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.
The Equal Protection Clause Cal. Const. art. I, § 7, is essentially interpreted as being equivalent to the federal equal protection clause.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

**HN12** | Commerce Clause, Dormant Commerce Clause

The dormant Commerce Clause prohibits the states from enacting laws which impede the flow of interstate commerce.

Governments > Legislation > Vagueness

**HN13** | Legislation, Vagueness

Vagueness challenges to statutes that do not involve First Amendment violations must be examined as applied to a defendant.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

**HN14** | Attorney Fees & Expenses, Reasonable Fees

In determining what a reasonable attorney's fee entails, the district court must apply a hybrid approach. The most useful starting point for determining the amount of a reasonable fee is (1) the number of hours reasonably expended on the litigation (2) multiplied by a reasonable hourly rate. The resulting figure is known as the "Lodestar."

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

**HN15** | Attorney Fees & Expenses, Reasonable Fees

To determine what qualifies as reasonable attorney's fees, the U.S. Court of Appeals for the Ninth Circuit has adopted the twelve Lodestar Factors as guidelines and as appropriate factors to be considered in the balancing process required in a determination of reasonable attorney's fees: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Civil Rights Law > ... > Procedural Matters > Costs & Attorney Fees > Statutory Attorney Fee Awards

**HN16** | Basis of Recovery, Statutory Awards


Counsel: [**1**] For Wal-Mart Stores Inc, a Delaware corporation, Wal-Mark Real Estate Business Trust, a Delaware statutory trust, Plaintiffs: Michael J. Coffino, LEAD ATTORNEY, Reed Smith LLP, San Francisco, CA; Alison Hersey Mijares, Ann Marie Heimberger, Steefel Levitt and Weiss, San Francisco, CA; John P. Kinsey, Sagaser, Jones & Hahesy, Fresno, CA.

For City of Turlock, Turlock City Council, Defendants: Benjamin Peters Fay, LEAD ATTORNEY, Jarvis, Fay & Doporto LLP, Oakland, CA; Rick W. Jarvis, Jarvis, Fay & Doporto, LLP, Oakland, CA.

For Raley's, Non-Party, Respondent: Jennifer H Crabb, Law Offices of Jennifer H Crabb Esq, West
Sacramento, CA; John Edward Fischer, Murphy Austin Adams Schoenfeld LLP, Sacramento, CA.

For Safeway Inc., Respondent: Joe Cross Creason, Ill, Dillingham and Murphy, San Francisco, CA.

For Save Mart Supermarkets, Intervenor: Natalie Michelle Weber, Herum Crabtree Brown, Stockton, CA.


Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

Opinion by: Oliver W. Wanger

Opinion

[*1024] ORDER RE: DEFENDANTS’ MOTION FOR ATTORNEY’S FEES (Doc. 224)

I. INTRODUCTION

[**2] Prevailing Defendants, the City of Turlock and the Turlock City Council (collectively, "the City" or "Turlock"), move for an award of attorney’s fees under 42 U.S.C. § 1988. Plaintiffs, Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust (collectively, "Wal-Mart"), oppose the motion.

II. BACKGROUND

The factual background of this case has been discussed at length in several previous decisions. For the purposes of this motion, only a brief summary of facts, most of which where undisputed throughout the litigation, is necessary.

Wal-Mart alleged that its representatives originally began negotiations with the City in December 2002 to establish a Wal-Mart Supercenter in Turlock; that these negotiations appeared likely to succeed as late as July 2003, when Wal-Mart purchased the real property for the prospective Supercenter; and that, at about that time, local grocery store owners learned of Wal-Mart’s plans, and began lobbying the Council to exclude Wal-Mart from Turlock in order to protect themselves from Wal-Mart’s competition.

On December 16, 2003, and January 13, 2004, the Turlock City Council adopted Ordinance Nos. 1015-CS and 1016[**3] (the "Ordinance"). The Ordinance amended the City’s Zoning Code and Northwest Triangle Specific Plan, and was codified in [*1025] Sections 9-1-202 and 9-3-302 of the Turlock Municipal Code. The Ordinance created three new categories of commercial retail land uses: “Discount Stores,” “Discount Clubs,” and “Discount Superstores.” "Discount Stores” are:

stores with off-street parking that usually offer a variety of customer services, centralized cashing, and a wide range of products. ["Discount Stores"] usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount stores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.

A "Discount Club" is:

a discount store or warehouse where shoppers pay a membership fee in order to take advantage of discounted prices on a wide variety of items such as food, clothing, tires, and appliances; many items are sold in large quantities or bulk.

A "Discount Superstore" is:

a store that is similar to a "Discount Store". [**4] . . with the exception that [it] also contain[s] a full-service grocery department under the same roof that shares entrances and exits with the discount store area. Such retail stores exceed 100,000 square feet of gross floor area and devote at least five percent (5%) of the total sales floor area to the sale of non-taxable merchandise . . . . These stores usually offer a variety of customer services, centralized cashing, and a wide range of products. They typically maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount superstores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.

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In Turlock, discount stores and discount clubs are permitted conditional uses in the C-C, C-H, and C-T commercial zones. Discount superstores are not permitted uses, conditional or otherwise, in any City zone. The Ordinance prohibits Plaintiffs from siting a Wal-Mart Supercenter (a “Discount Superstore”) in Turlock.

The Ordinance’s Preamble makes the following findings:

WHEREAS, [*5] the [City] General Plan (including, but not limited to, policies 2.4-a, 2.4-g, 2.4-h, 2.4-j, 2.4-k) establishes locational requirements for the [regional and neighborhood] retail centers: encouraging a number of neighborhood centers equally dispersed throughout the [City] while encouraging a concentration of regional shopping centers along the Highway 99/Countryside Drive corridor; and

WHEREAS, General Plan policies promote and encourage vital neighborhood commercial districts that are evenly distributed throughout the city so that residents are able to meet their basic daily shopping needs at neighborhood shopping centers; and

WHEREAS, given the changes in the retail sector and the evolution toward ever-bigger stores, it is necessary that the zoning ordinance be amended to regulate larger retail establishments appropriately and to afford them adequate review; and

WHEREAS, the [City] zoning ordinance (Title 9 of the [City] Municipal Code) has not kept pace with the evolution of the retail sector and fails to adequately distinguish the size, scale and scope of various retail activities;

WHEREAS, discount superstores compete directly with existing grocery stores that anchor neighborhood-serving commercial centers; and

WHEREAS, smaller stores within a neighborhood center rely upon the foot traffic generated by the grocery store for their existence and in neighborhood centers where the grocery store closes, vacancy rates typically increase and deterioration takes place in the remaining center; and

WHEREAS, discount superstores adversely affect the viability of small-scale, pedestrian-friendly neighborhood commercial areas, contributing to the blight in these areas; and

WHEREAS, the [Ordinance’s proposed [*7] zoning changes] are intended to preserve the [City’s] existing neighborhood-serving shopping centers that are centrally located within the community . . .; and

WHEREAS, the [City’s] current distribution of neighborhood shopping centers provides convenient shopping and employment in close proximity to most residential neighborhoods in Turlock, consistent with the Turlock General Plan; and

WHEREAS, this distribution of shopping and employment creates a land-use pattern that reduces the need for vehicle trips and encourages walking and biking for shopping, services, and employment.

On January 26, 2005, Doucet & Associates, Inc., an engineering firm, filed with the City on Wal-Mart’s behalf a document entitled “an application for entitlements for a Wal-Mart Supercenter proposed for development in Turlock.” On April 15, 2005, Wal-Mart filed with the City a revised application. By letter dated May 9, 2005, City Planning Manager Michael I. Cooke rejected the revised application because the operation of a Discount Superstore is barred by the Ordinance.

On February 11, 2004, Wal-Mart filed this lawsuit in federal court alleging that City’s expressions of concern for [*8] air quality, traffic flows, and urban blight are pretextual, and that the City’s true motive is to protect local retailers from competition in violation of the Commerce Clause and Equal Protection Clauses of both the United States and California Constitutions. Wal-Mart also argued the
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The Ordinance is void for vagueness under the United States Constitution’s Due Process Clauses. ¹

[**9]** The City did not file any challenges to the pleadings. In late November 2004, [*1027*] Wal-Mart filed a motion to compel Save Mart Supermarkets, a non-party, to produce certain discovery concerning the Commerce Clause claims. (Doc. 12.) Magistrate Judge Dennis L. Beck granted the motion and ordered Save Mart to provide information and documents concerning communications between Save Mart, the City, and other third parties relating to the Ordinance. (Doc. 30 at 6; Doc. 80 at 5.) Save Mart moved for reconsideration. (Doc. 25, filed Feb. 25, 2005.) The request for reconsideration was denied by the district court on June 1, 2005. (Doc. 80.) Among other things, the district court reasoned:

Save Mart's contention that the Ordinance in no way implicates the Commerce Clause is mistaken. As the magistrate judge noted, state legislation may constitute economic protectionism on the basis of discriminatory purpose or effect. See Baccus Imps., 468 U.S. at 270, 104 S. Ct. 3049, 82 L. Ed. 2d 200. Save Mart has not shown that Wal-Mart's claim that the Ordinance is discriminatory in effect is frivolous or meritless. (Doc. 80 at 27 (emphasis added).) ²

[**10]** On March 29, 2005, the City moved for summary judgment. (Doc. 50.) The City supplemented its motion on October 11, 2005. (Doc. 152.) Wal-Mart filed opposition on November 2, 2005 (Doc. 155) and the city replied on December 12, 2005 (Doc. 190). Oral argument on the motion was heard February 6, 2006 (Doc. 203), at which time the court granted the parties leave to file supplemental briefs concerning the issues of ripeness and exhaustion of administrative remedies in connection with the equal protection claim. (Doc. 204. at 1.) Wal-Mart filed a supplemental brief on February 21, 2006 (Doc. 204), and the City filed a supplement on February 27, 2006 (Doc. 207). ³ On July 3, 2006, the district court granted the City’s motion for summary judgment in its entirety. (Doc. 219.)

[**11**] On August 23, 2006, the City filed the instant motion for attorneys fees (Doc. 224), along with supporting declarations. (Docs. 226, 227 & 231.) Wal-Mart opposed. (Doc. 229, filed on Sept. 29, 2006.) The City replied. (Doc. 230, filed Oct. 6, 2006.)

III. ANALYSIS

A. Legal Framework.


1Wal-Mart also filed an action in state court against the City, Case No. F047372. In a decision issued April 5, 2006, the California Court of Appeals for the Fifth Appellate District upheld the Ordinance, rejecting Wal-Mart's challenges that the City unconstitutionally exceeded its police powers and failed to comply with the California Environmental Quality Act:

(1) a city may exercise its police power to control and organize development within its boundaries as a means of serving the general welfare, (2) the City made a legitimate policy choice when it decided to organize development using neighborhood shopping centers dispersed throughout the city, (3) the Ordinance was reasonably related to protecting that development choice, and (4) no showing was made that the restrictions significantly affected residents of surrounding communities. Accordingly, the restrictions in the ordinance bear a reasonable relationship to the general welfare and, thus, the City constitutionally exercised its police power.

2The district court's conclusion that Save Mart had not shown Wal-Mart's claim to be frivolous or meritless applies exclusively to the Commerce Clause claim. Wal-Mart's suggestion that the district court's decision on the motion for reconsideration applies to the other claims in the case is misplaced. Although the district court did acknowledge that the requested discovery might be relevant to the other claims in the case and briefly summarized the nature of those claims, the district court did not further discuss the other claims. (See Doc. 80 at 5.)

3Wal-Mart attaches too much importance to the fact that the district court granted the parties leave to file supplemental briefs. Wal-Mart suggests that this is somehow indicative of the merit of their claims. (Doc. 229 at 6-7.) It is not. It is simply indicative of the district court's attempt to fairly administer justice in an adversarial system.
Because Congress intended to promote vigorous enforcement of civil rights laws, "a district court must exercise caution in awarding fees to a prevailing defendant in order to avoid discouraging legitimate suits that may not be 'a right.'" See EEOC v. Bruno's Restaurant, 13 F.3d 285, 287 (9th Cir. 1993) (quoting Christiansburg Garment Co v. EEOC, 434 U.S. at 422). The Supreme Court warned in Christiansburg against the "temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Bruno's Restaurant, 13 F.3d at 290 (quoting Christiansburg, 434 U.S. at 421-22). Accordingly, a prevailing defendant is not entitled to attorney's fees merely because the defendant prevailed on the merits. For example, a Title VII complaint that merely ``commonplace in cases of this nature." Warren v. City of Carlsbad, 58 F.3d 439, 444 (9th Cir. 1995).

Courts should be cautious when considering an award to a prevailing defendant where the lawsuit was initiated by a party with limited financial resources or one who is appearing pro se. See Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 619 (9th Cir. 1987). Courts have expressed more willingness, however, to award attorneys fees against "corporate-type plaintiffs who present meritless civil rights claims," because "[s]aid group of plaintiffs is certainly well equipped to finance a civil rights suit." Goldrich, Kest & Stern v. City of San Fernando, 617 F. Supp. 557, 564-565 (D.C. Cal. 1985).

For the Court, the chilling effects of an award of attorney's fees to prevailing defendants as against a corporate-type plaintiff is de minimus. At the very least, courts should not hesitate to award attorney's fees against corporate civil rights plaintiffs when the Christiansburg standard has been met.

Turlock cites several cases in support of its request for attorney's fees. First, the City places great emphasis on a First Circuit case, Raskiewicz v. Town of New Boston, 754 F.2d 38 (1st Cir. 1985), asserting that Raskiewicz presents an "analogous factual pattern." (Doc. 230 at 2.) But, Raskiewicz is less analogous than the City suggests. In Raskiewicz, the plaintiff, a developer, alleged that the Town of New Boston had deprived him of his civil rights and violated the Sherman Act by refusing to grant him a permit to remove gravel from his property. Id. at 43. The district court granted defendants' motions for summary judgment and for attorney's fees. Id. The plaintiff appealed both rulings.

The factual circumstances of Raskiewicz are complex, but, essentially, the developer alleged that the Town exhibited bias, bad faith, and malice in repeatedly refusing to approve his development plans. The First Circuit began its review of the merits of the case by noting that "federal courts do not sit as a super zoning board or a zoning board of appeals." Id. at 44 (citations omitted). The Raskiewicz court relied upon a First Circuit rule that generally "prohibit[s] ordinary land use disputes from being litigated under § 1983." Id. at 44. Raskiewicz argued that this rule should be ignored where "bias, bad faith, and other 'opprobrious epithets of malice'" are alleged. But the First Circuit rejected this argument, reasoning that such allegations of bias and bad faith are "commonplace in cases of this nature." Id. (citations omitted).

If all that were required to secure federal jurisdiction were loose claims of conspiracy and corruption, virtually any case of this type could be brought into the federal court. Here, even assuming-which is unclear-that Raskiewicz, in alleging bias and conspiracy, is implicitly alleging actual corruption on the part of the Board and Redimix, and that sufficiently serious, supported assertions of this type could make out a due process claim under
section 1983 (a matter we do not now decide), the record falls far short of creating a genuine issue of material fact with respect to such a claim.

Id. The Raskiewicz court next examined the factual record and found "nothing that supports an inference of actual bias, let alone corruption," in part because the Town Board "did in fact twice offer Raskiewicz a permit although it was not required by the ordinance to do so." Id. at 45. The First Circuit held that Raskiewicz's federal claims were "totally frivolous and unwarranted" and affirmed the award of attorneys' fees and costs to the defendants.

[**16] Raskiewicz does not provide helpful guidance here. First, the case analyzes and applies various lines of First Circuit authority that appear to have no direct parallels in the Ninth Circuit. Second, the fact that the Raskiewicz court was unimpressed by the plaintiff's allegations of bias only underscores the fact-specific nature of the Christiansburg inquiry. More helpful is Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055 (9th Cir. 2006). In that case, the municipal defendant refused to allow plaintiff permission to land his private jet at the local airport because the jet violated the airport's pre-existing weight restrictions. Id. at 1058. Plaintiff filed suit, alleging both constitutional and statutory grounds for relief. Id. at 1059. The district court deemed all of Plaintiff's constitutional claims to be frivolous. The district court then granted defendants' motion for fees in part as to the fees incurred defending against the frivolous claims, but denied the motion as to fees incurred defending against several non-frivolous statutory claims. Id. The Ninth Circuit affirmed, reasoning that Tutor's constitutional [**17] claims were indeed frivolous:

Although Tutor cites various cases which he contends demonstrate that his claims were not frivolous, as we explain below, we conclude that the district court did not abuse its discretion [**18] when it found that Tutor knew that this claim was frivolous from the outset of the litigation.

Id. at 1061 (emphasis added). The Ninth Circuit's reasoning with respect to the plaintiff's equal protection claim was similar:

It is clear that aircraft weight is not a suspect classification, and there is no fundamental right to land an aircraft at any particular airport. See Hager v. City of West Peoria, 84 F.3d 865, 872 (7th Cir. 1996) ("Access to real property does not rise to the level of a fundamental right such that its denial merits heightened scrutiny."). Therefore, rational basis review applies.

Under rational basis review, the Equal Protection Clause is satisfied if: (1) "there is a plausible policy reason for the classification," (2) "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker," and (3) "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Nordlinger, 505 U.S. at 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (citations omitted).

4 The Raskiewicz court reached a similar conclusion with respect to plaintiff's Sherman Act claims. 754 F.2d at 45.
Tutor’s arguments do not overcome [*19] the obvious rational basis for the weight limitation. Since the weight restriction is closely related to the defendants’ interest in preserving the condition of the runway, and Tutor had no factual basis to support his contention that the defendants permitted other aircraft exceeding the 95,000 pound maximum take-off weight to operate at the airport, the district court did not abuse its discretion when it concluded that Tutor knew or should have known that this claim was frivolous.

Id. at 1061-62 (emphasis added) (parallel citations omitted). The same result was reached regarding Tutor’s Commerce Clause claim.

Tutor argued that defendants’ ban on dual-wheel aircraft with a maximum take-off weight in excess of 95,000 pounds is an impermissible burden on interstate commerce. To prove a Commerce Clause violation, Tutor had the burden of showing that defendants’ restriction has the effect of discriminating against out-of-state interests as compared to in-state interests, or was imposed with the primary purpose of regulating interstate commerce. Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). Tutor, however, merely asserted that he believed the ban [*20] was an impermissible burden on interstate commerce without offering any evidence to support the claim. Tutor offered no evidence indicating that the ban had anything more than an incidental effect on interstate commerce or that the weight restriction was imposed for an impermissible purpose, rather than the obvious purpose of promoting the safety of the airport by preventing deterioration of its runways. Accordingly, the district court did not abuse its discretion when it found that Tutor knew or should have known that this claim was frivolous from the outset of the litigation.

Id. at 1061-62 (emphasis added) (parallel citations omitted).

In general, however, Wal-Mart does not take issue with the general approach taken in Tutor-Saliba -- that HN3 fees are warranted where the plaintiff "knew or should have known that [a] [*21] claim was frivolous from the outset of the litigation."

The City next cites Goldrich, Kest & Stern v. City of San Fernando, 617 F. Supp. 557 (D.C. Cal. 1985), which concerned a developer who alleged that the City of San Fernando violated his constitutional rights by failing to rezone property so as to allow the developer to subdivide his land. The developer sued the City of San Fernando, alleging that the City’s conduct (1) constituted a taking; (2) exceeded the City’s police powers; and (3) violated plaintiff’s equal protection rights. Ultimately, the Goldrich court awarded attorney’s fees to the defendant because the defects of Developer’s suit were of such magnitude that the plaintiff’s ultimate failure was clearly apparent at some significant point in the proceedings.

Id. at 565 (internal quotations and citations omitted).

The plaintiff in Goldrich had filed a parallel lawsuit in state court, raising state procedural challenges to the City’s actions. The state court ruled in favor of the defendants while the federal case was still in its early stages. The Goldrich court found this to be significant in its determination [*22] that a fee award was justified.

The State Decision, based on identical facts and discovery, acts as a “significant point in the proceedings.” By this date, Developer must have realized the ill-founded nature of its federal claims. Evidence produced at trial proved unconvincing to a Superior Court judge, yet Developer continued on, seeking to proffer the same proof to this Court. On January 29, 1985 this Court dismissed Developer’s second amended complaint; this action coincides with the State Decision of January 14, 1984. At the hearing the Court alerted plaintiff of the perilous course that [its suit] may be taking due to an increasingly apparent lack of support for its claims. This Court’s oversight now provides a point of reference for awarding fees. In sum, by January, 1984 it should have been patently obvious to Developer that this action was meritless, grounded on baseless, unsubstantiated allegations. This Court finds that the continued prosecution of the
federal claims by Developer was frivolous, unreasonable and without foundation.

*Id. at 565* (internal quotations and citations omitted).

Wal-Mart asserts that *Goldrich* is not helpful [*23] to the City because, at the outset of the *Goldrich* litigation, the district court granted two motions to dismiss for failure to state a claim and repeatedly warned the developer that his case had no merit. (Doc. 229 at 21.) Nothing in the record indicates that the district court issued similar warnings to Wal-Mart in this case. There is, in fact, evidence to the contrary with respect to Wal-Mart's *Commerce Clause* claim. The decision denying Save Mart's motion for reconsideration states that “Save Mart has not shown that Wal-Mart's claim that the Ordinance is discriminatory in effect is frivolous or meritless.” (Doc. 80 at 27.) This at least suggests that Wal-Mart's *Commerce Clause* claim was not meritless from the outset.

As discussed, the *Goldrich* court also emphasized that the developer "had previously lost a state court action involving identical claims." *(Id.)* Wal-Mart also brought a parallel state court action [*1032] against the City, *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 299, 41 Cal. Rptr. 3d 420 (2006). Although no federal constitutional challenges were raised in that action, the state court decision did address the question of whether, under the California [*24] Constitution, the Ordinance exceeded the police power of the city. *(Id. at 299.)* In analyzing that claim, the state court found that the Ordinance was rationally related to a legitimate public purpose, noting "that the administrative record is replete with evidence of the city's concerns with traffic and urban/suburban decay that might arise from the development of discount superstores." *(Id. (internal citations and quotations omitted).)* The state court's reasoning is relevant:

Wal-Mart does not argue that its Supercenters do not have significant environmental effects, or even that they do not produce the results City fears—to wit, urban/suburban decay, increased traffic, and reduced air quality. Instead, Wal-Mart argues the lack of a rational relationship between those concerns and the Ordinance is demonstrated by the fact that, while the Ordinance bans superstores entirely, it permits the development of alternative multitenant shopping centers which, according to the evidence, have even greater negative environmental effects. The alternative developments to which Wal-Mart refers are those discussed in the TJKM report of November 20, 2003, all of which include [*25] a grocery supermarket of 60,000 square feet or more. It is clear from the record, however, that City decision makers did not ignore either the TJKM report, the statistics it presented, or the idea Wal-Mart sought to convey before enacting the Ordinance. Rather, they appear to have agreed with City's planning staff that "[w]hile any large-scale retail store can draw customers with low prices and a wide selection of goods, the big box grocers present a unique threat because of the inclusion of discount retail and full-service grocery under a single roof."

Further, it must be noted that City does have planning control, through the CUP process, over the prospective development of discount stores, discount clubs, and supermarkets of 60,000 square feet or more. And City has placed on record its view that the development of large grocery supermarkets in regional shopping centers raises environmental concerns and is undesirable. Wal-Mart cites no authority to support the proposition that a municipality must address all similar concerns related to the general welfare by the same means or in the same way.

*Id. at 301-302.* In addition, the state court rejected Wal-Mart's [*26] argument that "the Ordinance was enacted for the purpose of targeting Wal-Mart." *(Id. at 302.)*

The Ordinance does not single out Wal-Mart but, instead, prohibits all discount superstores within City's boundaries. The record demonstrates, to be sure, that Wal-Mart's prospective competitors, and some of its detractors, did lobby City officials regarding enactment of the Ordinance. As City points out, however, it is well-established that courts must "eschew inquiry into what motivated or influenced those who voted on...legislation." *(Board of Supervisors v. Superior Court (1995) 32 Cal.App.4th 1616, 1623, 38 Cal.Rptr.2d 876.)* "[T]he validity of legislative acts must be measured by the terms of the legislation itself, and not by the motives of, or the influences upon, the legislators who enacted the measure." *(City and County of San Francisco v.*
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Further, the simple fact that Wal-Mart was the first company to feel the effect of the Ordinance [*27] is not sufficient to establish that Wal-Mart was targeted in any unconstitutional manner. If that fact were enough to require a finding that a local governmental entity had exceeded its police power, then local government could never react to new situations brought to its attention by a specific proposal without having that reaction invalidated under the claim that it “targeted” the specific proposal. In short, local governments need the flexibility to react to specific proposals for a new kind of development not previously contemplated where such a development will or may have harmful consequences to the locality’s legitimate planning objectives.

Id. at 302. Unlike in Goldrich, where the state court decision was issued early during the federal litigation, the state court decision in Wal-Mart was issued on April 5, 2006, after oral argument was heard on the motion for summary judgment in the federal case. Goldrich does not present a parallel factual circumstance.

In sum, the Christiansburg inquiry is highly factspecific, and Tutor-Saliba provides some general guidance, standing for the proposition that fees are warranted where the plaintiff “knew [*28] or should have known that [a] claim was frivolous from the outset of the litigation.”

B. Application to the Claims in this Case.


Initially, it was not clear whether Wal-Mart sought to bring only a facial challenge to the ordinance, or whether the lawsuit also included an as-applied challenge. After the City moved for summary judgment on only the facial challenge, Wal-Mart continued to insist that the complaint also raised an as-applied challenge. But, Wal-Mart’s purported as-applied claim could not withstand scrutiny. While the operative complaint was filed on February 11, 2004 (Doc. 1), the City did not deny Wal-Mart’s application until May 9, 2005 (Doc. 191). Accordingly, the district court ruled:

The February 11, 2004, complaint could not have, and did not, allege the City violated Wal-Mart’s constitutional rights in applying the Ordinance to deny Wal-Mart’s Supercenter permit application, because the City did not apply the Ordinance to Wal-Mart’s Supercenter supplemented application until May 9, 2005. The complaint does not allege facts regarding the specific application of the Ordinance to Wal-Mart’s Supercenter [*29] permit application.

***

The complaint solely presents a facial challenge to the Ordinance.


Alternatively, even if the complaint had asserted an as-applied challenge, the district court analyzed whether any such claim could be maintained. This analysis was suggested by Defendants’ own memorandum in support of its motion for summary judgment, which preemptively attacked Wal-Mart’s ability to maintain an as-applied claim, arguing that any such claim would not be ripe for review, that the futility exception would not apply, and that the statute of limitations operated as a bar. (Doc. 51 at 21-24.) The applicability of the futility exception and the statute of limitations issue were resolved in Wal-Mart’s favor. The district court ruled that the facial challenge would have subsumed any as-applied claim because the Ordinance [*1034] left the City no discretion to approve any Supercenter.

Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064 (9th Cir. 2003), holds HN4 no as-applied challenge can be asserted where a statute grants no discretion to the administering agency:

As [*30] the district court recognized, this is essentially a facial challenge to the inherently unequal criteria for moving the IPES Line contained in the 1987 Plan. The 1987 Plan enshrined the differential triggering requirements for the vacant lot equations of California and Nevada; the Agency had no discretion to deviate from the Plan’s provisions.

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In 1999, the Agency did not apply equal terms unequally -- it applied inherently unequal terms in equal fashion. If the Association thought the inequality unlawful, its quarrel was with the terms of the 1987 Plan itself.

_Tahoe Sierra, 322 F.3d at 1080 n.15; see also Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 689 (9th Cir. 1993)._ (SJ Decision at 2006 U.S. Dist. LEXIS 47924,*41-42.)

Wal-Mart suggests that the as-applied claim should not be considered frivolous because the district court devoted almost 16 pages to its discussion of the as-applied claim and related issues. (See SJ Decision at 2006 U.S. Dist. LEXIS 47924.) Wal-Mart cites _Hughes v. Rowe, 449 U.S. 5, 15-16, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980),_ which held that "[e]ven [allegations that were properly dismissed for failure to state a claim" were not meritless in the _Christiansburg_ sense" where they "deserved and received the careful consideration of both the District Court and the Court of Appeals."

_HNG[32]_ Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, "groundless" or "without foundation" as required by _Christiansburg_.

_Hughes, 449 U.S. at 15-16._ This argument is persuasive. Although the district court ultimately found that no as-applied claim had been asserted, whether any such claim could be maintained was a debatable question that the district court discussed at length. _Hughes_ suggests that a fee award is not appropriate under such circumstances.

2. Constitutional Challenges.

Wal-Mart alleged that the Ordinance is unconstitutional on three grounds: (1) it deprives Wal-Mart of the equal protection of the laws, in violation of the _Fourteenth Amendment to the United States Constitution_ and _Article I, Section 7, of the California Constitution_; (2) it discriminates against interstate commerce, in violation of _Article I, Section 8, Clause 3, of the United States Constitution_ (the "Commerce Clause"); and (3) it is unconstitutionally vague.

a. Equal Protection Challenges.

(1) Federal Equal Protection Challenges.

With respect to Wal-Mart's federal equal protection challenge, the district court first concluded that _HN5[31]_ "because the Ordinance involves social and economic policy, and neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the 'rational basis' standard." (SJ Decision at 2006 U.S. Dist. LEXIS 47924 at *43 (internal citations omitted).)

Under this test, statutes are generally presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. _Fields v. Legacy Health System, 413 F.3d 943, 955 (9th Cir. 2005)._ A legislative classification under rational basis review must be wholly irrational to violate equal protection. _Id._ The challenger bears the burden of negating every conceivable basis which might support the legislative classification, whether or not the basis has a foundation in the record. _Id._ A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data. _Beach Communications, 508 U.S. at 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211._ (HNG[33])

(Id.)

The City advanced a number of bases for the Ordinance, both in the Ordinance's preamble and in subsequent declarations from City planners. Critically for the purposes of this motion, a number of independent studies were cited in the Ordinance's legislative record, including:

. A study commissioned by the City of Oakland that shows the traffic impact of a discount superstore is greater than the traffic impact of a supermarket, a discount club, or a discount store. It also shows discount superstores cause blight and an increase in air pollution.

. A study by VRPA Technologies, Inc., that shows Wal-Mart Supercenters generate 34.5% more vehicle trips than had been previously estimated by the Institute of Transportation Engineers.
Wal-Mart argued that this distinction bears no rational relationship to any legitimate interest. (Doc. 155 at 19-27.) The City, in its memoranda in support of its motion for summary judgment, pointed [**36] out that the legislative history was filled with evidence that a discount superstore has uniquely detrimental impacts on a community. [S]tudies in the legislative record showed [] Discount Superstores cause more traffic than Discount Stores, Discount Clubs, or supermarkets, and this provides a rational basis for prohibiting them. There was evidence in the record that people shop for groceries 2-3 times a week -- more often than they visit a Discount Store or a Discount Club. [citation] Although Discount Clubs sell groceries, because they sell in bulk, the number of customer trips is less. [citation] Although Supermarkets are similar to Discount Superstores in that they generate more trips per week than Discount Stores and Discount Clubs, they do not attract customers from as large a trade area as Discount Superstores, which because of their size and the synergy between their supermarket and discount store components draw customers from a larger area and therefore cause more vehicle miles to be driven. [citation] This increased traffic also causes more air pollution. [citation] The record also included evidence that competition from a Discount Superstore would [**37] threaten the viability of existing neighborhood centers by causing the closure of the supermarkets that anchor those centers, thereby causing blight. This also provides a rational basis for prohibiting Discount Superstores. [citations] With regard to Turlock specifically, the City Council received information that one Discount Superstore opening in Turlock would likely cause two or three supermarkets to close. [citation] This would mean two or three neighborhood shopping centers would lose their anchors and those shopping centers would then likely slip into decay.

Wal-Mart also questioned the distinctions drawn in the Ordinance between discount superstores, which are prohibited, [*1036] and other retail formats.

5Specifically, Wal-Mart argued:

The City's explanation for the cause of blight or decay is erroneous. The City has it backwards. "Blight" is not caused by new development; rather, blight results from economic and community deficiencies which have resulted in a decline in employment, income, and wealth. The resulting loss of consumer demand can result in failures of neighborhood businesses, which may result in under-maintained or vacant buildings if appropriate re-tenanting does not occur. In short, losses of community vitality, and not any commercial "use," cause blight.

(Doc. 155, 19.)
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(Doc. 51 at 26-27.) Wal-Mart knew or should have been aware of the bases that would be advanced by the City prior to filing its lawsuit because the bases were articulated in the Preamble to the ordinance. Wal-Mart submitted evidence suggesting that the evidence upon which the City relied was erroneous, but such evidence is of no legal consequence:

**HN9** It is well established a legislative choice is not subject to courtroom fact-finding on rational-basis review, and may be based on rational speculation unsupported by evidence or empirical data. Judicial review is at an end once the court identifies a [**38**] plausible basis on which the legislature may have relied. **Rui One Corp., 371 F.3d at 1155; accord, SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 680 (9th Cir. 2002); Jackson Water Works, Inc. v. Public Utilities Comm’n of State of Cal., 793 F.2d 1090, 1094 (9th Cir. 1986) ([a]ll that is needed to uphold the state’s classification scheme is to find that there are ‘plausible,’ ‘arguable,’ or ‘conceivable’ reasons which may have been the basis for the distinction”); **Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority, 825 F.2d 367, 370 (11th Cir. 1987) (“the federal courts do not sit as arbiters of the wisdom or utility” of economic legislation) (citing **Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981)**). (SJ Decision at **2006 U.S. Dist. LEXIS 47924,*50-51*.)

Wal-Mart placed greatest emphasis on its final allegation: that the ordinance violated equal protection because it was the result of collusion between local economic interests (owners of the neighborhood grocery stores and union representatives of [*1037*] those who worked in them) and the Council, acting with the improper legislative [*39*] motive of protecting local merchants and unions from Wal-Mart’s “foreign” competition. (Doc. 155 at 17.) The district court found that, even if true, such improper motives did not require the invalidation of the Ordinance under an equal protection analysis:

**HN9** Even an improper motive, without more, does not affect constitutional review of legislation:

According to the Supreme Court, “it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” **Beach Communications, 508 U.S. at 315.** The First Circuit has specifically rejected a claim that an environmental ordinance violated the **Equal Protection Clause** because its challengers alleged that its passage was motivated by a desire to restrict a business’s power in dealing with unions.

**Rui One Corp., 371 F.3d at 1155** citing **International Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1st Cir. 1991)).**

In **International Paper**, a paper company sued to invalidate and enjoin enforcement of a municipal ordinance regulating emission of pollutants by industries and businesses, including plaintiff. [*40*] **Int’l Paper, 928 F.2d at 481-82.** The company argued the ordinance unduly restricted its bargaining power in a labor dispute with striking unions. **Int’l Paper, 928 F.2d at 482.** The town’s board of selectmen, most of whom were striking union employees, authorized the drafting of the ordinance, and proposed it be put to a public referendum, and it passed. Id. After ruling the ordinance was a facially valid exercise of the town’s power to enact economic legislation, the court refused to “delve into the motivations of the Board members who proposed and drafted the [ordinance]”:

[While **HN10** courts may look to legislators’ motives where a suspect or quasi-suspect classification is subjected to discrimination or a fundamental right is infringed [citations], absent these circumstances, we will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. **Int’l Paper, 928 F.2d at 485.**

(SJ Decision at **2006 U.S. Dist. LEXIS 47924,*57-59.*)

Although the district court rejected all of Wal-Mart’s arguments, the critical question is whether the equal protection claim had a legal or factual basis at the [*41*] outset of the litigation. Wal-Mart cites a
number of cases in support of its assertion that "the equal protection claim was well-grounded in fact and constitutional jurisprudence, including **Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).** In **Romer,** the Supreme Court applied a version of the rational basis test to conclude that a Colorado Constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination "lacks a rational relationship to legitimate state interests," id. at 632, in part because a "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 634. Wal-Mart maintained that, under **Romer,** where a statute singles out a group of persons because of a particular trait, an otherwise legitimate state interest may be overcome if there is evidence of animus toward that corporation. Applying this principle to their own situation, Wal-Mart argued that, where there was evidence that the City singled out Wal-Mart because of its use of a particular retail [*1038*] format, the Supercenter, the City's stated interests could [*42*] be overcome.

Although the district court did not adopt this application of the rational basis test, it cannot be said that the theory underlying its claim was totally without merit. Prior to the filing of this lawsuit on February 11, 2004, Wal-Mart's theory had not been addressed, directly or indirectly, by any court of appeals or the Supreme Court. Moreover, whether the "higher-order rational basis review." [*6*] utilized by the Supreme Court in **Romer, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855** (applied to homosexuals), and **City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)** (applied to mentally retarded), is broadly applicable in other contexts is far from clear. See **Powers v. Harris, 379 F.3d 1208, 1224 (10th Cir. 2004)** (discussing three competing interpretations of the **Cleburne/Romer** approach).

[*43*] By July 2006, at least one other district court from another circuit had rejected a very similar argument in a case brought on Wal-Mart's behalf. See **Retail Industry Leaders Ass'n v. Fielder, 435 F. Supp. 2d 481, 501 (D. Md. 2006).** In **Retail Industry Leaders,** an association (of which Wal-Mart was a member) challenged a Maryland statute imposing a tax upon large, for-profit employers that spend less than certain percentage of total wages paid to employees in the state on health insurance costs. It was anticipated that only Wal-Mart would be affected by the statute. The association argued that the statute violated the Equal Protection Clause because it intentionally targeted Wal-Mart. But, the district court rejected this argument, explaining that "antipathy" was only relevant in the equal protection context in cases involving "politically vulnerable groups":

Unless there is a reason to "infer antipathy" from the targeting of a particular group or person, [**44**] the Constitution presumes that, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we [*44*] may think a political branch has acted. See **Beach Commc'n's, 508 U.S. at 314,** (quoting **Vance v. Bradley, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979).**) It is only in cases involving politically vulnerable groups that the Supreme Court has appeared to rely, at least in part, on legislative antipathy when invalidating a law under the rational basis test. See **Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996)** (invalidating Colorado constitutional amendment that prohibited the state and local governments from passing laws to protect persons from discrimination based on their sexual orientation); **City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)** (invalidating zoning ordinance that authorized a denial of a special use permit for mentally retarded persons to live together in a group home). Wal-Mart does not contend that it is similarly situated to the plaintiffs in **Romer and Cleburne,** and the fact that it is the only entity subject to the spending requirement of the Fair Share Act is not itself sufficient to make out a viable equal protection claim. See **City of New Orleans v. Dukes, 427 U.S. 297, 306, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976)** (expressly [*45*] overruling **Morey v.**

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In sum, although the district court ultimately rejected Wal-Mart’s equal protection argument, Wal-Mart’s animus argument was not totally without foundation at the outset of the litigation.

b. California Equal Protection Claim

Wal-Mart also invoked HN1[**46] the Equal Protection Clause of Article I, Section 7, of the California Constitution, which is essentially interpreted as being equivalent to the federal equal protection clause. See Manduley v. Superior Court, 27 Cal. 4th 537, 357, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002); Kasler v. Lockyer, 23 Cal.4th 472, 481-82, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000). The district court rejected the California Constitutional equal protection claim for the same reasons it rejected the federal equal protection claim, noting that all are “equally enjoined from establishing a discount supermarket in Turlock.” (SJ Decision at 2006 U.S. Dist. LEXIS 47924,*71) Yet, for the same reasons that the federal equal protection claim was not frivolous, neither was the California equal protection claim.

Moreover, although the district court eventually ruled in favor of defendants on the Commerce Clause issues, Wal-Mart’s claim was not totally unreasonable from the outset of the litigation. Wal-Mart advanced a number of legal arguments that were not wholly baseless. For example, in support of its argument that a statute may violate the Commerce Clause if it is the intent of the legislature to discriminate against interstate commerce, Wal-Mart [*47] cited Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984), in which the Supreme Court stated:

A finding that state legislation constitutes “economic protectionism” may be made on the basis of either discriminatory purpose or discriminatory effect.[*]

Id. at 270 (citations omitted). The district court did not find this language controlling, however, reasoning that “the Bacchus Imports Court did not hold the statute was unconstitutional solely because of its intended purpose.” (SJ Decision at 2006 U.S. Dist. LEXIS 47924,*71)

Bacchus Imports cited Hunt for the proposition that a state statute may be invalidated based on its apparent purpose. Bacchus Imports, 468 U.S. at 270. However, Hunt does not stand for the proposition that alleged discriminatory purpose alone will invalidate a statute. See Hunt, 432 U.S. 333, 351, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) ("[a]s the [d]istrict [c]ourt correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them") (emphasis added).

c. Commerce Clause Claim.

Wal-Mart next contended that the Ordinance violated HN12[*1040] the dormant Commerce Clause, which prohibits the states from enacting laws which impede the flow of interstate commerce. Edgar v. MITE Corp., 457 U.S. 624, 640, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982). In fact, as discussed above, discovery related to the Commerce Clause claim was the subject of a motion to compel. The district court, ruling on a non-party’s motion for reconsideration of the magistrate’s ruling granting Wal-Mart’s motion to compel, reasoned that the non-party had failed to establish that Wal-Mart’s Commerce Clause claim was meritless or frivolous. (Doc. 80 at 27.) Wal-Mart was entitled to rely on this determination in pursuing its Commerce Clause claim.
frivolous. Defendants are not entitled to recover attorney’s fees incurred defending against this claim.

d. Vagueness

Finally, Wal-Mart argued that the Ordinance is unconstitutionally vague and ambiguous. (Doc. 155, at 48-50.) This claim was rejected outright because HN13 “[v]agueness challenges to statutes that do not involve First Amendment violations must be examined as applied to defendant.” United States v. Jae Gab Kim, 449 F.3d 933, 941-42 (9th Cir. 2006) [*49] (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). Because Wal-Mart had not asserted an as-applied challenge to the Ordinance, the vagueness claim was meritless. In the alternative, assuming, arguendo, that the complaint had asserted an as-applied challenge, the district court found that the vagueness challenge necessarily failed because the Ordinance clearly prohibits Wal-Mart from establishing a Wal-Mart Supercenter in Turlock. (SJ Decision at 2006 U.S. Dist. LEXIS 47924, *94.)

Wal-Mart suggests that it had a non-frivolous basis for arguing that the Ordinance was unconstitutionally vague as to what uses are permitted. For example, Wal-Mart suggested that if it "sought to build two stores next door to one another -- a discount store and a grocery store -- where each store was less than 100,000 square feet, the Ordinance would not provide a clear ascertainable standard for Wal-Mart (or any other applicant) to determine whether such a project would be permitted." (Doc. 229 at 18.) However, Wal-Mart never pled or presented any evidence that it filed any application, complete or otherwise, with Turlock regarding anything other than a Supercenter. [*50] Therefore, there could never have been any as-applied vagueness claim based on the Ordinance’s failure to clearly delineate whether Wal-Mart’s hypothetical two-store plan would be permissible.

The vagueness claim was frivolous from the outset of the litigation. Defendants are entitled to reasonable attorney’s fees incurred defending against the vagueness claim.

C. Reasonable Attorney’s Fees.

HN14 [�行] "In determining what a reasonable attorney’s fee entails, the district court must apply the hybrid approach adopted in Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 [] (1983)." United States v. $ 12,248 U.S. Currency, 957 F.2d 1513, 1520 (9th Cir. 1992). "The most useful starting point for determining the amount of a reasonable fee is [1] the number of hours reasonably expended on the litigation [2] multiplied by a reasonable hourly rate." Sorenson v. Mink, 239 F.3d 1140, 1145 (9th Cir. 2001) (relying upon Hensley, 461 U.S. at 433). The resulting figure is known as the "Lodestar."

[*1041] HN15 To determine what qualifies as reasonable attorney’s fees, the Ninth Circuit has adopted the twelve Lodestar Factors as "guidelines [and] as appropriate [*51] factors to be considered in the balancing process required in a determination of reasonable attorney’s fees:"

(1) the time and labor required,
(2) the novelty and difficulty of the questions involved,
(3) the skill requisite to perform the legal service properly,
(4) the preclusion of other employment by the attorney due to acceptance of the case,
(5) the customary fee,
(6) whether the fee is fixed or contingent,
(7) time limitations imposed by the client or the circumstances,
(8) the amount involved and the results obtained,
(9) the experience, reputation, and ability of the attorneys,
(10) the "undesirability" of the case,
(11) the nature and length of the professional relationship with the client, and
(12) awards in similar cases.

1. Wal-Mart’s Objections

Wal-Mart only raises two objections to the amount of fees requested. First, Wal-mart argued that the City has failed to provide evidentiary support for its request for $25,000 in fees for bringing the instant motion. In response to this objection, the City filed further [*52] billing documentation along with its reply brief. (See Doc. 231, Jarvis Decl., Ex. B.) These supplemental billing records sufficiently document the City’s fees on fees request.

Second, Wal-Mart notes that the City’s attorneys placed a cap on the amount of fees the City would need to pay in this case. Wal-Mart objects to any fee award that exceeds the cap. Specifically, Wal-Mart argues:

Wal-Mart has learned…that the City will not have to pay $25,000 for bringing this motion. The City and its attorneys have a deal by which the City need only pay “an agreed not-to-exceed figure, with the understanding that, if the motion is successful, [City’s] attorneys may recover any amounts billed in excess of this not-to-exceed figure as part of the ultimate award of fees.”… In other words, if the City wins the motion, Wal-mart pays $25,000, but if the City loses, it pays its attorneys a lesser sum. Wal-Mart should not have to pay more than the City itself would have to pay if the motion were denied. This, Wal-Mart’s liability, if any, for fees incurred by the City in connection with the motion should be capped to the currently undisclosed ceiling figure and the City should disclosed [*53] the cap in its reply.

(Doc. 229 at 24.) Notably, Wal-Mart cites no legal authority to support this argument. In fact, the bulk of legal authority suggests exactly the opposite. It is well-settled that prevailing parties may be awarded fees under § 1988 even if they were represented free of charge by a nonprofit legal aid organization. Blum v. Stenson, 465 U.S. 886, 894-95, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). This is because [*54] § 1988 makes the "party, rather than the lawyer," eligible for a discretionary award of attorney’s fees. Venegas v. Mitchell, 495 U.S. 82, 87-88, 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990) (emphasis added).

2. The City’s Request.

The City has endeavored to separate its request for fee reimbursement according to each claim as follows:

Go to table1

As discussed above, the City is entitled to reimbursement for expenses incurred defending against the vagueness claim only, in the amount of $4,181.29.

Turlock also requests reimbursement for fees incurred preparing its fee petition. [*54] Turlock’s total fees-on-fees request is $20,937.50. Because Turlock is entitled to fees for only the vagueness claim, 7 a minor issue in this very complex case, Turlock should only receive a small portion of its fees-on-fees request. Having reviewed all of the briefs and supporting documents submitted by Turlock in support of its fee petition, it is reasonable to award Turlock twenty percent (20%), one-fifth of its fees-on-fees request, a percentage that roughly reflects (a) the amount of time dedicated to argument on the frivolity of the vagueness claim and (b) a portion of time spent presenting general background information and law in the fee petition.

The court has also reviewed the Declaration of Benjamin Fay, filed in support [*55] of Defendants’ motion for attorney’s fees. (Doc. 227.) His declaration explains that all legal services were provided by the law firm of Jarvis Fay & Deporto, LLP. Work on this matter was provided primarily by Mr. Fay and his partner Rick Jarvis, each of whom have considerable litigation experience in similar matters. (See Exhibits A & B to the Fay Decl.) Mr. Fay and Mr. Jarvis each billed the City at the standard discount rate of $225 per hour for partners, while associates billed at $175 per hour, and paralegals at $100 per hour. These are

7 The total amount of fees claimed for the Equal Protection claim ($71,456.90), the as-applied claim ($12,255.00), and the vagueness claim ($4,181.29) is $196,737.96. The fee expenses incurred by Turlock ($4,181.29) on the vagueness claim amount to 2.13 percent of $196,737.96.
reasonable rates to bill a public entity. Wal-Mart interposes no objection to these hourly rates.

Also attached to the Fay Declaration is a detailed billing spreadsheet, indicating the specific tasks performed for each unit of time billed, and allocating portions of the hours billed to each of the four claims in the case. The bills are reasonably detailed and do not indicate excessive or wasteful billing practices.

IV. CONCLUSION

For the reasons set forth above, Turlock is entitled to a fee award for expenses incurred defending against the vagueness claim ($4,181.29) and for twenty percent (20%) of its fees-on-fees request [*56] ($4,187.50) for a total fee award of ($8,368.79).

IT IS SO ORDERED.

Dated: March 12, 2007

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE
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Appendix 4:

*Lighthouse v. Inslee* complaint
6.4 Appendix 4: *Lighthouse v. Inslee* complaint

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LIGHOUSE RESOURCES INC.;  
LIGHOUSE PRODUCTS, LLC; LHR  
INFRASTRUCTURE, LLC; LHR COAL,  
LLC; and MILLENNIUM BULK  
TERMINALS-LONGVIEW, LLC,  

vs.                                            NO.  

JAY INSLEE, in his official capacity as  
Governor of the State of Washington;  
MAIA BELLON, in her official capacity as  
Director of the Washington Department of  
Ecology; and HILARY S. FRANZ, in her  
onofficial capacity as Commissioner of Public  
Lands,  

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 1 OF 53

(4822 5378 3084)
I. INTRODUCTION

1. From the framing of the Constitution, the federal government has enjoyed supreme authority to regulate foreign and interstate commerce.

2. In giving the federal government this authority, the Constitution necessarily prohibits individual states from discriminating against, or unreasonably burdening the free flow of, such commerce.

3. Plaintiff Lighthouse Resources Inc. and its subsidiaries are filing this action because the Defendants are actively preventing coal mined in other states from moving in foreign and interstate commerce.

4. In particular, the Defendants have unreasonably delayed and denied a number of permits and approvals for a port facility that would enable the export of coal to U.S. allies and trading partners in Asia.

5. Those Asian trading partners want the United States to help them meet their coal demands. They have specifically identified coal from the Powder River Basin in Wyoming and Montana as having ideal characteristics, including for the next generation of high efficiency, low emissions coal-fired power plants.

6. The United States, which possesses the largest coal reserves in the world, wants to supply coal to its Asian allies, and is aggressively pursuing a national policy that facilitates coal exports to Asia.

7. Lighthouse Resources Inc. (Lighthouse) and its subsidiaries are working to meet Asian coal demand. They have already contracted for delivery of coal to customers in Asia. But Lighthouse cannot address Asian demand or fulfill its contracts.
with Asian customers unless additional economic coal export capacity opens on the West Coast.

8. To address this capacity deficit, one of Lighthouse’s subsidiaries is proposing a new coal export facility at the existing Millennium Bulk Terminal in Longview, Washington. That facility would directly generate numerous jobs, grow tax revenues for state and local governments, attract further investment, and support thousands of additional jobs throughout the country.

9. The Defendants oppose coal exports on policy grounds. So they have unreasonably delayed and denied a number of permits and approvals needed to construct the proposed new coal export facility at the Millennium Bulk Terminal. And they have ceased processing other pending permits for the proposed facility, without basis in law.

10. The Defendants’ delays and denials are not consistent with normal permitting procedures. They have, among other things, improperly expanded the scope of their environmental review, arbitrarily and capriciously declined to approve a sublease, and illegally refused to grant a Clean Water Act section 401 water quality certification based on alleged effects that are exclusively within federal jurisdiction.

11. The Defendants’ actions have both the intent and effect of discriminating against and unduly burdening foreign and interstate commerce, in violation of the United States Constitution’s dormant commerce clause, the federal ICC Termination Act, and the federal Ports and Waterways Safety Act.
II. JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983 because this controversy arises under the Constitution and laws of the United States, and involves the deprivation, under state law, of rights and privileges secured by the United States Constitution and acts of Congress.

13. This Court also has jurisdiction pursuant to its inherent equitable powers to enforce federal law and to enjoin state actions that are preempted by federal law.


15. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

III. PARTIES

16. Lighthouse is a privately held company headquartered in Salt Lake City, Utah. Lighthouse's wholly owned subsidiary companies include the parent company of entities owning or leasing coal mining rights, and operating two coal mines (one in Montana and one in Wyoming); the parent company of entities that have proposed to develop port facilities in Oregon and Washington to export coal from Wyoming, Montana, Utah, and Colorado, including the company that has proposed an export terminal in Longview, Washington; and an entity that contracts with rail carriers, ports, and customers in Asian markets for delivery of coal and is currently seeking additional port capacity to export coal through terminals with economic access to foreign markets.1

1Lighthouse was previously known as Ambre Energy North America, Inc. In 2014, Ambre Energy North America, Inc. separated from its Australian parent company, Ambre Energy Limited, when it recapitalized. Ambre Energy North America, Inc. announced that it had changed its name to Lighthouse Resources, Inc. in April 2015.
17. LHR Coal, LLC (LHR Coal) is a wholly owned subsidiary of Lighthouse. LHR Coal, through its subsidiaries, is in the business of owning and operating upstream production and mining assets, including coal mines. LHR Coal’s subsidiaries own or lease coal mining rights, coal loading and rail infrastructure, and operate existing coal mines in Montana and Wyoming.

18. LHR Infrastructure, LLC (LHR Infrastructure) is a wholly owned subsidiary of Lighthouse. LHR Infrastructure, through its subsidiaries, is in the business of identifying and developing infrastructure projects, including coal export facilities, to connect downstream demand to upstream supply. LHR Infrastructure’s subsidiaries own or lease assets to develop marine terminals for transloading bulk products, including coal, from rail to marine vessels.

19. Millennium Bulk Terminals-Longview, LLC (MBT Longview) is a wholly owned subsidiary of LHR Infrastructure and operates an existing bulk product marine terminal in Longview, Washington. MBT Longview has proposed a coal export terminal at that site to receive coal from Lighthouse and other third party customers for loading and shipment to customers in northeast Asia, presently including Japan and South Korea.

20. Lighthouse Products, LLC (LHP) is a wholly owned subsidiary of Lighthouse. LHP markets, sells, and delivers products to its customers. It is in the business of supplying Lighthouse products to meet downstream demand. LHP delivers coal mined by LHR Coal subsidiaries in Montana and Wyoming to Asian customers at the point of sale, which is usually free-on-board (FOB) an ocean-going vessel at a coal export terminal on the Pacific Coast.
21. Jay Inslee is the current governor of the state of Washington, an office he assumed in January 2013. He is being sued in his official capacity.

22. Maia Bellon is the current director of the Washington Department of Ecology. She has served in that role since she was appointed by Governor Inslee in February 2013. She is being sued in her official capacity.

23. Hilary S. Franz is the current Washington Commissioner of Public Lands. She was elected to that position in November 2016 and sworn in on January 11, 2017. She is being sued in her official capacity.

IV. FACTUAL BACKGROUND

A. Asian demand for coal

24. The top five coal-importing countries in the world are located in Asia. Together these countries accounted for 63% of global coal imports in 2014.

25. Japan and South Korea, both of which are among the world’s top five coal importers, have each signed the Paris Accord.

26. Despite having the largest coal reserves in the world, the United States has historically supplied less than five percent of Asia’s demand for imported thermal coal. The United States accordingly has pursued a policy of facilitating coal exports to Asia.

27. Japan in particular has limited domestic energy resources. Following the Fukushima nuclear power plant accident, Japan imports more than 90% of its primary energy.

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28. Japan is installing new, clean coal plant technologies to meet environmental targets. Overall, “Japanese companies plan to develop about 45 additional coal power plants, adding more than 20 GW of capacity in the next decade.”

29. Japan has specifically identified Powder River Basin (PRB) coal from the United States as having the quality characteristics that are desirable for Japan’s next generation of high efficiency, low emissions coal-fired power plants.

30. South Korea—the world’s ninth-largest energy consumer in 2015—lacks domestic energy reserves, making it one of the top energy importers in the world.

31. In recent years, South Korea has also scaled back its long-term reliance on nuclear power and increased its coal imports from 131 million short tons in 2010 to 149 million short tons in 2015.

32. South Korea is the fourth-largest importer of coal in the world. Coal accounts for 28% of South Korea’s installed electricity generating capacity, and 20 new coal-fired power plants are scheduled to enter service by 2022. South Korean energy companies also seek additional U.S. coal imports to diversify the sources of their coal supply.

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3See METI, Clean Coal Technology in Japan (Sept. 6, 2017), http://www.jcoal.or.jp/event/upload/15%20Clean%20Coal%20Technology%20in%20Japan.pdf.
33. Increasing its U.S. coal imports would also allow South Korea to diversify away from its dependence on imports from Indonesia and the Russian Federation.

34. Japan, South Korea, and other U.S. allies in Asia want stable and secure energy supplies for their economies and stability in the region, especially in light of the threat from North Korea and the growing international activism of China and the Russian Federation.

B. Lighthouse's coal supply chain

35. Since 2009, Lighthouse and its affiliated companies have responded to Asian demand by pursuing a strategy to secure port capacity and deliver U.S. coal to Asia.

36. Lighthouse, through its subsidiaries, operates a coal energy supply chain company. That means that Lighthouse manages or arranges the mining of coal, the transfer of coal from rail to ocean-going vessels, and the sale of coal to end users.

37. Since 2011, Lighthouse subsidiary LHR Coal has owned and leased coal mining rights, maintained coal loading infrastructure, and operated coal mines in Montana and Wyoming through its own subsidiary companies. These mining properties were acquired primarily to meet current and projected demand from Asian customers.

38. Under federal regulations, LHR Coal’s subsidiaries are obligated to seek the maximum economic recovery for minerals mined on federal lands. Lighthouse's efforts to export coal to Asia are part of its effort to seek maximum economic recovery.
39. One of LHR Coal’s subsidiaries owns and operates the Decker Coal Mine in southern Montana. The Decker mine, which has been in operation since the early 1970s, is on the northern corridor of the BNSF railroad.

40. The Decker mine has two load out facilities, each of which can handle up to 14 million tons of coal per year. The mine has over 60,000 acres of mineral and surface rights under lease from federal, state, and private mineral owners.

41. Coal from the Decker mine is in high demand from overseas customers. Reserves at Decker are approximately 241 million tons, with additional resources estimated at over 1.2 billion tons.

42. Another one of LHR Coal’s subsidiaries owns a 50% interest in, and operates, the Black Butte mine in Wyoming. The Black Butte mine, which has been in operation since the 1970s, is on the Union Pacific railroad.

43. The Black Butte mine has a rail load out facility capable of handling up to 14.5 million tons of coal per year. Reserves at Black Butte are over 50 million tons, with additional resources estimated at over 90 million tons.

44. LHR Coal’s subsidiary Big Horn Coal Company also has rights to approximately 40 million tons of recoverable coal leased from the State of Wyoming.

45. LHP is party to an amended ten-year contract with a customer in South Korea that was originally executed on May 11, 2012 to deliver two million metric tons per year with the option for the customer to elect to receive an additional one million metric tons per year (Contract #1).

46. LHP is party to another amended contract with a second customer in South Korea, originally executed as a ten-year contract on June 5, 2012, to deliver one
million metric tons per year with the option for the customer to purchase an additional
one million tons per year (Contract #2).

47. LHP also sold a trial shipment of coal to other potential Japanese
customers, but is unable to execute long-term contracts for larger volumes until it
secures more coal export capacity and can be more certain about when deliveries can
be made.

48. Other customers in South Korea, Japan, and Taiwan have expressed interest in
purchasing coal from Lighthouse and its subsidiaries.

49. The lack of sufficient economic west coast coal export capacity has prevented
delivery of the coal volumes specified in both Contract #1 and Contract #2.

As a result, the contracts had to be amended in December 2015 to make both subject to
termination for failure to deliver.

50. At present, LHP supplies coal to its Asian customers by shipping coal out
of a Canadian port. That port has not contracted sufficient capacity to LHP to fulfill the
contracts to which LHP is a party and is approximately 250 miles farther from the
mines than the Millennium Bulk Terminal, resulting in increased shipping costs.

51. LHP needs additional economic coal export capacity to fulfill its contracts
and meet market demand.

C. Lighthouse’s efforts to secure coal export capacity

52. Given that there is not sufficient economic coal export capacity for
Lighthouse and its subsidiaries to fulfill existing contracts and meet increasing Asian
market demand, Lighthouse and predecessor entities have been working to identify,
contract with, and/or develop new coal export facilities on the West Coast since 2009.
53. In 2010, Lighthouse investigated over two dozen potential coal export locations, including 14 potential sites in Washington, 5 in Oregon, 4 in California, and 4 in British Columbia.

54. Based on this thorough investigation, Lighthouse concluded that the Millennium Bulk Terminal brownfield site in Longview, Washington (the Terminal) was the preferred site for coal exports. It entered into an asset purchase and sale agreement that ultimately resulted in its acquisition of substantially all Terminal assets.

55. In July 2010, Washington State offered potential tax abatement, rail infrastructure improvements, assistance to streamline permitting, and job training incentives to redevelop the Terminal into a bulk products facility that included coal exports.

56. While it sought to acquire and permit the Millennium Bulk Terminal facility, LHP continued searching for other coal export capacity.

57. Starting in 2011, Lighthouse—through LHR Infrastructure and its subsidiaries Coyote Island Terminal, LLC and Pacific Transloading, LLC—proposed to construct the Morrow Pacific Project, a coal export facility at the Port of Morrow near Boardman, Oregon.

58. The Port of Morrow is the second-busiest port in Oregon, and has more than 12,000 acres of land that is used and available for a variety of industries. Oregon law (ORS 777.250) gives the port very broad operational authority, including for "storing, warehousing, distributing, or selling or servicing any products of agriculture, mining or industry . . . ."
59. After taking two and one-half years to review it, the Oregon Department of State Lands denied Coyote Island Terminal’s application for a removal-fill permit to construct an industrial dock. Despite the heavy commercial use and industrial purpose of the Port, the Department asserted that the Port of Morrow’s busy waters were best used for fishing. That decision effectively blocked U.S. coal exports through Oregon.

D. The proposed Millennium Bulk Terminal coal export facility

60. The proposed Millennium Bulk Terminal coal export facility would provide sufficient capacity to enable Lighthouse’s subsidiaries to economically fulfill existing and new contracts with Asian customers by shipping coal from Montana and Wyoming through the Terminal and onto ocean-going vessels bound for Asia.

61. The Terminal has been an active industrial site since 1941, with an active industrial dock that was used for decades before MBT Longview acquired it in 2011 with the goal of expanding it into a state-of-the-art coal export facility.

62. At present, the Terminal receives coal by rail weekly, which is then loaded onto trucks for distribution. The Terminal also maintains readiness to unload shiploads of alumina imported primarily from Australia for transportation by rail to an aluminum smelting facility in Wenatchee, Washington.

63. A 2008 Aquatic Lands Lease between the State of Washington and Northwest Alloys, Inc. (the Aquatic Lands Lease) expressly allows coal to be handled over and across the Terminal’s existing dock and two new planned docks.

64. The Aquatic Lands Lease further specifies that the “State believes that this Lease is consistent with the Public Trust Doctrine” and makes clear that approval of a sublease “shall not be unreasonably conditioned or withheld.”
65. MBT Longview acquired the Terminal assets and executed a ground lease with Northwest Alloys, Inc. (the “Ground Lease”) in 2011. At the same time, MBT Longview agreed to certain performance obligations (including but not limited environmental remediation) for the property, including on the aquatic lands, the uplands of the proposed coal export terminal, and the uplands of the existing bulk terminal.

66. Lighthouse is a guarantor of MBT Longview’s performance under the Ground Lease. MBT Longview and Northwest Alloys, Inc. further intended that MBT Longview would become a sublessee under the Aquatic Lands Lease.

67. The Terminal is connected to the existing national rail freight network, already receives common carrier service from BNSF, and is capable of receiving trains from Union Pacific.

68. The Terminal is on the Columbia River, which has been designated by the U.S. Department of Transportation Maritime Administration as a Marine Highway for the transportation of commerce. The river was deepened pursuant to an Act of Congress—at a cost exceeding $180 million—so it could handle more cargo and facilitate growth.

69. At full build-out the Terminal would be capable of exporting 44 million metric tons of coal, which would both satisfy the export requirements of Lighthouse and its subsidiaries and provide export capacity to third party shippers.

70. MBT Longview began the permitting process for the proposed Terminal coal export facility in February 2012. That process requires MBT Longview to acquire roughly two dozen separate federal and state plans, permits, and approvals.
E. Benefits of the Millennium Bulk Terminal

71. The Millennium Bulk Terminal has been underutilized for more than 15 years. Lighthouse’s and MBT Longview’s plans would redevelop it into a world-class port facility.

72. In part due to underutilization of facilities like the Terminal, Cowlitz County has faced economic challenges that have left it lagging behind state averages for employment. The proposed coal export facility at the Terminal is expected to add over 1,300 construction jobs and approximately 135 family-wage jobs.7

73. The Terminal would generate substantial direct tax receipts at the state and local levels.8 A 2012 economic study estimated that the Terminal would generate $146 million in tax revenues over a 30-year period, with approximately 26% of this revenue going to the County, 54% to the State, and 20% to special purpose districts.9

74. Investment in the Terminal would also attract further investment to improve infrastructure around Cowlitz County, resulting in upgrades to rail and other methods of transportation. Improved freight transportation along the Columbia River would increase the value and attractiveness of other industrial properties,10 including the Port of Longview’s proposed port development at Barlow Point, which is adjacent to the Millennium Site.

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8 Id. at 2-1.
10 Id. at Executive Summary.
75. In addition to the local jobs in Cowlitz County, the Terminal at full build-out would support thousands of direct and indirect jobs throughout the country, and bring substantial benefits to the economies of Washington’s sister states, including Montana and Wyoming.

76. In 2015, Montana coal sales generated nearly $15 million in federal and state revenue, much of which funds schools, state parks, libraries, and local infrastructure. Because Montana holds about one-fourth of America’s demonstrated coal reserves, coal export is essential to the state’s economy.

77. Likewise, coal production and export is a cornerstone of Wyoming’s economy. The majority of the coal mined in Wyoming is exported by rail out of state or out of the country. In 2012, coal accounted for 14% of gross state product, 9.3% of total labor income, and 5.9% of total employment in Wyoming.

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14 See State of Wyoming Mot. for Summ. Determination 5, Coyote Island Terminal LLC, OAH Case No.: 1403883 (May 6, 2016), https://drive.google.com/file/d/0B_4Eq9Pe9OQdwx6NHhBemkWYkU/view (Wyoming produced 401,457,074 tons of coal in 2012, which represented 39 percent of the entire nation’s coal production).
15 Id.
78. The Terminal also has the potential to increase annual U.S. coal exports by 44 million metric tons, increasing the annual value of U.S. exports by more than $2.5 billion and shrinking U.S. trade deficits with Asian trading partners.77

79. At the same time, the Terminal will provide Asian markets greater access to coal mined under U.S. laws and regulations, giving Asian customers the alternative they seek to achieve their energy policy objectives, including by meeting their environmental commitments.

F. Defendants’ opposition to coal and coal exports

80. The Defendants have all expressed unyielding opposition to coal and coal exports.

81. Defendant Inslee co-authored a 2007 book titled Apollo’s Fire: Igniting America’s Clean Energy Economy in which he opines that coal is “killing us.”8 More specifically, he claims that “[s]hould we fail to restrain the growth of CO₂ emissions from coal, “all six billion of us on this little spaceship are at risk . . . .”9

82. In the same part of his book, Defendant Inslee claims that “[c]oal is in a race with cars to be the greatest danger to our climate.”20 He also specifically points to the growth of coal use in Asia as a looming threat to the environment.21

7. 48 million short tons x $57.87 per short ton = $2.7 billion, using Platt’s North East Asian Thermal Coal Index Nethback Price at Vancouver BC, dated November 24, 2017.
9. Id. at 200.
10. Id.
11. Id. at 201.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
53
(4822 5378-3084)
83. In November 2012, following Defendant Inslee’s election as Governor of Washington, an article reported that state and national environmental groups viewed him as “their best chance to block the coal ports [in Washington].” According to the article, environmental groups believed that Defendant Inslee “could push rigorous environmental reviews that could slow and complicate the permitting process or impose so many conditions that it would be difficult for developers to build the terminals.”

84. During his first inaugural address as the Governor of Washington, Governor Inslee proclaimed that he would not “consciously accept the dangers of climate change” and described Washington State as the “first responders” who must help “solve this global problem.”

85. During his first press conference as Governor, Defendant Inslee discussed his concerns about the “ramifications” of “burn[ing] the enormous amounts of Powder River Basin coal that are exported through our ports.” He called permitting those exports “the largest decision we will be making as a state . . . certainly during my lifetime and nothing comes close to it.”


[24] Id.


86. In May 2014, Defendant Inslee, speaking at a “Climate Solutions” fundraiser, touted his view that Washingtonians could be “leaders” by taking advantage of Washington’s “attributes as a state”—meaning that states on “the West Coast” could fight climate change by preventing coal exports.26

87. Following the 2016 U.S. presidential election, Defendant Inslee claimed that President Trump “has made it clear that he wants to go backwards on our efforts to fight climate change,” and promised that Washington would continue its “aggressive effort to fight climate change.”27 He went on: “No matter what happens in Washington D.C., Washington State is going to fight climate change, and we’re going to win . . . .”28

88. In October 2017, while speaking at Climate Change Town Hall meeting, Inslee indicated that “you don’t want to lock yourself into infrastructure that is going to be there 50 years to essentially expand fossil fuel. We do not want to get into that mindset for making that kind of decision.”29

89. In another Climate Change Town Hall meeting, Defendant Inslee again referenced Millennium, warned against “build[ing] an infrastructure that locks us into fossil fuels,” and asserted that Washington State will "do some great things to reduce our carbon pollution from all sources wherever it is, so we can reduce carbon whether it is produced in China, or Montana, or Brazil . . . .”30

28 Id.
30 Governor Inslee Climate Change Town Hall, TVW (Oct. 25, 2017, 2:45 PM), www.tvw.org/watch?eventID=201710098.
90. Defendant Inslee’s policy goal of stopping coal exports is implemented in large part through the Washington Department of Ecology.

91. Defendant Bellon was appointed by Defendant Inslee to the position of Director of the Washington Department of Ecology in February 2013. In that position, she has worked with Defendant Inslee to oppose coal exports.

92. In November 2013, Defendant Bellon explained during a panel discussion that “This effort starts with Governor Inslee’s vision, his mission . . . . I’ve been asked to lead the sustainable energy and clean environment goal area . . . . Governor Inslee is pushing us hard on ‘You don’t do your work in a silo. You check in with [other administration officials]’ . . . . Something that I may push from the environmental or water quality perspective may be problematic in a different area.”

93. When the Washington Department of Ecology (Ecology) published its Environmental Impact Statement (EIS) for the Millennium Bulk Terminal in April 2017, its official Twitter account tweeted out four “key findings” from the EIS, while paying little attention the EIS’s findings of no significant adverse impact.

94. When Ecology tweeted a “key finding” that “[t]he project would increase carbon pollution globally by 2 million metric tons,” Defendant Bellon retweeted that statement.

95. Despite Ecology having jurisdiction over several pending and future permits for the Terminal project, Defendant Bellon also tweeted in April 2017 that

9 Panel Discussion on “A New Direction in Washington” with Maia Bellon (Director, Dept. of Ecology), Carol Nelson (Director, Dept. of Revenue), and Joel Sacks (Director, Dept. of Labor & Industries), TVW (Nov. 14, 2013, 9:00 AM), https://www.tvw.org/watch?eventID=20131106.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 19 OF 53

(4822.5378-3084)
“[t]he proposed coal terminal in Longview would significantly impact the environment . . .”

96. Defendant Franz campaigned against coal exports when running for Washington State Lands Commissioner, indicating in response to a questionnaire that she “opposes coal and oil exports from Washington ports.”

97. Defendant Franz’s campaign website also argued that coal “is projected to be an economically outdated energy source within 10 years,” and praised the U.S. Army Corps of Engineers for “suspend[ing] the Cherry Point Coal Terminal project,” another proposed coal export terminal in Washington State.

98. In sum, all the Defendants steadfastly oppose the use of coal as a source of energy and, more specifically, the export of coal to Asian markets.

99. As public officials of the state of Washington, the Defendants have translated their personal opposition to coal exports into official state policy by actively thwarting Lighthouse’s plans to ship coal from Montana and Wyoming to the proposed Millennium Bulk Terminal for export to Asia.

G. Defendants’ coordination with other states to block coal exports

100. On information and belief, the Defendants have also coordinated with officials in Oregon and California in a “subnational” effort to prevent any new coal exports from the United States Pacific Coast to Asian markets.


COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 20 OF

(4822:5378-3084)
101. The Pacific Coast Collaborative (PCC), a partnership between Washington, Oregon, California, Alaska, and British Columbia that was initially formed in June 2008, has been used to coordinate policies and actions between the states of Oregon, Washington, and California, as well as British Columbia.

102. Opposition to coal exports originated with one PCC member state at least as early as February 2011, when then-Oregon First Lady Cylvia Hayes responded to an email from the environmental group Climate Solutions about the proposed Millennium Bulk Terminal coal export facility.  

103. Hayes and her fiancée, then-Oregon Governor John Kitzhaber actively worked to stop coal exports in Oregon and expanded collaboration with officials in Washington, including one or more of the Defendants, in an attempt to block all coal exports from the West Coast.

104. On information and belief, subnational efforts to prevent coal exports from the West Coast by PCC member states were also intertwined with the efforts of environmental groups seeking to block coal exports to Asia.

105. For instance, while acting as First Lady of Oregon, Hayes was being paid by the Clean Economy Development Center to develop “a strategic approach to preventing the development of coal export facilities on the west coast.”

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 21 OF 53

(4822 5378-3084)

106. Hayes worked with Governor Kitzhaber to ensure that Oregon’s policies and decisions opposing coal exports were consistent with the positions taken by the environmental groups who paid her salary. They also worked with the Defendants to help Washington adopt the same anti-coal export policies.

107. In December 2012, before Defendant Inslee was sworn into office, Oregon Governor Kitzhaber left him a message to invite his participation in a project that would create a systemic case against investment in west coast coal export infrastructure.

108. In March 2013, Defendant Inslee and Governor Kitzhaber co-authored a letter to the chair of the White House Council on Environmental Quality that decried the “inevitable consequences of coal leasing and coal export . . . [which] are likely to lead to long-term investments in coal generation in Asia” and urged the federal government “in the strongest possible terms to undertake and complete a thorough examination of the greenhouse gas and other air quality effects of continued coal leasing and export . . .”.\footnote{Letter from Jay Inslee, Governor of Wash., and John Kitzhaber, Governor of Or., to Nancy Sutley, Chair, Council Envtl. Quality (Mar. 25, 2013), http://critfc.org/wp-content/uploads/2012/10/sutley-coal.pdf?x78172.}

109. The Defendants also continued to coordinate with Oregon and California officials through the PCC, using the PCC to “present united fronts opposing new coal
export facilities on the West Coast,” and seeking grant funding for the PCC from environmental organizations opposed to coal exports.38

110. On October 28, 2013, as part of their public efforts with the PCC, California, Oregon, Washington, and British Columbia signed an “Action Plan on Climate and Energy” that agreed to “meaningful coordination and linkage between states and provinces in North America . . . [to] improve the effectiveness of [their] actions, increase their overall positive impact and build momentum for broader international coordination to combat climate change.”

111. Officials in Oregon also sought funding for the PCC from groups opposed to coal exports with the idea that the states on the west coast, including Washington, could work with those anti-coal export groups as a unified “network.”

112. During an April 19, 2014 speech to the League of Conservation Voters, Governor Kitzhaber made it clear that he intended to stop all coal exports: “It is time once and for all to say no to coal exports from the Pacific Northwest . . . . The future of Oregon and the West Coast does not lie in nineteenth century energy sources.”39

113. On October 8, 2014, Willamette Week published a story explaining how First Lady Hayes had misused her position in Governor Kitzhaber’s administration. In January 2015, it came to light that Hayes had not disclosed her contract with the Clean Economy Development Center in her ethics filings.

38 See Inslee’s Enviro Outsourcing: 5 Things We Learned from Jay Manning’s Grant Proposals, SHIFT WA (June 2, 2014), https://shiftwa.org/5-things-we-learned-from-jay-mannings-grant-proposals/.


Ben Adler, Kitzhaber is on His Way Out, But Expect Oregon to Keep Being a Green Leader, GRIST (Feb. 14, 2015), http://grist.org/politics/kitzhaber-is-on-his-way-out-but-oregon-should-continue-being-a-green-leader/.
114. On February 4, 2015, the Oregonian editorial board called for Kitzhaber
to resign. On February 9, 2015, Oregon Attorney General Ellen Rosenblum announced
a criminal investigation. On February 13, the U.S. Attorney’s Office issued a subpoena
for records.\footnote{See Jonathan Cooper, \textit{Feds Subpoena Records Pertaining to Departing Oregon Gov.}, \textit{AP News} (Feb. 14,
2014), https://apnews.com/d2b8cb5c03947df859fe26b55bd0f3.}

115. Kitzhaber resigned as Governor of Oregon effective February 18, 2015, but
PCC member states continued to act in opposition to coal exports.

116. On June 1, 2016, members of the PCC—British Columbia, California, Oregon,
and Washington—together with the cities of Los Angeles, Oakland, Portland,
San Francisco, Seattle, and Vancouver, signed the “Pacific North America Climate
Leadership Agreement.” The Preamble to that agreement noted that the parties are
“embracing the Pacific Coast’s opportunity to demonstrate global leadership by
providing a model for decisive, coordinated subnational climate action . . . .”

H. Washington’s environmental review of the proposed Terminal

117. In November 2010, MBT Longview received a Shoreline Substantial
Development Permit from Cowlitz County for initial development of a coal export
facility at the Terminal. Several environmental groups appealed that decision.

118. The Washington Department of Ecology filed to intervene in the appeal.

Ecology’s Southwest Regional Office claimed in an email that Ecology was not
“suggesting that the SEPA analysis should include emissions that occur from the
burning of coal in China.” Instead, Ecology’s position was that the greenhouse gas
emissions inventory should evaluate transportation impacts from the border of
Washington to the three mile territorial limit.

119. Rather than litigate the appeal of its original Shoreline Development
Permit, MBT Longview withdrew its permit application and began a new process that
would evaluate the environmental effects of the possible expansion of coal exports at
the Terminal—including preparation of an EIS.

120. In October 2012, the U.S. Army Corps of Engineers, Washington
Department of Ecology, and Cowlitz County agreed to collaborate on a joint National
Environmental Policy Act (NEPA)/State Environmental Policy Act (SEPA) document.
Approximately three years later, after Defendants Inslee and Bellon were in office, the
parties amended their Memorandum of Understanding to allow separate state and
federal environmental reviews.

121. The separation of the federal and state environmental review process
stemmed from a disagreement over the scope of the document. Defendant Bellon
explained on August 22, 2013 that the State’s broader scope of environmental review
was based on “the end use of a product” and that “there is no speculation as to the end

122. In other words, Defendant Bellon explicitly proposed to expand the
environmental review of proposed Terminal project beyond the scope originally

envisioned with the federal government solely because of the commodity being
exported: coal.42

123. In November 2013, just 2 days after the public scoping comment period to
define the scope of the Millennium Bulk Terminal EIS ended, Governor Kitzhaber
praised Defendant Inslee for assuring that Washington’s review of coal export facilities
would include a full examination of upstream and downstream impacts, including rail
effects and the effects of coal’s use as a fuel in Asia.

124. In February 2014, Ecology formally decided that the Draft EIS for the
Terminal project would evaluate impacts beyond the State’s borders, including impacts
from lifecycle greenhouse gas emissions and transportation that occurs outside of the
project area and the State of Washington. This change in scope was inconsistent with
both Ecology’s stated position in 2011 and its original scoping agreement with the
federal government.

125. The U.S. Army Corps of Engineers declined to follow Ecology’s decision to
conduct an expansive environmental review.

126. The Corps explained its scoping decision in a February 2014
Memorandum of Record. In sum, the Corps concluded that Ecology’s broader analysis

42The proposed MBT Longview coal export terminal is almost six years into the permitting process and it
has undergone repetitive, burdensome, and unnecessarily complex government processes. As of October
2017, MBT Longview has invested about $15 million in permitting. A report by James Bacchus and Rosa
Jeong of the law firm Greenberg Traurig LLP prepared for the National Association of Manufacturers
noted that expanded SEPA review could constitute export restrictions under World Trade Organization
rules. See JAMES BACCHUS & ROSA JEONG, GREENBERG TRAURIG LLP, LNG AND COAL: UNREASONABLE DELAYS
IN APPROVING EXPORTS LIKELY VIOLATE INTERNATIONAL TREATY OBLIGATIONS 3-5
infringed on numerous areas over which “other Federal agencies may have regulatory
control.”

127. On information and belief, Defendant Inslee and Defendant Bellon
influenced the scope and preparation of the EIS in a manner to include factors over
which Washington State has no jurisdiction, some of which are exclusively under
federal jurisdiction.

128. In June 2016, following publication of the state’s Draft EIS, Defendant
Bellon reiterated the State of Washington’s goal of being a national and global leader
in opposing the use of carbon-based fuels, and argued that if Washington, Oregon, and
California show leadership, then “others will fall in line.”

129. During the same June 2016 interview, Defendant Bellon acknowledged
that the state has little authority to regulate rail transportation, and that if a recently
passed law went further, it would be “beyond our authority again and . . . interfering
with commerce clause concepts.”

130. The unusually broad, global scope of analysis for the Final EIS is just one
of the ways that the Defendants undermined the Terminal expansion project’s goal of
exporting U.S. coal to Asian markets.

131. On information and belief, Defendant Inslee and Defendant Bellon also
influenced the preparation of the EIS to exclude analysis that did not support their
opposition to coal exports.

43 Inside Olympia, Interview with WA Dept. of Ecology Director Maia Bellon, TVW (June 2, 2016, 7:00
PM), www.tvw.org/watch/?eventID=201606084.
44 Id.

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132. For example, the draft EIS excluded the analysis of greenhouse gas emissions during coal extraction. After several comment letters noted the omission, the final EIS added two paragraphs referencing “uncertainty associated with estimated coal extraction emissions”—but entirely excluded the results of that analysis from its conclusion that the project would increase greenhouse gas emissions.

133. This omission is particularly glaring in light of the 122-page SEPA Greenhouse Gas Emissions Technical Report—prepared by Ecology’s own third-party consultant—which found that U.S. coal mining actually reduces total greenhouse gas emissions by displacing mining with higher emissions elsewhere in the world, even when accounting for uncertainty.45

134. Ultimately, the Defendants used their substantive authority under SEPA to reject MBT Longview’s proposal by finding that it would causesignificant adverse environmental effects not reasonably capable of mitigation.

135. In particular, the Defendants concluded that the environmental effects of a coal export facility at the Terminal could not be mitigated because those effects were subject to federal jurisdiction, and not within the state’s authority to mitigate.

136. On May 25, 2017, following publication of the Final EIS, Defendant Bellon admitted that the state subjected the Terminal project to a greater level of scrutiny because the coal it would export is “meant to be used as an end product for

45 The final EIS reported that the project increased total net annual emissions in 2028 by 1.19 million metric tons of CO2 equivalent. MBT Longview SEPA Final Environmental Impact Statement, supra note 4, at 5.8-19. However, if coal extraction analysis is included as reported in the Technical Report, total net indirect annual emissions in 2028 decreases by 3.77 million metric tons of CO2 equivalent. See ICF, SEPA GREENHOUSE GAS EMISSIONS TECHNICAL REP., http://www.milleniumbulkeiswa.gov/assets/greenhouse-gas-emissions2.pdf.
combustion. These comments again confirmed Defendant Bellon’s opposition to
ccoal export to Asian markets.

137. Washington State’s expanded review of the Terminal stands in sharp
contrast to its treatment of the Barlow Point terminal, which is adjacent to the MBT
Longview site and is served by the same rail line that serves the Terminal.

138. At Barlow Point, the Port of Longview aims to export dry or liquid bulk
commodities including bio-diesel, crude oil, methanol, potash, urea/ammonia, and
wood chips. State officials and agencies are actively pushing for expedited
development of Barlow Point. It was estimated that its environmental review process
will take between 18 and 24 months.

139. The primary material difference between the Barlow Point project and the
Terminal is the commodity being shipped from the Terminal: coal.

140. Washington State’s expanded review of the Terminal also stands in sharp
contrast to its review of a grain export terminal that was originally proposed at the Port
of Longview in or about June 2009.

[References]

46 Inside Olympia, Interview with Wash. Dept. of Ecology Maia Bellon, TVW (May 25, 2017, 7:00 PM),
www.tvw.org/watch/?eventID=20705004.

47 See KPFF & PORT OF LONGVIEW, PORT OF LONGVIEW: MASTER PLAN PHASE I FEASIBILITY STUDY, EXECUTIVE

48 See Letter from Roger Millar, Sec’y of Transp., and Dan Gatchet, Chair, Wash. State Freight Advisory
Comm., to David Schumacher, Dir., Office of Fin. Mgmt., Curtis King, Chair, Senate Transp. Comm., and
note 47 at 14.

49 KPFF & PORT OF LONGVIEW, supra note 47 at 14.

50 Bunge Partners with Two Leading Agribusiness Firms to Build Export Grain Terminal in the Pacific
Northwest, EGT (June 1, 2009), http://www.egtgrain.com/news/release/bunge-partners-with-two-
leading-agribusiness-firms-to-build-export-grain-terminal-in-the-pacific-northwest/.

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141. Despite the fact that this grain export terminal also receives 110-car trains from Montana and other states, and transloads grain onto oceangoing vessels bound for Asian markets,\(^5\) it proceeded quickly through the environmental review and permitting process. It began receiving trains in September 2011.\(^2\)

142. The primary material difference between the grain export terminal at the Port of Longview and the Millennium Bulk Terminal is the commodity being shipped from the Terminal: coal.

143. The State of Washington’s treatment of the Terminal further stands in contrast to its review of a 2015 Port of Seattle proposal to modernize its currently-vacant Terminal 5, including associated dredging, to allow much bigger container ships to call at that terminal.

144. The Port of Seattle’s proposed container terminal modernization project is targeted at attracting new shipping to the Northwest through upgrades that would allow Terminal 5 to handle at least 1 million more twenty foot shipping containers per year than the facility’s current permits allow.

145. SEPA review for the Port of Seattle’s Terminal 5 modernization project, which was initiated in 2015, limited its analysis of GHG emissions to emissions related to the operation of the project itself. This limitation was in spite of the revitalized terminal’s potential effects on the dynamics international trade in any number of products.


146. Ecology also did not request an analysis of GHG emissions from the trans-Pacific shipping of goods to or from the terminal, or any analysis of the market effects of a modernized terminal designed to accommodate much bigger vessels than any port in the Northwest can currently handle.

147. The final EIS was issued in October 2016, just one year after the Port of Seattle determined that an EIS would be prepared.

148. Again, the primary material difference between the Port of Seattle terminal expansion and the Millennium Bulk Terminal is the commodity being shipped from the Terminal: coal.

I. Washington State’s denial of a sublease to MBT Longview

149. LHR Infrastructure initially approached the Washington Department of Nature Resources (DNR) in August 2010 to discuss LHR Infrastructure becoming the sublessee under the Aquatic Lands Sublease at the Terminal.

150. After LHR Infrastructure transmitted the lessee's consent to DNR, the Department’s representative indicated in an October 18 email that he had “no objections” to the sublease. He then explained that “[t]he only thing [DNR] require[s] will be the security and insurance be in place at the time or before the sublease is in place.”

151. On October 19, 2010, in a follow-up telephone conversation, the same DNR representative confirmed that his October 18 email was DNR's consent to the sublease, and that DNR would not sign a written consent because there was no one within the agency to sign such a document.
152. Later in October 2010, as part of the transaction for MBT Longview to acquire the Terminal assets, Northwest Alloys submitted a written request for approval of an aquatic lands sublease to MBT Longview.

153. On November 12, 2010, four environmental groups (Sierra Club, Columbia Riverkeeper, Washington Environmental Council, and Climate Solutions) sent then-Washington DNR Commissioner, Peter Goldmark, a letter urging him to deny consent to a "sublease transfer" to LHR Infrastructure and requesting a meeting to discuss DNR's decision.

154. Six days later, on November 18, 2010, DNR left a voice message for LHR Infrastructure’s attorney to inform him that an attorney would be taking over the sublease issue.

155. More than six years later, in January 2017, DNR announced that it would not approve the proposed sublease between Northwest Alloys and MBT Longview.

156. Although the ostensible reason for this sublease denial was a lack of information about MBT Longview's finances and the structure of the sublease, MBT Longview had in fact provided all of the information normally required.

157. Opponents of the Terminal project hailed DNR’s decision as “a firm no to the largest coal terminal in the country.”

158. Defendant Franz, who assumed leadership of the DNR just weeks after her predecessor's decision, subsequently explained that the denial of the sublease was “right” because “the answer to sustainable, long-term revitalization of our economies is

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best served by looking forward to the development of new technologies that protect
the environment, not backward to technologies that exploit it.”

Defendant Franz’s statement is consistent with the platform she espoused
when running for her current office, when she indicated that she “opposes
ccoal and oil exports from Washington ports,” but inconsistent with DNR’s stated
reasons for denying the sublease.

When MBT Longview challenged DNR’s sublease denial in Cowlitz
County Superior Court, the judge ruled that DNR’s decision was “arbitrary and
capricious.”

J. Washington State’s denial of a Clean Water Act § 401 certification

In July 2016, MBT Longview requested a water quality certification under
section 401 of the Clean Water Act (CWA) from the Washington Department of
Ecology (Ecology). Obtaining that certification is a key step in securing a CWA section
404 dredge and fill permit for the Terminal project from the U.S. Army Corps of
Engineers.

On September 26, 2017—just 3 business days after receiving 240 pages of
additional information in response to Ecology’s requests and questions—Ecology
denied the request for a CWA section 401 certification “with prejudice.” A copy of that
decision is filed with this Complaint as Exhibit A.

54 Marissa Luck, Millennium Appeals State’s Denial of Coal Dock Sublease, TDN (Feb. 11, 2017),
http://tdn.com/news/local/millennium-appeals-state-s-denyal-of-coal-dock-sublease/article_1a70be78-
0101-5eb1-bc50-4a9b4f7866.html.
55 Martinelli, supra note 32; see 46th District Democrats Legislative & Statewide Questionnaire, supra note
32.

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163. Lighthouse and MBT Longview are not aware of any other instances in which Ecology denied a request for CWA section 401 certification “with prejudice.” Ecology has also admitted that it does not know of other “with prejudice” 401 certification denials.

164. Ecology’s denial was not based on the water quality effects of the Terminal, as required by CWA section 401. Indeed, the SEPA EIS for the Terminal project concluded that it would not have any significant adverse effects on water quality.

165. Unable to rely on water quality issues, Ecology denied the certification based almost entirely on effects that would be caused by rail carriers transporting coal into Washington from Montana and Wyoming, where it is being mined by LHR Coal’s subsidiaries.

166. Ecology’s denial was also founded in part on the potential effects of the oceangoing vessels that would transport coal from the Terminal to LHP’s customers in Asia.

167. Defendant Bellon announced Ecology’s denial of MBT Longview’s request for CWA section 401 certification on her Twitter account. She has not mentioned other CWA section 401 certification decisions on Twitter.

168. Defendant Bellon also “liked” several responses to her tweet announcing Ecology’s denial, including a tweet that said “Let’s keep Powering Past Coal!”
169. In October 2017, on the heels of Ecology’s section 401 denial, Defendant Inslee publicly argued that “[c]limate change policy is under attack at the federal level, making state and local action more urgent and important than ever.”56

170. Defendant Inslee further stated that because Washington State has “control of [its] own destiny,” it has “done some very progressive things leading the country and the world to reduce carbon pollution that is damaging our future here in the state.”57 This appears to be a direct reference to Ecology’s denial of MBT Longview’s requested CWA section 401 certification.

171. During the same October 2017 discussion, Defendant Inslee specifically referenced the proposed Terminal as a project that could not meet Washington’s rigorous environmental standards in order to receive permits.58 In another apparent reference to the Terminal, he warned against building “an infrastructure that locks us into a fossil fuel.”59

172. MBT Longview’s CWA section 401 certification request was not treated like other requests of its kind. It was denied because the Defendants oppose coal exports and construction of a coal export facility at the Terminal.

K. Washington State’s refusal to permit improvements to the Terminal

57 See Governor Inslee Climate Change Town Hall, supra note 30.
59 Governor Inslee Climate Change Town Hall, supra note 30. Similarly, at a Climate Change Town Hall at Bellevue College, Defendant Inslee noted that he doesn’t want Washington to “lock [its]elf into infrastructure that is going to be there 50 years that will essentially expand fossil fuel and lock you into that. We do not want to get into that mindset or make those kinds of decisions.” 350 Seattle, supra note 29.
173. In August 2017, the current lessee of the Millennium Bulk Terminal, Northwest Alloys, sought DNR’s consent under the lease to make certain improvements to the existing terminal.

174. The proposed improvements to the terminal were part of MBT Longview’s plan to construct a coal export facility, but they did not exempt MBT Longview from any permitting or approval requirements.

175. Because the lease already allows transloading of coal and the coal export facility would still be subject to numerous federal and state environmental review and permitting requirements, DNR approval should have been straightforward and consistent with the 60 days allowed for such review under the lease.

176. Nonetheless, on October 24, 2017, Defendant Franz sent a lengthy legal memorandum to the lessee explaining that DNR had determined the proposed improvements were not “in the best interests of the State.” A copy of that memorandum is filed with this Complaint as Exhibit B.

177. Defendant Franz’s memorandum rejecting the proposed lease improvements adopts Ecology’s rationale for denying MBT Longview’s request for CWA section 401 certification, including Ecology’s reliance on the environmental effects of rail transportation.

178. Despite having executed a lease that expressly allows a coal export facility at the site, DNR did not treat the request to make improvements to the Terminal like other similar requests. It refused to consent to the proposed improvements because Defendant Franz and the other Defendants do not support construction of a coal export facility at the Terminal.
L. **Defendants’ actions lead to the denial of the shoreline permit**

179. As part of its proposal to construct a coal export facility at the Terminal, MBT Longview applied for a Shoreline Substantial Development Permit and a Shoreline Conditional Use Permit from Cowlitz County. In November 2017, the permits came before a Cowlitz County Hearing Examiner for review.

180. The Cowlitz County staff who reviewed MBT Longview’s proposal found that it was consistent with all requirements of the county’s Shoreline Master Plan and with the Shoreline Management Act and recommended that the permits be approved.

181. Despite Cowlitz County’s recommendation, the Hearing Examiner explicitly relied on Ecology’s EIS, as well as the findings that Ecology made in connection with its CWA section 401 decision, to deny the permits. A copy of that decision is filed with this Complaint as **Exhibit C**.

182. The Hearing Examiner further observed that DNR’s refusal to authorize improvements related to MBT Longview’s proposal made it “likely” that DNR would also deny future permits.

183. Despite the fact that the Cowlitz County staff recommended granting the permits requested by MBT Longview, the Hearing Examiner relied on the prior decisions of the Defendants to block MBT Longview’s proposed coal export terminal. Those prior decisions were motivated by the Defendants’ opposition to coal exports, and were not based in law or consistent with the facts of the case.

M. **Defendants have no intention of ever approving the Terminal**

184. It is well established that the Defendants oppose coal and coal exports on policy grounds. Their actions in denying the proposed sublease, the CWA section 401
certification, and the proposed lease improvements demonstrate that they have no intention of allowing the Terminal to be constructed.

185. On October 23, 2017, Ecology sent a letter to MBT Longview that makes the state’s position on the proposed Terminal crystal clear. A copy of that letter is filed with this Complaint as Exhibit D.

186. In that letter, Ecology stated that the same potential environmental effects on which it relied to deny MBT Longview’s request for CWA section 401 water quality certification “likely preclude Ecology from approving” any of MBT Longview’s other permit applications.

187. Ecology’s letter also bluntly stated that its “staff will not be spending time on permit preparation” related to those applications.

188. The letter, which was signed by Defendant Bellon, referred any questions MBT Longview might have to the Washington Attorney General’s Office.

189. Defendants, in their capacity as Washington public officials, are using the state’s regulatory approval authority to set economic and foreign policy for the United States as a whole.

190. Any bulk commodity shipped by train would have many of the same in-state environmental effects as coal. If the environmental review processes and regulatory standards that Defendants have applied to the proposed coal export facility at the Terminal were applied more broadly, it would have a chilling effect on virtually all interstate and foreign commerce.

191. The SEPA EIS concludes that the project can meet all state and federal environmental standards. But because they believe that coal exports should not be
permitted, the Defendants are blocking both foreign and interstate commerce by not approving—or even processing—the permits for the Millennium Bulk Terminal.

V. LEGAL AND REGULATORY BACKGROUND

A. Federal support for coal and coal exports

192. The United States government has long supported coal mining and coal export to other countries.

193. Twenty-five years ago, Congress directed the Secretary of Commerce to prepare “a plan for expanding exports of coal mined in the United States.”


195. The current administration continues to pursue a policy of “export[ing] American energy all over the world,” including into Asian markets.

196. On March 29, 2017, Secretary of Interior Ryan Zinke published Secretary’s Order 3348, which lifted a moratorium on the federal coal leasing program that had been in place by the prior administration.

197. Secretary’s Order 3348 directed the Bureau of Land Management to process coal lease applications and modifications expeditiously. Much of the coal that will be mined under these leases and modifications is intended for export to Asia.

60 42 U.S.C. § 13367(a).

198. Secretary Zinke issued a statement accompanying Order 3348 in which he explained that “it is better to develop our energy here under reasonable regulations and export it to our allies . . . . [A]chieving American energy independence will strengthen our national security by reducing our reliance on foreign oil and allowing us to assist our allies with their energy needs.”

199. Approximately one quarter of all existing United States coal exports are shipped to South Korea, Japan, China, and India.63 And demand for coal in Asian markets is continuing to increase.64

200. Japan, for example, is “highly interested in importing coal from the United States” to stabilize and secure its energy supplies.65

201. The United States recently launched a “U.S.-Japan Economic Dialogue,” aimed at, among other things, “deepen[ing] energy ties.”66

202. The United States also recently forged an agreement with the Government of Ukraine that facilitates purchase of American coal. In connection with that agreement, Secretary of Energy Rick Perry issued a statement indicating that the U.S. “looks forward to making available even more of our abundant natural resources.

64 Southeast Asia’s Coal Demand Boom, INST. FOR ENERGY RESEARCH (Nov. 6, 2017), https://instituteforenergyresearch.org/analysis/southeast-asias-coal-demand-boom/.

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to allies and partners like Ukraine in the future to promote their own energy security through diversity of supply and source.”\(^{67}\)

203. Secretary of Commerce Wilbur Ross also issued a statement in connection with the agreement to supply coal to the Ukraine. There, he emphasized that he “look[s] forward to working with Secretary Perry and others in industry and government to further expand American exports in support of our goals of keeping this country safe and promoting robust economic growth.”

204. In December 2017, the White House released its updated National Security Strategy. Its discussion of energy issues includes “Promote Exports” in a list of “Priority Actions.”\(^{68}\)

205. The National Security Strategy further explains that “[t]he United States will promote exports of our energy resources,” including by “expand[ing] our export capacity through the continued support of private sector development of coastal terminals . . .”\(^{69}\)

B. The dormant commerce clause

206. The U.S. Constitution’s commerce clause provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”


\(^{69}\) Id.
207. Though the commerce clause only explicitly mentions Congress’
affirmative power to regulate commerce, federal courts have long read into it a
“dormant” or negative limitation that also constrains the states’ power to regulate
foreign and interstate commerce.
208. States violate the dormant commerce clause if their actions discriminate against
or unduly burden foreign or interstate commerce.
209. More specifically, state regulation runs afoul of the foreign commerce clause if it
(i) creates a substantial risk of conflicts with foreign governments; or, (2)
undermines the ability of the federal government to speak with “one voice” concerning
foreign commercial affairs.
210. Dormant interstate commerce clause claims are analyzed using a two-tier
framework: If an action is facially discriminatory, either in purpose or “practical
effect,” it is unconstitutional unless it serves a legitimate local purpose that could not
be served by available nondiscriminatory means. Nondiscriminatory actions, on the
other hand, are unconstitutional when the burden imposed on interstate commerce is
clearly excessive in relation to the putative local benefits.

C. General Agreement on Tariffs and Trade
211. The United States has been a party to the General Agreement on Tariffs
and Trade (GATT) since January 1, 1948, and a member of the World Trade
Organization (WTO) since January 1, 1995.
212. Article XI:1 of the GATT provides “[n]o prohibition or restrictions other
than duties, taxes or other charges, whether made effective through quotas, import or
export licenses or other measures, shall be instituted or maintained by any contracting

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party . . . on the exportation or sale for export of any product destined for the territory
of any other contracting party."

213. Article XI.2 provides a number of exceptions to this general rule,
including “[e]xport prohibitions or restrictions temporarily applied to prevent or
relieve critical shortages of foodstuffs or other products essential to the exporting
contracting party” and “export prohibition or restrictions necessary to the application
of standards or regulations for the classification, grading or marketing of commodities
in international trade.”

214. Article XX of the GATT provides certain additional exceptions to the
requirements of Article XI, provided that the measure in question is not “a disguised
restriction on international trade.”

215. In the past, the United States has relied on GATT Article XI.1 to protect its
commercial interests. For instance, in a recent case, the United States successfully
challenged Chinese export restrictions on rare earths, tungsten, and molybdenum.

D. ICC Termination Act

216. Congress and the courts long have recognized a need to regulate railroad
operations at the federal level. Today that regulation is performed pursuant to the ICC
Termination Act (ICCTA),70 which created the Surface Transportation Board and gave
it complete jurisdiction, to the exclusion of the states, over the regulation of railroad
operations.

70 49 U.S.C. §§ 10101, et seq.

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217. ICCTA further provides that “remedies . . . with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

218. Any form of state or local permitting or preclearance that, by its nature, could be used to deny, or place conditions on, a railroad’s ability to conduct some part of its operations is “categorically” preempted by ICCTA.

219. Even when state actions are not categorically preempted, they are still preempted if they may reasonably be said to have the effect of managing or governing rail transportation.

E. Ports and Waterways Safety Act

220. The Ports and Waterways Safety Act (PWSA) regulates the operation of marine tanker vessels in U.S. harbors.

221. In enacting the PWSA, Congress intended to provide for sole federal regulation of national and international maritime commerce.

222. The PWSA accordingly preempts state and local laws that are inconsistent with the federal statutory structure.

223. Where state actions bear on national and international commerce, there is no threshold assumption that concurrent regulation by the State is a valid exercise of its police power.

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72 33 U.S.C. §§ 1221, et seq.

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VI. CLAIMS FOR RELIEF

Count I – Dormant Foreign Commerce Clause

224. Plaintiffs incorporate and re-allege the foregoing paragraphs.
225. By unreasonably denying and refusing to process permits for the Millennium
Bulk Terminal, the Defendants have discriminated against Lighthouse’s
and its subsidiaries’ efforts to export coal to their Asian customers, in violation of the
dormant foreign commerce clause.
226. By expanding the scope of their SEPA review beyond the boundaries of
Washington State, and especially by including the environmental effects of coal
exports to foreign nations, the Defendants have further discriminated against
Lighthouse’s and its subsidiaries’ efforts to export coal to their Asian customers, in
violation of the dormant foreign commerce clause.
227. The Defendants’ actions have created a substantial risk of conflict with foreign
governments, which rely on American coal exports for power production.
228. In addition, the federal government has made it clear that the policy of the
United States is to favor the expansion of coal exports to foreign countries,
including countries in Asia.
229. By taking actions and refusing to act in ways consistent with the federal
government’s coal export policies, the Defendants have severely undermined the
ability of the United States to speak with one voice in foreign commercial affairs and to
implement its National Security Strategy.
230. By unilaterally imposing an embargo on new coal exports, the
Defendants are interfering with Washington’s sister states’—including Wyoming and
Montana—ability to engage in foreign commerce.

231. By expanding the scope of their SEPA review beyond the boundaries of
Washington State, and especially by including the environmental effects of coal
shipments destined for foreign nations, the Defendants have further discriminated
against Lighthouse’s and its subsidiaries’ efforts to engage in foreign commerce.

232. By concluding that potential environmental effects cannot be mitigated
under SEPA if those effects are within the jurisdiction of the federal government, the
Defendants are unduly burdening, and in effect regulating, foreign commerce.

233. Defendants’ refusal to license a coal export facility is prohibited under the
United States’ obligations as a member of the WTO, as it constitutes a prohibition
or restriction on exportation under GATT Article XI:1; is not covered by any of the
exceptions set out in GATT Articles XI:2 or XX; and, in any case, is a “disguised
restriction on international trade.”

234. In addition, Defendants’ actions could be cited and leveraged by
respondents in WTO disputes involving export restrictions brought by the United
States, and may interfere with the ability of the United States to compel other nations
through the WTO dispute settlement process and other available bilateral, regional,
and multilateral mechanisms to reduce or remove export restrictions that impair the
foreign commerce of the United States.
235. The Defendants’ actions also injure Lighthouse and its subsidiaries by impacting the willingness of the private sector to invest in the development of coal export facilities in the state of Washington, and along the entire Pacific Coast.

236. Defendants’ actions have injured Lighthouse and its subsidiaries directly and have created a disincentive to build or expand other coal export facilities, which will negatively impact U.S. economic growth, job creation, and exports.

237. Defendants’ actions amount to an embargo or quota on American coal exports to Asia, in violation of the dormant foreign commerce clause.

238. On information and belief, the Defendants’ true reason for denying the Plaintiffs’ permit applications is the desire to prevent American coal export to Asia.

239. In all of these ways, the Defendants in their capacity as public officials of the state of Washington have violated the dormant foreign commerce clause and 42 U.S.C. § 1983.

**Count II – Dormant Interstate Commerce Clause**

240. Plaintiffs incorporate and re-allege the foregoing paragraphs.

241. By unreasonably denying and refusing to process permits for the Millennium Bulk Terminal, the Defendants have discriminated against Lighthouse’s and its subsidiaries’ efforts to transport into Washington coal that is being mined in Montana, Wyoming, and other states in violation of the dormant interstate commerce clause.

242. By expanding the scope of their SEPA review beyond the boundaries of Washington State, and especially by including the environmental effects of coal shipments being transported from other states, the Defendants have further...
discriminated against Lighthouse’s and its subsidiaries’ efforts to transport into
Washington coal that is being mined in Montana and Wyoming.

243. By concluding that potential environmental effects cannot be mitigated
under SEPA if those effects are within the jurisdiction of the federal government, the
Defendants are unduly burdening, and in effect regulating, interstate commerce.

244. Defendants’ actions and inactions with respect to the Millennium Bulk
Terminal discriminate against interstate commerce in both purpose and practical
effect, and they serve no legitimate local purpose that could not be served by
nondiscriminatory means.

245. Defendants’ actions and inactions with respect to the Millennium Bulk
Terminal have also imposed a burden on interstate commerce that is clearly excessive
in relation to its putative local benefits.

246. Defendants’ actions also injure Lighthouse and its subsidiaries by
impacting the willingness of the private sector to invest in the development of coal
export facilities in the state of Washington, and along the entire Pacific Coast.

247. Defendants’ actions have injured Lighthouse and its subsidiaries directly
and have created a disincentive to build or expand other coal export facilities, which
will negatively impact U.S. economic growth, job creation, and exports.

248. In all of these ways, the Defendants in their capacity as public officials of
the state of Washington have violated the dormant interstate commerce clause and 42

Count III – ICCTA Preemption

249. Plaintiffs incorporate and re-allege the foregoing paragraphs.
250. Lighthouse, LHR Coal and its subsidiaries, and LHP are all rail customers
who have a right to common carrier rail service under ICCTA.

251. Defendants’ actions and inactions with respect to the Millennium Bulk Terminal
are forms of permitting or preclearance that are being used to deny or
condition rail carriers’ ability to provide common carrier service to Lighthouse and its
subsidiaries.

252. Defendants’ actions and inactions with respect to the Millennium Bulk
Terminal have the effect of managing or governing rail transportation, including the
common carrier service requested by Lighthouse’s subsidiaries.

253. Defendants’ conclusion that potential environmental effects cannot be
mitigated under SEPA if those effects are within the jurisdiction of the federal
government, and their actions in denying permits and approvals on that basis, have the
effect of managing or governing rail transportation, including the common carrier
service requested by Lighthouse’s subsidiaries.

254. Defendants’ actions also injure Lighthouse and its subsidiaries by
impacting the willingness of the private sector to invest in the development of coal
export facilities in the state of Washington, and along the entire Pacific Coast.

255. Defendants’ actions have injured Lighthouse and its subsidiaries directly
and have created a disincentive to build or expand other coal export facilities, which
will negatively impact the investment-backed expectations of Lighthouse investors
specifically, as well as U.S. economic growth, job creation, and exports generally.
256. For all these reasons, Defendants’ actions in their capacity as public officials of the state of Washington are preempted by ICCTA and violate Lighthouse’s and its subsidiaries’ rights to receive common carrier service under 42 U.S.C. § 1983.

Count IV – PWSA Preemption

257. Plaintiffs incorporate and re-allege the foregoing paragraphs.

258. Lighthouse, LHR Coal and its subsidiaries, and LHP all have a right to receive vessel service as a means of exporting coal to their Asian customers.

259. The PWSA preempts state laws that attempt to regulate the operation of vessels in U.S. harbors, including the vessels that would provide service to Lighthouse and its subsidiaries at the proposed Millennium Bulk Terminal coal export facility.

260. By concluding that potential environmental effects cannot be mitigated under SEPA if those effects are within the jurisdiction of the federal government, the Defendants are in effect regulating the operation of vessels in U.S. harbors, including the vessels that would provide service to Lighthouse and its subsidiaries at the proposed Millennium Bulk Terminal coal export facility.

261. Defendants in their capacity as public officials of the state of Washington have acted to prevent vessels from serving the Terminal, including by relying on the effects of vessel traffic as one reason for the denial of MBT Longview’s request for CWA section 401 certification.

262. Defendants’ actions also injure Lighthouse and its subsidiaries by impacting the willingness of the private sector to invest in the development of coal export facilities in the state of Washington, and along the entire Pacific Coast.
263. Defendants’ actions have injured Lighthouse and its subsidiaries directly and have created a disincentive to build or expand other coal export facilities, which will negatively impact U.S. economic growth, job creation, and exports.

264. For all these reasons, Defendants’ actions in their capacity as public officials of the state of Washington are preempted by the PWSSA and violate Lighthouse’s and its subsidiaries’ rights to receive vessel service under 42 U.S.C. § 1983.

VII. PRAYER FOR RELIEF

Wherefore, the Plaintiffs respectfully request the following relief:

A. A declaration that Defendants’ denial of MBT Longview’s requested sublease for the Millennium Bulk Terminal was an unconstitutional violation of the dormant commerce clause.

B. A declaration that Defendants’ denial of MBT Longview’s requested CWA section 401 certification was an unconstitutional violation of the dormant commerce clause.

C. A declaration that Defendants’ denial of MBT Longview’s requested CWA section 401 certification was preempted by ICCTA and the PWSSA.

D. A declaration that any environmental reviews of the proposed coal export facility at the Millennium Bulk Terminal—or any future coal export terminal that Lighthouse or its subsidiaries propose—may not be used to deny or unreasonably condition a permit beyond the standards applied to other non-coal terminal projects, including denying or unreasonably conditioning a permit based on the effects of transporting coal to and from the Terminal by rail and vessel traffic in interstate or foreign commerce.
E. A declaration that potential environmental effects within the jurisdiction of the federal government cannot be the basis of a conclusion that the environmental effects of the Millennium Bulk Terminal—or any future coal export terminal that Lighthouse or its subsidiaries propose—project are unmitigable.

F. A declaration that any decision by any state or local entity relying on the Defendants’ denial of the sublease or the Defendants’ denial of the CWA section 401 certification, including the denial of MBT Longview’s requested shoreline permit, is an unconstitutional violation of the dormant commerce clause and/or is preempted by ICCTA and the PWSA.

G. An order vacating any and all of the Defendants’ unconstitutional and illegal decisions regarding the Millennium Bulk Terminal, as well as any federal, state, or local decisions relying on Defendants’ unconstitutional or illegal actions.

H. An injunction ordering the Defendants to apply the same review standards to the Millennium Bulk Terminal—or any future coal export terminal that Lighthouse or its subsidiaries propose—that are applied to other non-coal terminal proposals.

I. An injunction ordering the Defendants not to deny MBT Longview’s requested CWA section 401 certification or any other permit or approval for the Millennium Bulk Terminal on the basis of rail or vessel traffic, or any other potential environmental effects within the jurisdiction of the United States.

J. An injunction ordering the Defendants to continue processing any and all current and future MBT Longview permit applications.
K. An order awarding plaintiffs their costs of litigation, including attorneys’ fees and expert witness fees, including those awardable under 42 U.S.C. § 1988.

L. Such other relief as the court deems just and proper.

Dated this 3rd day of January, 2018 at Tacoma, Pierce County, Washington.

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 53 OF
33
(4822-5378-3084)
Appendix 5:

LUBA Decision 2017-001
COLUMBIA PACIFIC BUILDING TRADES COUNCIL, PORTLAND BUSINESS ALLIANCE, and WESTERN STATES PETROLEUM ASSOCIATION, Petitioners, and WORKING WATERFRONT COALITION, Intervenor-Petitioner, vs. CITY OF PORTLAND, Respondent, and COLUMBIA RIVERKEEPER, OREGON PHYSICIANS FOR SOCIAL RESPONSIBILITY, PORTLAND AUDUBON SOCIETY, and CENTER FOR SUSTAINABLE ECONOMY, Intervenors-Respondents

Prior History:

[*1] Appeal from City of Portland.

Disposition: REVERSED

Core Terms

terminal, fuel, fossil fuel, regional, transport, freight, fossil, zoning, transportation facilities, classification, storage, export, comprehensive plan, interstate commerce, truck, sanctuary, assigned error, statewide, transloading, interstate, practical effect, city council, intermodal, retail, dormant commerce clause, local government, use regulation, commerce, marine, bulk

Synopsis

NATURE OF THE DECISION

Petitioners appeal Portland city Ordinance No. 188142, which adopts legislative text amendments (FFT amendments) to the city's zoning ordinance to prohibit new bulk fossil fuel terminals (FFTs) and the expansion of existing FFTs. ¹

[*2] __________________________

¹ To assist the reader, an index of the many acronyms in this opinion is attached as an appendix.
REPLY BRIEFS

Petitioners and intervenor-petitioner Working Waterfront Coalition (WWC) move to file reply briefs to address alleged "new matters" raised in the response briefs. OAR 661-010-0039 (allowing a reply brief to address new matters raised in a response brief). Intervenors-respondents (collectively, Riverkeepers) oppose the reply briefs, arguing that they do not respond to "new matters" within the meaning of OAR 661-010-0039, but instead embellish arguments already made in the petitions for review, or simply offer rebuttal to responses to arguments made in the petition for review.

We agree with Riverkeepers. "New matters" within the meaning of OAR 661-010-0039 include (1) responses that an argument in the petition for review should fail regardless of its stated merits (i.e., something in the nature of an affirmative defense), and (2) responses to assignments of error that otherwise could not reasonably have been anticipated. Foland v. Jackson County, 61 Or LUBA 264, 266-67, aff'd 239 Or App 60, 243 P3d 830 (2010). Reply briefs that simply embellish or elaborate arguments made in the petition for review, rebut direct responses to the merits of arguments made in the petition for review, offer new arguments in support of an assignment of error, or advance new bases for reversal or remand are not authorized by OAR 661-010-0039.

With one exception, the two reply briefs consist entirely of one or more of the latter type of arguments. Riverkeepers concede that WWC's reply brief at page 4, lines 6-15 addresses a new matter raised in the response briefs. Accordingly, that portion of WWC's reply brief is allowed. Otherwise, LUBA will not consider the arguments in the two reply briefs.

Counsel

William L. Rasmussen, Portland, filed a petition for review. With him on the brief was Miller Nash Graham & Dunn LLP. William L. Rasmussen and Steven G. Liday argued on behalf of petitioners.

Phillip E. Grillo, Portland, filed a petition for review on behalf of intervenor-petitioner. With him on the brief was Davis Wright Tremaine LLP.

Lauren A. King, Deputy City Attorney, Portland, filed a response brief on behalf of respondent. Lauren A. King and Maja K. Haium argued on behalf of respondent.

Maura C. Fahey and Scott Hilgenberg, Portland, filed a response brief on behalf of intervenors-respondents. With them on the brief was Crag Law Center. Scott Hilgenberg argued on behalf of intervenors-respondents.

Panel: BASSHAM, Board Member, participated in the decision. RYAN, Board Chair, and HOLSTUN, Board Member, did not participate in the decision.

Opinion By: BASSHAM

Opinion

FINAL OPINION AND ORDER

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

FACTS

Reducing Impacts from Fossil Fuel Projects Appendix 5, Page 125 of 293
February 12, 2018
The city of Portland is one of the largest ports on the West Coast, located at the confluence of the Columbia and Willamette Rivers, and at the western end of a low gradient rail and barge passage through the Cascade Mountains, at a strategic commercial position for regional, national and international trade. 2 Prior to adoption of the FFT amendments, the city's zoning code, Portland City Code (PCC) Title 33, regulated freight terminals of any description, including what the city now calls FFTs, under the general [*4] land use category of "Warehouse and Freight Movement." The use category "Warehouse and Freight Movement" is generally allowed in employment and industrial zones under standards that do not limit the size or number of such terminals. The challenged zoning code amendments establish FFTs as a new land use category, defined as sites that "rely on access by marine, railroad, or regional pipeline to transport fuels to or from the site, and either have transloading facilities for transferring a shipment between transport modes, or have storage capacity exceeding 2 million gallons for fossil fuels."

[*5] PCC 33.920.300(A). Examples include crude oil terminals, petroleum products terminals, natural gas terminals, propane terminals and coal terminals. PCC 33.920.300(C). The amendments include a number of exceptions to the definition of FFTs, listed in n 30. "Fossil fuel" is defined as "petroleum products (such as crude oil and gasoline), coal, methanol, and gaseous fuels (such as natural gas and propane) that are made from decayed plants and animals that lived millions of years ago and are used as a source of energy. Denatured ethanol and similar fuel additives, with less than 5 percent fossil fuel content, biodiesel/renewable diesel with less than 5 percent fossil fuel content, and petroleum-based products used primarily for non-fuel uses (such as asphalt, plastics, lubricants, fertilizer, roofing and paints) are not fossil fuels." PCC 33.910.030.

At least 11 existing terminals within the city of Portland meet the newly-adopted definition of FFT: 10 petroleum terminals and one natural gas terminal. The 11 terminals are clustered in the city's northwest industrial area, at the terminus of the Olympic Pipeline, which delivers petroleum products to Oregon and southwest Washington from [*6] four refineries in the Puget Sound area. Record 44-45. At the terminals, petroleum and gas are stored in approximately 300 tanks and transloaded into other modes of transportation (marine, train, truck, and the in-state Kinder Morgan pipeline) to distribution sites all over the state of Oregon. 3 Record 316. The terminals range from 11.6 to 67 million gallons, with most facilities having more than 25 million gallons of storage capacity. Record 55. Together, these 11 terminals handle approximately 90 percent of fossil fuel for the State of Oregon. Record 316. Much of the city's northwest industrial area is located in a moderate to high-risk earthquake liquefaction zone. Record 33, 1866. Many

2 The Portland Freight Master Plan (FMP) states:

"From its early days, Portland has been a center of trade and commerce in the Pacific Northwest. The city's growth has been driven by its role in the movement of commodities. At the turn of the 21st century, Portland has established strong international trade connections * * *. Today, Portland is a competitive gateway for international and domestic trade. It is a 'trans-shipment' center, where freight is handled on the way to somewhere else. In fact, more goods move through its transportation network to national and international destinations than are consumed here in the region." Portland Freight Master Plan (FMP) 1; App-248. [All citations to appendix (App) are to Petitioner's Appendix, unless otherwise noted.]

3 The Oregon Freight Plan (OFP) defines "transloading" as "[t]ransferring bulk shipments from the vehicle/container of one mode to that of another at a terminal interchange point." OFP E-3; App-1205. Relatedly, the Oregon Transportation Plan (OTP) defines "intermodal facilities" as "[f]acilities that allow passenger and/or freight connections between modes of transportation. Examples include airports, rail stations, marine terminals and truck-rail facilities." OTP 122; App-813. The term "multimodal" is defined as "[t]he movement of goods or people by more than one transportation mode." OTP 123; App-814.
of Portland's fossil fuel storage tanks were built before seismic design requirements in building codes were adopted. Record 2.

[*7]

In 2015, in response to concerns regarding proposals to establish fossil fuel export terminals in the region, the city began efforts to limit future establishment or expansion of fossil fuel terminals within the city. According to the city, that effort was intended to further two objectives: (1) reducing potential for catastrophic damage in the event of an earthquake, and (2) reducing the city's contribution to greenhouse gas emissions and climate change, and encouraging a transition within the city to cleaner, renewable energy sources.

[*8]

On November 12, 2015, the city council passed Resolution 37168, which states that the city council "will actively oppose expansion of infrastructure whose primary purpose is transportation or storing fossil fuels in or through Portland or adjacent waterways." Record 3761. The resolution directed the city Bureau of Planning and Sustainability (BPS) to develop zoning code amendments to implement the resolution. Id. Relatedly, in June 2016, the city adopted a new comprehensive plan, the 2035 Comprehensive Plan (2035 PCP). The 2035 PCP includes a new policy, Policy 6.48, which states that it is city policy to "[l]imit fossil fuel distribution and storage facilities to those necessary to serve the regional market." Record 3317.

[*9]

Pursuant to Resolution 37168, BPS developed a draft of proposed zoning code amendments (proposed draft). The proposed draft prohibited FFTs citywide, and made existing FFTs nonconforming uses. The proposed draft defined FFT in part to include facilities with a storage facility of five million gallons. The city Planning and Sustainability Commission (PSC) held hearings on the proposed draft, and approved modifications resulting in the recommended draft. The PSC recommended draft also prohibited new FFTs

4The city's findings state on this point:

"The energy distribution market in the Pacific Northwest is changing. Production of crude oil and natural gas, particularly from North Dakota, has substantially increased in the U.S. since 2009, as shown in Figure 1. In turn, several large new fuel distribution terminals have been proposed in the Pacific Northwest to access West Coast and export markets, as shown in Figure 2. Similar trends have occurred in Alberta and British Columbia."

"The FFT amendments] propos[e] a prompt, focused response to these market changes. The recommended code amendments will restrict development of new fossil fuel terminals and limit the expansion of existing terminals, consistent with City and State objectives on climate change and public safety." Record 316.

Figure 2 lists nine oil, gas and coal export terminals that have been proposed in recent years in the Pacific Northwest, including one (the Pembina propane terminal, discussed further below) proposed in an industrial area in north Portland.

5The 2035 PCP is not effective until January 1, 2018, although the city's decision cites it as "guidance." In this opinion, unless otherwise noted, we will use "PCP" to refer and cite to the version of the acknowledged comprehensive plan in effect when the city council adopted the zone amendments challenged in this appeal.

Policy 6.48 does not define "regional" market, and neither does the city's decision. Because resolving the issues raised in this appeal requires terminology with some geographic precision, we will attempt to use the term "local" to describe the city of Portland and its larger urban area (essentially the Metro region or urban growth boundary), plus small areas of southwest Washington that rely on the city's FFTs to meet local demand for fossil fuels. Record 339. We will use the term "regional" to describe the larger area currently served by transloading via the city's FFTs and the in-state Kinder Morgan pipeline, which apparently includes 90 percent of the state of Oregon. We will use "state," "statewide" or "intrastate" to refer to the market represented by the entire state of Oregon. We will also refer to "interstate" and "international" markets, which have their obvious meanings.
but allowed up to a 10 percent expansion of existing FFTs, if in conjunction with tank replacement for seismic and safety upgrades. The recommended draft also modified the proposed definition of FFT to include facilities with a storage facility of only two million gallons, in order to capture FFT storage facilities sized to handle a “unit train,” which is a uniform trainload of a single commodity (e.g., coal) designed to be transloaded to other shipping modes as a single unit. 6 Expanding the scope of the definition of FFT to include facilities with as little as two million gallons of storage capacity captures an additional 24 smaller facilities in the Portland area, in addition [10] to the 11 larger terminals that were the subject of the proposed draft. Record 55.

The city council held hearings on the PSC recommended draft on November 10 and 16, 2016. The city council voted to adopt the PSC recommended draft, with seven changes. The changes included eliminating the proposal to allow a 10 percent expansion of existing terminals. On December 14, 2016, the city council adopted the recommended draft, as amended, as Ordinance No. 188142. This appeal followed.

JURISDICTION

Riverkeeper argues that if LUBA concludes that FFTs are "transportation facilities" as petitioners contend, then the consequence is that LUBA lacks jurisdiction over the appeal of the FFT amendments pursuant to ORS 197.015(10)(b)(D), which [11] excludes from the definition of "land use decision" a decision that determines the "operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with" the comprehensive plan and city code. We reject the argument. The exclusion at ORS 197.015(10)(b)(D) encompasses technical decisions regarding operation, maintenance etc., of transportation facilities that are planned and authorized under the plan and zoning code. The exclusion does not encompass decisions that adopt or modify plan or zoning code text regarding transportation facilities.

STANDARD OF REVIEW

As all parties recognize, the challenged decision is a legislative decision that amends the city's land use regulations. Because it is a legislative decision, principles of preservation that would govern a quasi-judicial decision, e.g., the "raise it or waive it" requirements of ORS 197.763(1), do not apply. In addition, a local government is not necessarily required to adopt findings supporting a legislative decision; nonetheless the record on appeal must be sufficient to demonstrate that "required considerations were indeed considered." Citizens Against Irresponsible Growth v. Metro, 179 Or App 12, 16 n 6, 38 P3d 956 (2002), [12]

PCC 33.835.040(A) provides that:

"Text amendments to the zoning code must be found to be consistent with the Comprehensive Plan, Urban Growth Management Functional Plan, and the Statewide Planning Goals. In addition, the amendments must be consistent with the intent or purpose statement for the base zone, overlay zone, plan district, use and development, or land division regulation where the amendment is proposed, and any plan associated with the regulations * * * ."

LUBA's standard of review of a decision that amends a local government's land use regulations is subject to ORS 197.835(7), which provides:

"[LUBA] shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

__________________________

6 The OFP defines a “rail unit train[ ]” as a "train of a specified number of railcars handling a single commodity type which remain as a unit for a designated destination or until a change in routing is made.” OFP E-3; App-1205; see discussion under the ninth assignment of error, below.
“(a) The regulation is not in compliance with the comprehensive plan; or
“(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.”

In addition, ORS 197.835(9) provides that LUBA shall reverse or remand a land use decision if LUBA finds that the local government “[i]mproperly construed the applicable law,” or “[m]ade [13] an unconstitutional decision[.]” ORS 197.835(9)(a)(D) and (E).

Finally, under ORS 197.829, LUBA must affirm a governing body's interpretation of its comprehensive plan or land use regulations, unless the interpretation is inconsistent with the express language, purpose or policy underlying the local legislation under interpretation, or the interpretation is contrary to a statewide planning goal, statute, or administrative rule that the local legislation implements. 7

[*14]

ORGANIZATION OF THIS OPINION

Petitioners and WWC advance a number of overlapping assignments of error, arguing that the FFT amendments are inconsistent with city comprehensive plan provisions, statewide planning goals, Metro regional plan provisions, and statewide transportation plans. Petitioners and WWC also argue that the FFT amendments violate the dormant Commerce Clause of the United States Constitution.

As discussed below, we conclude under petitioners’ ninth assignment of error that the FFT amendments violate the dormant Commerce Clause of the United States Constitution. OAR 661-010-0071 provides that LUBA shall reverse a land use decision when the Board finds that the decision is unconstitutional. Accordingly, reversal is the appropriate disposition. However, given the likelihood that LUBA’s opinion is not the last stop on the appellate ladder, and to minimize potential for multiple trips up and down that ladder, we deem it appropriate to also resolve challenges to the city's decision under local, regional and statewide standards. Additionally, in our view, those challenges inform the analysis under the dormant Commerce Clause.

We address the local, regional and statewide [*15] standards roughly in that order. As discussed below, we sustain some of the challenges under local and state standards. In ordinary circumstances, sustaining such challenges would result in remand to the city for additional evidence or consideration. However, in the present circumstances our resolution of those challenges is necessarily, if unfortunately, somewhat advisory.

7 ORS 197.829 provides:

“(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct.”
SIXTH AND SEVENTH ASSIGNMENTS OF ERROR SECOND ASSIGNMENT OF ERROR, Subsection (iii) (WWC)

These assignments and sub-assignments of error concern whether the FFT amendments are consistent with the Portland Comprehensive Plan (PCP) and subordinate plans, including the city's Transportation System Plan (TSP), the city's Freight Master Plan (FMP), and the Guild's Lake Industrial Sanctuary Plan (GLISP), an industrial area within the city of Portland that includes most of the existing fossil fuel terminals affected by the FFT amendments.

A. PCP Policies

Petitioners and WWC argue that the city's decision is inconsistent with a number of PCP goals and policies, which generally require the city to support its industrial areas and its multimodal and intermodal freight system. The city adopted findings addressing consistency with the PCP goals and policies it deemed relevant, which include almost all of the PCP goals and policies that petitioners and WWC cite.

The city and Riverkeeper respond that petitioners and WWC fail to demonstrate that the city erred in concluding that the FFT amendments are consistent with the applicable PCP goals and policies. For most of the cited PCP goals and policies, we agree with respondents. Most of the cited PCP goals and policies are generally worded expressions of support for the city's industrial areas and multimodal transportation facilities. The city council adopted findings addressing most of the cited PCP goals and policies. Petitioners and WWC disagree with the city council's findings of consistency, and invite us to second guess those conclusions. However, given the generally-worded language of most of the goals and policies at issue, and the leeway a governing body has in balancing and weighing consistency of a zoning text amendment with a variety of sometimes competing policy objectives, petitioners and WWC must do more than simply disagree with the city's conclusions. Petitioners and WWC must demonstrate that the city council failed to meaningfully consider a reasonably specific and pertinent PCP goal or policy.

We have considered petitioners' and WWC's challenges to the county's findings regarding consistency with PCP goals and policies, and for the most part reject them without further discussion. In our view, only two challenges warrant further review.

PCP Policy 5.1, Objective C, is to "[r]etain industrial sanctuary zones and maximize use of infrastructure and intermodal transportation linkages with and within these areas." PCP 5-1; App-3. Petitioners and WWC argue that prohibiting new and expanded FFTs is clearly inconsistent with "maximiz[ing]" intermodal transportation linkages.

The city's finding addressing consistency with PCP Policy 5.1, Objective C does not address the objective to "maximize * * * intermodal transportation [18] linkages." After paraphrasing the language of Policy 5.1 and Objective C, the city's findings state:

"The zoning code amendments support this policy and objectives and will not affect the City's supply of land for economic development and employment growth because there are no changes proposed to the Comprehensive Plan or Zoning Map that will impact the overall size or intensity of development in the industrial areas of Portland." Record 9.

The city appears to conclude that the FFT amendments are consistent with Objective C as long as the amendments do not affect the supply of land zoned for economic or industrial use. However, that finding is

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8 Petitioners and WWC cite PCP Goal 5 (Economic Development), Policy 5.1, Objective C; Policy 5.4; Policy 5.4, Objective A; Policy 5.12; PCP Goal 6 (Transportation), Policy 6.9, Objective A; Policy 6.18; Policy 6.29; and Policy 6.31.
not responsive to the language of Objective C. It is not clear to us what land supply has to do with the obligation to "maximize use of infrastructure and intermodal transportation linkages" with and within industrial sanctuaries. On its face, prohibiting new and expanded intermodal fossil fuel transportation facilities appears to be inconsistent with the objective of "maximiz[ing] * * * intermodal transportation linkages" in "industrial sanctuaries." It is an apparent inconsistency that, in our view, requires some analysis and a direct [*19] explanation, both of which are missing from the city's decision, the record, and the respondents' briefs on appeal.

Second, PCP Policy 5.4, Objective A is to

"Support multimodal freight transportation improvements to provide competitive regional access to global markets and facilitate the efficient movement of goods and services in and out of Portland's major industrial and commercial districts. Ensure access to intermodal terminals and related distribution facilities to facilitate the local, national, and international distribution of goods and services."

PCP 5-2; App-4.

Petitioners and WWC argue that prohibiting new and expanded FFTs is inconsistent with the obligation to "[s]upport multimodal freight transportation improvements to provide competitive regional access to global markets and facilitate the efficient movement of goods and services in and out of Portland's major industrial districts.

The city adopted no findings addressing Policy 5.4, Objective A. In its brief, the city argues that the record demonstrates that the amendments are consistent with Policy 5.4, Objective A because the amendments exempt multimodal terminals that handle the growing markets for aviation [*20] fuel and non-fossil fuels, and further because the amendments do not restrict existing FFTs from increasing throughput. However, the city's explanations on appeal are insufficient to demonstrate that "required considerations were indeed considered." Citizens Against Irresponsible Growth, 179 Or App at 16 n 6. As explained elsewhere in this opinion, one of the city's stated purposes of the FFT amendments is to effectively prohibit the siting of fossil fuel export terminals in the city. It is difficult to square that purpose with the policy objective of supporting "multimodal freight transportation improvements to provide competitive regional access to global markets and facilitate the efficient movement of goods and services in and out of Portland's major industrial" districts.

Had the city adopted findings addressing Policy 5.4, Objective A, it might be able to explain why the FFT amendments are consistent with this objective. However, the city's decision did not address Objective A, there is no evidence that the city in fact considered that objective, and the city's attempt to demonstrate consistency on appeal falls short of demonstrating [*21] consistency with the objective. That the city's code as amended continues to allow new or expanded terminals for aviation fuel or non-fossil fuels does nothing to demonstrate that prohibiting new or expanded fossil fuel terminals is consistent with Objective A. Further, the city cites no evidence supporting its assertion that existing FFTs have the excess capacity or ability to increase throughput to meet any increased demand for fossil fuels in local, regional, statewide, interstate, or international markets.

B. Guild's Lake Industrial Sanctuary Plan (GLISP)

Most of the city's large FFTs are located within the Guild's Lake Industrial Sanctuary Plan (GLISP) area. The introduction to the GLISP notes that the sanctuary is "equipped with intermodal transportation facilities that enable it to serve the nation, the Pacific Rim and other worldwide markets. The [sanctuary's] businesses and facilities help make Portland the leading exporter in the state, and Oregon one of the top ten exporting states in the country." GLISP 6; App-103. The GLISP is incorporated into the city's comprehensive plan, and the city does not dispute that PCC 33.835.040(A) requires the city to demonstrate that [*22] the FFT amendments are consistent with the GLISP. However, the city adopted no findings addressing consistency with the GLISP.
As relevant here, the GLISP includes three policies, each of which is refined by a number of objectives. Petitioners argue that the FFT amendments are inconsistent with these three GLISP policies and objectives. We address each in turn.

1. Policy 1, Objective 2

GLISP Policy 1 (Jobs and Economic Development), Objective 2 is to:

"Maintain and expand industrial business and employment opportunities in the Guild's Lake Industrial Sanctuary. Stimulate investment in the area's public and private infrastructure and industrial facilities.

"Objective 2: Foster a business and policy environment that promotes continued private and public sector investments in infrastructure, facilities, equipment and jobs." GLISP 34; App-131.

Petitioners and WWC argue that the FFT amendments fail to foster a business environment that promotes continued investment in infrastructure and facilities within the sanctuary, because it discourages continued investments in the sanctuary's FFTs, which are a significant component of the sanctuary, occupying approximately 242 acres. Record [*23] 331.

The city responds that while the FFT amendments limit one type of industrial use, the amendments do not affect the industrial land supply within the sanctuary. Further, the impacts of the amendments are moderated by exempting new and expanded terminals handling the growing market in non-fossil fuels. The city argues that nothing in Policy 1, Objective 2 requires the city to allow the unlimited expansion of any one particular land use.

While it is certainly true that Policy 1, Objective 2 does not require the city to allow unlimited expansion of existing industrial land uses in the sanctuary, Objective 2 does require the city to foster a policy environment that promotes continued private investment in the sanctuary. Arguably, that requires the city to protect the ability of existing industrial uses in the sanctuary to expand, or at least consider that objective balanced against other policy objectives. But we do not know how the city council views Objective 2, or how it would balance it against other policy objectives, because the city adopted no findings addressing Objective 2, and apparently gave no consideration to whether the amendments are consistent with the GLISP. The [*24] city's arguments on appeal are insufficient to establish that these required considerations were indeed considered.

2. Policy 2, Objective 1

GLISP Policy 2 (Transportation), Objective 1 is to:

"Maintain, preserve and improve the intermodal and multimodal transportation system to provide for the smooth movement of goods and employees into and through the Guild's Lake Industrial Sanctuary.

"Objective 1: Maintain, protect, and enhance the public and private transportation investments in the [sanctuary], including rail and marine terminal facilities, to ensure its continued viability as a major center for the import and export of industrial products in the State of Oregon." GLISP 38; App-135.

Petitioners and WWC argue that prohibiting new and expanded FFTs in the sanctuary fails to protect and enhance rail and marine terminal facilities in the sanctuary, and reduces the sanctuary's viability as a major center for fuel imports and exports.

The city responds that Policy 2, Objective 1 is not particularly concerned with fuel terminals, and does not require the city to allow unlimited expansion of existing fuel terminals. The city also argues that the FFT amendments do not limit [*25] the ability of existing FFTs to increase throughput via efficiency or other measures.
However, Policy 2, Objective 1 requires the city to maintain, protect and enhance private transportation investments, with particular emphasis on rail and marine terminals, and does not exclude fossil fuel terminals from the scope of the objective. Further, Objective 1 states that the purpose of maintaining, protecting and enhancing such investments is to ensure the sanctuary's "continued viability as a major center for the import and export of industrial products in the State of Oregon." As explained elsewhere in this opinion, one purpose of the FFT amendments is to preclude new or expanded fossil fuel export terminals within the city. That purpose seems difficult to square with the language of Policy 2, Objective 1, and in its decision, the city council did not even make the attempt.

The city's attempt on appeal to articulate a demonstration of consistency with Policy 2, Objective 1 falls far short. As noted, the city cites no evidence that the existing terminals have the capacity or ability to increase throughput without expansion of storage or transloading capacity.

3. Policy 3, Objective [*26] 7

GLISP Policy 3 (Land Use), Objective 7 is to:

"Preserve and protect land primarily for industrial uses, and minimize land use conflicts in the Guild's Lake Industrial Sanctuary. Allow compatible nonindustrial uses within the [sanctuary] that provide retail and business services primarily to support industrial employees and business.

"Objective 7: Preserve the [sanctuary's] Willamette River waterfront as a location for river-dependent and river-related uses." GLISP 42; App-139.

WWC argues that approximately 242 acres of the industrial sanctuary are occupied by waterfront FFT's that depend in part on marine transportation. Because those sites are already committed to use as fossil fuel terminals, and the amendments prohibit any expansion of those FFTs, WWC argues that the amendments effectively fail to preserve the GLISP's river waterfront as a location for river-dependent and river-related uses.

The city responds that the focus of Policy 3 and its objectives is on protecting industrial uses within the sanctuary from competition with non-industrial uses. According to the city, restricting expansion of one type of river-dependent and river-related industrial use is not inconsistent [*27] with Policy 3, Objective 7, because the waterfront will remain available for other types of river-dependent and river-related industrial uses.

We understand WWC to argue that the city ignores practical reality if it expects that potential expansion areas of existing waterfront FFTs, which are massively committed to fossil fuel operations, will be developed or redeveloped with other types of water-dependent industrial uses.

The city is correct that Policy 3 and Objective 7 are focused on preserving industrial areas from non-industrial development, and preserving waterfront for river-dependent and river-related uses, and are not expressly concerned with preserving existing types of river-dependent industrial uses against competition with other types of river-dependent industrial uses. WWC is also probably correct that it is optimistic to expect that prohibiting expansion of existing waterfront FFTs will simply result in displacing one type of river-dependent industrial use with another. The practical result may well be that the sanctuary's waterfront will be underutilized, compared to its potential. However, while that result might be inconsistent with some other GLISP policy or objective, [*28] we agree with the city that it does not appear to offend Policy 3, Objective 7.

Petitioners' sixth and seventh assignments of error are sustained in part. WWC's Second Assignment of Error, Subsection (iii), is sustained in part.
FIFTH ASSIGNMENT OF ERROR

SECOND ASSIGNMENT OF ERROR, Subsection (ii) (WWC)

These assignments and sub-assignments of error concern whether the FFT amendments are consistent with the plans adopted by the Metro regional government.

PCP Goal 1 requires that the city comprehensive plan shall "support regional goals, objectives and plans adopted by" Metro. PCP 1-1; App-1. The Metro Regional Framework Plan (Framework Plan) is Metro's overarching plan for the region. It is implemented by several sub-plans, including the Metro Regional Transportation Plan (Transportation Plan). The Transportation Plan in turn is implemented by the Metro Regional Transportation Functional Plan (Functional Plan). Petitioners and WWC argue that the city's decision is inconsistent with several goals, objectives and vision statements in either the Framework or Transportation Plan. At one point in the petition for review, petitioners refer to the Functional Plan, but all cites [*29] to specific language are to either the Metro Framework or Transportation Plans.

Initially, the city argues that the PCP Goal 1 obligation to "support" Metro "plans" does not mean that the city must evaluate whether the FFT amendments are consistent with either the Framework or Transportation Plan. According to the city, Metro functional plans are the vehicles that Metro uses to require changes in city and county comprehensive plans. See Framework Plan Policy 7.5.2 (it is the policy of the Metro Council to "[u]se functional plans as the identified vehicle for requiring changes in city and county comprehensive plans in order to achieve consistency and compliance with this Plan"). MRFP 3; R-App-39. The city argues that the city achieves consistency with the Framework Plan by achieving consistency with applicable elements of Metro's functional plans. As noted, petitioners and WWC do not argue that the FFT amendments are inconsistent with any provision of any Metro functional plan, including the Transportation Functional Plan. Further, the city and Riverkeeper argue that PCP Goal 1 requires only that the city comprehensive plan support regional goals, objectives and plans; [*30] it does not require that city land use regulations provide such support. Respondents note that PCC 33.835.040(A) governs zoning text amendments, and expressly requires only that the city evaluate whether the text amendment is consistent with the Metro Urban Growth Management Functional Plan, which the city did. We understand respondents to argue that if the city intended to obligate itself to consider whether a zoning text amendment is consistent with other Metro plans, it knows how to do so, and the omission of that express obligation in PCC 33.835.040(A) should be understood as a deliberate choice.

We agree with respondents. Petitioners and WWC have not demonstrated that PCP Goal 1 or any other source of authority cited to us obligates the city to evaluate whether a text amendment to its zoning code is consistent with the Framework or Transportation Plans. Absent a more developed argument, petitioners and WWC's arguments do not provide a basis to reverse or remand the challenged decision.

Petitioners' fifth assignment of error, and WWC's second assignment of error, subsection (ii), are denied.

SECOND, THIRD, FOURTH ASSIGNMENTS OF ERROR

SECOND ASSIGNMENT OF ERROR, Subsection [*31] (i) (WWC)

These assignments and sub-assignments of error concern whether the FFT amendments are consistent with state transportation plans and requirements.

A. Background

Statewide Planning Goal 12 (Goal 12) (Transportation) is:

"To provide and encourage a safe, convenient and economic transportation system."
Goal 12 generally requires local governments to adopt transportation plans, which among other things must “facilitate the flow of goods and services so as to strengthen the local and regional economy.” 9 Goal 12 is implemented by OAR 660, chapter 012, the Transportation Planning Rule (TPR), one purpose of which is to "[f]acilitate the safe, efficient and economic flow of freight and other goods and services within regions and throughout the state through a variety of modes including road, air, rail and marine transportation." OAR 660-012-0000(1)(d). The TPR requires the Oregon Department of Transportation (ODOT), regional governments, and local governments to adopt Transportation System Plans (TSPs), consistent with the standards and requirements set out in the rule. Local TSPs must include an “air, rail, water and pipeline transportation plan which identifies [*32] where public use airports, mainline and branchline railroads and railroad facilities, port facilities, and major regional pipelines and terminals are located or planned within the planning area.” OAR 660-012-0020(2)(e).

[*33]

B. Transportation Facility

Both Goal 12 and its implementing regulations at OAR 660-012-0005(30) define “transportation facilit[y]” as “any physical facility that moves or assist[s] in the movement of people or goods including facilities identified in OAR 660-012-0020 but excluding electricity, sewage and water.” Initially, petitioners argue that under those definitions FFTs are clearly “transportation facilities.” See also OAR 660-012-0045(1)(a)(A) (identifying “major regional pipelines and terminals” as transportation facilities). Petitioners contend that in its findings the city failed to recognize that FFTs are transportation facilities for purposes of Goal 12 and the Goal 12 rule, and hence failed to address the impacts of the amendments on the FFTs themselves. 10

[*34]

The city responds that a “transportation facility” as defined in Goal 12 and the Oregon Transportation Planning Rule (TPR) does not include a storage facility, such as a warehouse. That may be the case, but we do not understand the city to dispute that the scope of “transportation facility” includes intermodal

9 Goal 12 continues:

“A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.” (Emphasis added.)

10 The city council did not adopt findings addressing Goal 12 itself, but adopted findings addressing a section of the TPR, OAR 660-012-0060 (discussed below) and PCP Goal 6, Transportation. The findings addressing OAR 660-012-0060 are quoted in n 14, below. The only finding that appears to address impacts on the existing terminals themselves is as follows:

“[T]hese amendments create a new land use category, but impose prohibitions and limits that restrict the level of development to less than what is allowed under the current standards. The zoning code currently allows Bulk Fossil Fuel Terminals as a Warehouse and Freight Movement use without any limits on the size of terminals. The amendments will prohibit new terminals and limit the expansion of existing terminals.” Record 20.
facilities that transfer persons or cargo from one transportation mode to another. As defined by PCC 33.920.300, the category of FFT includes facilities that engages in both the transport and the bulk storage of fossil fuels. Therefore, the FFTs subject to the amendments are "transportation facilities," because they move or assist in the movement of goods, notwithstanding that they also involve storage of fossil fuels.

[*35]

Petitioners are correct that the city's findings do not appear to recognize that the existing FFTs are "transportation facilities," for purposes of evaluating compliance with Goal 12 and the TPR. However, the city's failure to adopt findings directly addressing impacts on existing FFTs as transportation facilities is not, in itself, reversible error. The question is whether the decision and record demonstrate that the amendments comply with the substantive requirements of the goal and rule. See n 7. We first turn to the parties' arguments under the TPR, and then to Goal 12 and state-level plans such as the Oregon Transportation Plan (OTP) and Oregon Freight Plan (OFP).

C. Transportation Planning Rule (TPR)

OAR 660-012-0060, part of the Oregon Transportation Planning Rule (TPR) implementing Goal 12, requires that local governments determine whether an amendment to a land use regulation would "significantly affect an existing or planned transportation facility" in one of three ways and, if so, adopt one or more measures to offset the significant effect.

[*36]

1. Change the Functional Classification of a Transportation Facility

Two of the three ways in which a local government plan or zoning amendment can "significantly affect" a transportation facility involves changes to functional classification or the standards implementing a functional classification system. If the amendment does significantly affect a transportation facility, OAR 660-012-0060(2) requires the local government to adopt one or more measures.

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11 The city may be correct that the natural gas facility located in the city's northwest industrial district may not constitute a "transportation facility" as defined in Goal 12 and the TPR, if it merely functions as a peak storage facility for natural gas that arrives and leaves the site by same modality (pipeline). However, an intermodal facility, such as an airport or freight transloading terminal, etc., is clearly a "transportation facility" within the meaning of Goal 12 and the TPR.

12 OAR 660-012-0060(1) provides, in relevant part:

"If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule * * *. A plan or land use regulation amendment significantly affects a transportation facility if it would:

"(a) Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);

"(b) Change standards implementing a functional classification system[.]

13 OAR 660-012-0060(2) provides, in part:

"If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, * * *.
measures listed are to amend the local transportation system plan to modify the planned function of a transportation facility. OAR 660-012-0060(2)(c).

["37"]

The city council adopted findings concluding that the FFT amendments do not significantly affect any transportation facility in any of the three ways described in OAR 660-012-0060(1). The findings state, in so many words, that the amendments do not change the functional classification of an existing or planned transportation facility, or change standards that implement a functional classification system.

["38"]

As explained above, intermodal FFTs are a type of "transportation facility" within the meaning of the TPR and OAR 660-012-0060. Petitioners contend that the city's findings of compliance with OAR 660-012-0060 focus exclusively on impacts to roads and similar types of transportation facilities, and do not evaluate the impacts of the amendments on existing and future FFTs themselves.

According to petitioners, the amendments "significantly affect" FFTs within the meaning of the meaning of OAR 660-012-0060(1), because the amendments effectively change (1) the functional classification of an existing or planned transportation facility, or (2) the standards implementing a functional classification system. Petitioners argue that PCP Transportation Goal 6.9 and the city's Freight Master Plan (FMP) provide a functional classification system for freight infrastructure, which includes a system of freight roads as well as "freight facilities," a classification that includes marine terminals, intermodal rail yards, airports and pipeline terminals. Petitioners argue that in reclassifying FFTs from the general land use category

\[\text{\"(c)\ Adapting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.}\]

\[\text{\"* \* \* \*}\]

\[\text{\"(c) Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.\"}\]

14 The city council's findings state, in relevant part:

\[\text{\"a. These amendments do not change the functional classification of an existing or planned transportation facility,}\]

\[\text{\"b. These amendments create a new land use category, but impose prohibitions and limits that restrict the level of development to less than what is allowed under the current standards. The zoning code currently allows Bulk Fossil Fuel Terminals as a Warehouse and Freight Movement use without any limits on the size of terminals. The amendments will prohibit new terminals and limit the expansion of existing terminals.}\]

\[\text{\"c. Given the new prohibitions and limits on expansion, the amendments will not reduce or worsen the performance of an existing or planned transportation facility below the minimum acceptable performance standard identified in the TSP or comprehensive plan.}\]

\[\text{\"d. For the same reason, these changes will not have a significant effect on existing or planned transportation facilities because the proposed amendments are minor changes to the allowed uses in industrial uses, and will not increase development intensity in a manner that will be inconsistent with the function or classification of existing transportation facilities or increase automobile traffic.}\]

\[\text{\"e. There are not changes proposed to the Comprehensive Plan or Zoning Map that will impact the overall size or intensity of development in the industrial areas of Portland.\" Record 20.}\]

15 PCP Goal 6.9, entitled "Freight Classification Descriptions," is to "[d]esignate a system of truck streets, railroad lines, and intermodal freight facilities that support local, national, and international distribution of goods and services." PCP
of "Warehouse and Freight Movement," formerly allowed without any [*39] limit on size or function, to a new land use category (FFT) subject to prohibitions on new terminals and the expansion of existing terminals, the city's decision effectively changed the city's freight functional classification system, and the standards implementing the city's freight functional classification system.

[*40]

The city and Riverkeeper respond that a zoning code amendment that merely adds a new land use category to distinguish one sub-type of freight facility from others does not change the functional classification of that facility, or the standards that determine the functional classification of any facility, within the meaning of OAR 660-012-0060(1).

The TPR does not define the term "functional classification," and as far as we are informed, neither city nor state transportation plans define the term. As applied to transportation facilities such as roads and streets, the term "functional classification" appears to refer to a scheme that sorts the universe of such facilities into a hierarchical classification scheme, e.g., highway, arterial, collector, local street, etc., and assigns different function, capacity, mobility, or access standards to each classification.

Portions of the city's freight classification system described in PCP Goal 6.9 and FMP at pages 21-23 (App-268-70) are similar to the typical hierarchical classification system used for roads and streets. FMP Table 3 lists "Freight Classification by Activity Type," and describes a hierarchical and interrelated system [*41] of truck roads: regional truckway, priority truck street, major truck street, truck access street, local truck street, and freight district. FMP 22; App-269. Each of these classifications serves a distinct function within the city's freight transportation system, and appears to be subject to different standards. It would be no stretch to describe the portion of the city's freight classification system that concerns truck roads as a functional classification system, for purposes of OAR 660-012-0060.

FMP Table 3 also lists three other types of freight classifications, but these classifications are isolated from the truck road classifications, and do not possess the same hierarchical character as the truck road system described above. FMP 22; App-269. One such stand-alone classification is for "Freight Facilities," which as noted lumps together the major marine terminals, airport, railyards, and intermodal facilities that are located in Freight Districts. The rest of the FMP includes almost no discussion of the Freight Facilities classification, and there appear to be no standards or functional distinctions among the various sub-types of freight facilities.

We understand petitioners [*42] to argue that the FFT amendments effectively modify the functional classification of Freight Facilities, creating a new sub-classification in order to distinguish the function of

6-11; App-19. PCP Goal 6.9(I) describes "Freight Facilities," and states that "Freight Facilities include the major shipping and marine, air, rail and pipeline terminals that facilitate the local, national, and international movement of freight." PCP 6-12; App-20.

The FMP states:

"Portland relies on a multimodal classification system to describe the design and function of a street or other transportation facility. There are seven classification categories: Traffic, Transit, Pedestrian, Bicycle, Freight, Emergency Response, and Street Design. When funding, designing, or operating a facility all model classifications are considered.

"Portland's freight system is comprised of streets, rail lines, and freight facilities including marine terminals, intermodal rail yards, airports, and pipeline terminals. [PCP] Policy 6.9 describes each of the freight system classifications in the hierarchy. The classifications correspond to land use activities. For classifying network features, freight movement is divided into two broad categories: industrial-serving and commercial delivery of goods and services." FMP 21; App-268.
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FFTs from other intermodal terminals. According to petitioners, the amendments are intended to restrict existing FFTs to serve only "regional" needs for fossil fuels, see n 5, consistent with the intent of PCP Policy 6.48, and to preclude new or expanded terminals that might serve an interstate or international market, for example, a coal or propane export terminal. Freight transloading facilities that serve other bulk commodities, including non-fossil fuels, are allowed to site new facilities or expand existing ones, and the city has expressed no intent to restrict the function of such non-FFT facilities to serve only regional needs. We understand petitioners to argue that the creation of these distinctions among freight facilities constitute a de facto "[c]hange [in] the functional classification of an existing or planned transportation facility" for purposes of OAR 660-012-0060(1). Accordingly, petitioners argue, the city must adopt one or more of the measures listed in OAR 660-012-0060(2), such [*43] as amending its TSP and FMP to expressly modify the planned function of FFTs, to reflect the change from unrestricted to restricted fossil fuel transportation facilities.

We disagree with petitioners that the FFT amendments "change the functional classification" of Freight Facilities or FFTs, within the meaning of OAR 660-012-0060(1). Although the classification of Freight Facilities exists within what appears to constitute a functional classification system, it is a stand-alone classification, lacking the kind of hierarchical, relational connections exhibited by the truck road classifications. Within the classification of Freight Facilities, the various facilities are lumped together indiscriminately, with no functional distinctions among them. No standards appear to apply to distinguish one type of freight facility from another. While the FFT amendments introduce some distinctions between FFTs and other types of freight facilities, those distinctions serve normative purposes extraneous to a functional classification system, and do not have the effect of creating a functional classification system for freight facilities, as petitioners argue. Accordingly, we agree with respondents [*44] that the city did not err in concluding that the FFT amendments do not change the functional classification system for any transportation facility, within the meaning of OAR 660-012-0060(1).

2. Degrade the Performance of a Transportation Facility

The third, and more common way, in which an amendment can significantly affect a transportation facility is described in OAR 660-012-0060(1)(c), which generally concerns impacts of increased traffic levels generated by uses allowed under the amendment on the function or performance of transportation facilities. 16 Petitioners argue that by prohibiting the expansion of existing FFTs and siting of new FFTs, increased regional demand for fossil fuel transportation projected by city and state transportation plans will have to be met by increased levels of truck traffic. According to petitioners, increased levels of truck traffic on freight roads and streets could significantly affect the function, capacity or performance of such facilities in one of the ways described in OAR 660-012-0060(1)(c)(A)-(C). For example, petitioners cite to testimony that the aviation fuel supply chain relies on FFTs, and that demand for aviation fuel will increase [*45] by more than 50 percent by 2035, requiring new FFTs for aviation fuel. Record 487. Petitioners argue that by prohibiting the expansion or siting of new FFTs, the amendments will force aviation fuel trucks to drive from out of state

16 OAR 661-012-0060(1)(c) provides that an amendment significantly affects a transportation facility if it would:

"Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP * * * ."

"(A) Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;"

"(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or"

"(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan."
and along surface roads, including Airport Way, to deliver fuel directly to the Portland International Airport, which may cause increased levels of truck traffic that would significantly affect the function or performance of Airport Way. We do not know, petitioners argue, because the city made no effort to evaluate the effects of increased truck traffic on city roads and streets that may be indirectly caused by restricting new and expanded FFTs.

[*46*]

The city and Riverkeeper respond that petitioners’ arguments regarding impacts of increased truck traffic on city freight roads are entirely speculative. Riverkeeper also notes that in response to testimony regarding aviation fuel supply, the city council exempted facilities storing or transloading aviation fuel from any restrictions. Riverkeeper argues that that exemption eliminated the only specific example of potential impacts on city roads that petitioners identify.

We agree with respondents that petitioners’ arguments do not provide a basis for reversal or remand. OAR 660-012-0060(1)(c) generally concerns circumstances where a proposed plan or zoning amendment has the effect of increasing land development potential, causing increased traffic generation compared to the unamended plan or zoning regulation. In that circumstance, local governments are required to evaluate impacts of traffic generated under the increased development potential on affected transportation facilities. In the present case, the FFT amendments effectively freeze the development capacity of FFTs at current levels. This is not the type of amendment that could directly cause increased traffic compared to [*47*] the unamended zoning regulations (which allowed unrestricted expansion or siting of FFTs). Essentially the FFT amendments downzone the development potential within the city's industrial districts, as the city's findings conclude. Petitioners argue, however, that by effectively restricting one mode of fossil fuel transportation in the city, the amendments will indirectly cause future fuel demand to be met entirely by other modes, such as tanker trucks, which will cause increased levels of truck traffic over that anticipated in the city's transportation plans, which in turn might be inconsistent with the planned function or performance of some city freight routes.

However, we do not think that OAR 660-012-0060(1)(c) requires the city to evaluate the possibility that downzoning the intensity of one particular type of land use at one location in the city may indirectly cause compensatory development and related traffic generation elsewhere in the city. For example, an amendment that restricts potential for commercial development on one property need not be supported by an evaluation of the possibility that other commercially-zoned sites in the city will meet future commercial demand by [*48*] intensifying development, causing increased traffic impacts on city streets elsewhere. Further, to meaningfully evaluate impacts on transportation facilities under OAR 660-012-0060(1)(c), the local government must be able to identify the transportation facilities affected by the amendment. Under petitioners' indirect impact approach, that task would be an impossible burden, potentially requiring evaluation of every freight route in the city. Petitioners identify only one specific transportation facility that might be impacted under that indirect approach, but, as Riverkeeper argues, the city adopted exemptions that appear to moot arguments based on that example. Accordingly, we reject petitioners’ arguments that the city erred in concluding that the FFT amendments do not significantly affect any facility within the meaning of OAR 660-012-0060(1)(c).

D. Statewide Planning Goal 12

As noted above, Goal 12 requires local governments to adopt transportation system plans that "facilitate the flow of goods and services so as to strengthen the local and regional economy[.]" Further, the TPR requires that TSPs "[f]acilitate the safe, efficient and economic flow of freight and other goods [*49*] and services within regions and throughout the state through a variety of modes including road, air, rail and marine transportation[,]" OAR 660-012-0000(1)(d).
Petitioners argue that the FFT amendments violate Goal 12 and the intent of the Goal 12 rule because rather than "[f]acilitate the safe, efficient and economic flow of freight and other goods and services within regions and throughout the state through a variety of modes including road, air, rail and marine transportation," the amendments instead will impede the flow of fossil fuels within the region and throughout most of the state, by prohibiting the expansion of existing terminals and the siting of new terminals. Similarly, WWC argues that the unique cluster of intermodal transportation facilities along Portland's industrial waterfront is a critical component of the statewide fossil fuel transportation system. According to WWC, the FFT amendments create a less economic, less convenient, and less safe transportation system by forcing any future expansion of fossil fuel storage and distribution needed to address increased local, regional or statewide demand to be met through small (two million gallon or less) terminals or terminals that use a single mode of transport--trucks.

The city responds that because the city has a TSP that is acknowledged to comply with Goal 12, re-examination of compliance with Goal 12 is triggered only if the FFT amendments trigger evaluation under OAR 660-012-0060(1), i.e., the amendments have a significant effect on a transportation facility. We disagree with the city. PCC 33.835.040(A), as well as state law, require that a zoning code amendment be consistent with the Statewide Planning Goals. While OAR 660-012-0060 provides specific and additional standards for certain types of plan and zoning code amendments, nothing in OAR 660-012-0060 or elsewhere cited to us suggests that an amendment is required to comply only with the OAR 660-012-0060. OAR 660-012-0060 is not particularly concerned, for example, with other Goal 12 and TPR requirements intended to "[f]acilitate the safe, efficient and economic flow of freight and other goods and services within regions and throughout the state through a variety of modes including road, air, rail and marine transportation." The requirements of Goal 12 and other portions of the Goal 12 rule may well apply to a plan or zoning amendment that does not "significantly affect" a transportation facility in one of the three ways specified in OAR 660-012-0060(1)(c). See n 16.

The city and Riverkeeper next argue that much of Goal 12 and the Goal 12 rule are concerned with the adoption of transportation system plans (TSP), and nothing in the goal or rule is triggered by a plan or zoning amendment that does not amend a TSP. However, that is too facile an answer. A local transportation system plan does not exist in a vacuum, but is highly integrated with local zoning and land use schemes. As discussed below, a local transportation system plan is also integrated to some extent with regional and state transportation system plans. A plan or zoning amendment that changes the zoning classification for a specific type of transportation facility, particularly one that has regional and statewide significance, could potentially affect whether the local TSP remains in compliance with applicable Goal 12 or rule requirements that are in addition to those imposed under OAR 660-012-0060. If so, we believe that the local government is obliged to consider that question in adopting the plan or zoning amendment.

On the merits, the city and Riverkeeper argue that the FFT amendments are consistent with Goal 12. According to respondents, the amendments do not limit the ability of the city, under its TSP, to facilitate the flow of goods and services throughout the region and state. Respondents argue that the amendments do not expressly limit the quantity of fuel that flows through pipelines or terminals, or the ability of existing terminals to increase throughput to other parts of the state, if that is required, by operating more efficiently. Respondents also note that the amendments include a number of exemptions, for aviation storage facilities, and for facilities handling non-fossil fuels (ethanol, biodiesel, etc.), for which the city anticipates an increasing demand. The amendments also allow new small terminals (less than two million gallons) and fossil fuel terminals served by a single mode--trucking. Given these considerations, respondents argue that the amendments will have only a minimal effect on the flow of fossil fuel through the city's terminals to the rest of state.
The considerations cited by respondents in their briefs might be the kind of considerations that would justify a conclusion that the FFT amendments [*53] do not affect the city TSP’s continued compliance with the Goal 12 requirement to facilitate the flow of goods. However, there is no indication in the city's decision or in the record that the city in fact evaluated such considerations. For example, no findings or evidence are cited to us that the existing terminals have the ability to increase throughput to the region or the rest of the state by adopting more efficient operations. As noted, the city adopted no findings addressing Goal 12 itself (as opposed to OAR 660-012-0060), and there are no findings or analysis cited to us that evaluates the impact of the FFT amendments on the flow of fossil fuel through the city's terminals to the region and to the rest of the state. As discussed, the city enjoys a commanding geographic and logistical position with respect to the fossil fuel supply for the state of Oregon: the city’s existing FFTs transload or handle 90 percent of the state’s petroleum supply. Record 31. Under these circumstances, we do not believe the city can adopt zoning amendments that restrict FFTs to their existing number and capacity, without at least considering the impact of the amendments on the flow of fossil fuel [*54] to the region and the state. Specifically, the city must consider whether the city’s TSP and zoning regulations, post-amendment, continue to comply with the Goal 12 requirement to facilitate the flow of goods and services.

E. Oregon Transportation Plan (OTP)

Petitioners and WWC advance similar arguments based on the Oregon Transportation Plan (OTP) and the Oregon Freight Plan (OFP), which is a component of the OTP. OAR 660-012-0015(3)(a) requires local governments to adopt local TSPs that are consistent with the Oregon TSP. In turn, OAR 660-012-0045(1) requires local governments to amend their land use regulations to implement the local TSP. Petitioners argue that the FFT amendments restrict transportation facilities in a manner that cause the city's zoning regulations to conflict with several OTP goals and policies.

Among other OTP goals and policies, petitioners cite to OTP Strategy 1.1.2, which is to "[p]romote the growth of intercity bus, truck, air, pipeline and marine services to link all areas of the state with national and international transportation facilities and services." OTP 47; App-738. OTP Strategy 1.2.2 also requires that local governments "[c]oordinate and [*55] support the development of intermodal connections between air, marine, pipeline, public transportation, rail and road transportation." OTP 48; App-739. Further, OTP Policy 3.1 states: "[i]t is the Policy of the State of Oregon to promote an integrated, efficient and reliable freight system involving air, barges, pipelines, rail, ships, and trucks to provide Oregon a competitive advantage by moving goods faster and more reliably to regional, national and international markets." OTP 54; App-745. Similarly, OTP Goal 7 requires that local governments "remove barriers and bring innovative solutions so the transportation system functions as one system." OTP 74; App-765.

The city responds that because the challenged decision does not amend the city's TSP, the FFT amendments are not required to be consistent with the OTP. The city notes that the OTP was adopted by the Oregon Transportation Commission (OTC), which explains in a preface to the OTP that it lacks statutory authority to impose OTP goals, policies and performance recommendations on entities other than state agencies. 17

17 The OTP quotes ORS 184.618(1), which authorizes the Oregon Transportation Commission to develop the OTP to provide a comprehensive, long-range plan for a safe, multimodal transportation system for the state, including aviation, highways, mass transit, pipelines, ports, rails, and waterways, to be used by state agencies and officers to guide and coordinate transportation activities. OTP 34; App-725. The OTP continues:

"ORS 184.618(1) requires state agencies to use the OTP to ‘guide and coordinate transportation activities,’ but it does not give the OTC authority to impose OTP goals, policies and performance recommendations on entities other than state agencies. However, the OTP operates in the legal context of the State Agency Coordination Program and the Land Conservation and Development Commission’s Transportation Planning Rule which impose additional
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The city is correct that nothing cited to us requires that a city zoning code amendment be consistent with the OTP, or applies OTP goals and policies as direct review standards for the challenged FFT amendments. However, it does not follow that OTP goals and policies are completely irrelevant to a zoning code amendment that directly affects key multimodal transportation facility of statewide significance. The FFT amendments do not occur in a vacuum, or concern only local transportation infrastructure. As discussed above, given the nature of the FFT amendments, the city is required to consider whether, post-amendment, the city's TSP continues to comply with the Goal 12 requirement to facilitate the flow of goods and services in the region and state. As the quoted OTP excerpt at n 17 states, the OTP operates within a legal context that includes Goal 12 and the Goal 12 rule. The OTP and the incorporated OFP represent a state-level body of information and policy guidance that speak directly to the state's interest in maintaining and improving the flow of goods and services throughout the state (and beyond). In essence, the OTP represents the judgment of the highest transportation planning entity in the state about what it means to "facilitate the flow of goods and services." In considering whether the FFT amendments are consistent with Goal 12, there may be no authority that requires the city to apply relevant OTP goals and policies as approval standards; nonetheless, such OTP goals and policies would seem to be pertinent considerations to any such evaluation under Goal 12.

F. Oregon Freight Plan (OFP)

As noted, the Oregon Freight Plan (OFP), adopted in 2011, is an incorporated part of the OTP. The OFP includes a number of projections and estimates regarding demand for freight, including estimates that many areas of the state will experience significant increases in demand for fossil fuels through the year 2035. See, e.g., OFP 47: App-1043 (estimating a compound annual growth rate of 2.3 percent for truck freight of petroleum and natural gas-based products in the state). WW&C argues that the OFP estimates contradict the city's apparent presumption, in the findings supporting the FFT amendments, that local and regional demand for fossil fuels will be relatively flat or even decline in the foreseeable future.

The city and Riverkeeper respond that the OFP projections and estimates cited by WW&C are not in the record, and further are the kind of "adjudicative facts" that cannot be judicially noticed, even if located within documents that are subject to judicial notice. We agree with respondents. Blatt v. City of Portland, 21 Or LUBA 337, aff'd 109 Or App 259, 819 P2d 309 (1991), rev den 314 Or 727, 843 P2d 454 (1992) ("LUBA does not have authority to take official notice of adjudicative facts, as set out in OEC 201."). WW&C offers no theory we can understand that would allow LUBA to consider the data in the OFP, which is not in the record, requirements and authority in the planning process for other jurisdictions. The OTP must also comply with federal legislation." Id.

The city's decision includes the following finding:

"The most recent cargo forecast for Portland Harbor in 2012 projected 1.0% AAG [average annual growth] in liquid bulk tonnage to 2040 as a high scenario and 0.5% AAG as a low scenario (BST Associates, 2012). Based on this forecast, EcoNorthwest (2012) estimated no additional land need for new liquid bulk terminals **." Record 48.

The city also found:

"The potential impacts of the code amendments on constraining the fossil fuel supply to meet regional demand is uncertain. Fossil fuel demand in this growing region has been relatively flat over the last 15 years. At best, the demand for fossil fuel may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with a shifted shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction strategies." Record 4.
for purposes of undermining the city’s reliance on evidence that is in the record. Accordingly, WWC's arguments regarding the OFP estimates of future demand for fossil fuels in the state do not provide a basis for reversal or remand. 19

[ouflage]

Petitioners' second and fourth assignments of error are sustained; Petitioners' third assignment of error, and WWC's second assignment of error, subsection (i), are denied.

FIRST ASSIGNMENT OF ERROR 20

Statewide Planning Goal 2 (Goal 2) (Land Use Planning) requires in relevant part that comprehensive plan and implementing measures be "coordinated with the plans of affected governmental units," and that land use decisions be supported by an "adequate factual base." Petitioners and WWC argue that the city erred in failing to coordinate with the plans of affected governmental units and in adopting a decision that is not supported by an adequate factual base.

A. Coordination with the Plans of Affected Governmental Units

The Goal 2 requirement to coordinate comprehensive plan and implementing measures with the plans of affected governmental units is satisfied by (1) inviting an exchange of information between the planning [*60] jurisdiction and affected governmental units, and (2) using the information gained in that exchange to balance the needs of all affected government units and the citizens they represent. ODOT v. City of Klamath Falls, 39 Or LUBA 641, 671, aff'd 177 Or App 1, 34 P3d 667 (2001); Rajneesh v. Wasco County, 13 Or LUBA 202, 210 (1985).

Petitioners argue that despite proposing to enact major legislation that would have consequences throughout the metropolitan area and state, the city made no concerted effort to involve Metro, ODOT, other cities, the Port of Portland or other affected governmental units.

The city responds that it mailed notice of the proposed amendments to Department of Land Conservation and Development (DLCD) pursuant to ORS 197.610, and many multiple notices of the PSC hearings and the city council hearings to Metro (34 notices), ODOT (94 notices) and the Port of Portland (369 notices). Record 1247-81 (city council hearing), Record 3456-3674 (PSC hearings). According to the city, only the Port of Portland submitted comments, expressing concern that the amendments [*61] should not impact aviation and marine fuel supplies. In response, the city modified the proposal to exclude aviation and marine fuel storage facilities. The city argues, and we agree, that Goal 2 does not require more from the city.

PCP Goal 1 provides that the comprehensive plan shall be coordinated with federal and state law and support regional goals, objections and plans adopted by Metro, to promote regional planning framework. The city council adopted findings concluding that PCP Goal 1 is met basically for the same reasons why the Statewide Planning Goal 2 coordination requirement is met. 21 Petitioners contend that a local

19 That said, to the extent Goal 12 or the Goal 12 rule requires the city to evaluate the impacts of the FFT amendments on statewide fossil fuel supply and demand, the OFP appears to provide relevant data that could be used for that evaluation.

20 WWC incorporates petitioners' first assignment of error as its first assignment of error.

21 The city council findings state, in relevant part:

"Goal 1, Metropolitan Coordination, calls for the Comprehensive Plan to be coordinated with federal and state law and to support regional goals, objectives and plans. The amendments are consistent with this goal because
coordination requirement such as PCP Goal 1 requires more than Statewide Planning Goal 2. Petitioners cite Twin Rocks Water District v. City of Rockaway, 2 Or LUBA 36 (1980), and Textronix, Inc. v. City of Beaverton, 18 Or LUBA 473, 479 (1989), for the proposition that local coordination requirements cannot be met by simply providing affected governmental entities with notice and soliciting comments.

[62]

However, both of the cited cases predate ORS 197.829(1) and caselaw requiring that LUBA defer to a governing body’s interpretation of local land use legislation. See n 7. Petitioners do not acknowledge or challenge the city council’s findings of consistency with PCP Goal 1. Under those findings, it is clear that the city council does not interpret PCP Goal 1 to impose more onerous coordination obligations on the city than does Statewide Planning Goal 2. Petitioners have not demonstrated that that understanding of PCP Goal 1 is inconsistent with its express language, or otherwise reversible under ORS 197.829(1). Petitioners’ arguments regarding PCP Goal 1 do not provide a basis for reversal or remand.

B. Goal 2 Adequate Factual Base

Statewide Planning Goal 2 is:

"To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions."

LUBA has interpreted the Goal 2 requirement to "assure an adequate factual base" to mean that legislative decisions must be supported by substantial evidence, i.e., findings of fact supported by evidence in the [*63] record which, viewing the record as a whole, would permit a reasonable person to make that finding. 1000 Friends of Oregon v. City of North Plains, 27 Or LUBA 372, 377-78, aff'd 130 Or App 406, 882 P2d 1130 (1994).

The PSC recommended draft includes findings addressing future regional demand for fossil fuels, noting studies showing a trend toward increased local or regional demand, 22 but noting the possibility that notification of the proposals, and an opportunity to provide comment at a public hearing before the [PSC], was provided to [DLCD] consistent with ORS 197.610, and to Metro, Tri-Met, the Port of Portland, and [ODOT] consistent with [PCC] 33.740.020 * * *.” Record 8.

22 The recommended draft includes the following:

*Analysis* to date is limited on the energy consumption forecasts and how the recommended code changes would impact the demand for additional fossil fuel storage capacity. Fossil fuel demand in this growing region may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with implementation of climate resilience goals and strategies. National forecasts of energy consumption by the U.S. Energy Information Administration show varying growth trajectories by energy type, including a relatively flat outlook for petroleum fuels, decline for coal, and moderate growth for natural gas and renewables * * *

*Liquid* bulk cargo in Portland Harbor is projected to expand at a range of 0.5% to 1.0% average annual growth (AAG) to 2040 (BST Associates, 2012), providing an estimate of potential market expansion needs for petroleum fuels, which could mean a need for an additional 10-20% increase in storage capacity. However, based on this forecast, ECONorthwest (2012) estimated that there was no additional land needed for new liquid bulk terminals in Portland. The 1.9% average annual growth to 2034 (NW Natural 2014 Integrated Resource Plan) provides an estimate of market expansion needs for natural gas distribution facilities.

*Even if* regional fossil fuel demand follows trend-based local forecasts, there is a wide margin between the size of recently proposed crude oil, coal, and [liquefied natural gas (LNG)] terminals in the Pacific Northwest and the scale of expected growth of existing Portland fuel terminals that generally serve the regional market area * * *." Record 330.
increases in demand for fossil fuel may plateau and decline "with implementation of climate resilience goals and strategies." Record 330. In part to account for the need to accommodate possible increased future demand, the PSC recommended draft proposed allowing existing terminals to expand by 10 percent. Record 363.

[*64]
The city council adopted a similar finding, noting that the impact of the FFT amendments on constraining the growing regional demand for fossil fuel is "uncertain," but expressing the hope that such demand may decline "with a continued shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction strategies." However, as noted, the city council eliminated the provision for a 10 percent expansion. Record 50.

Petitioners [*65] argue that findings to the effect that regional demand for fossil fuels will plateau or decline are not supported by substantial evidence in the record. According to petitioners, that unsupported finding is the apparent basis for rejecting the PSC recommendation to allow a 10 percent increase in the size of existing terminals, and instead completely prohibiting the expansion of existing terminals. Petitioners argue that the uncontradicted evidence in the record, cited in the city's own decision, is that growing regional demand for fossil fuels will likely require a 10-20% percent increase in storage capacity. 24

[*66]
The city responds that the record includes evidence from which a reasonable decision maker could conclude that future fossil fuel demand, while uncertain, may be relatively flat. Record 245 (graph showing relatively flat actual consumption of fossil fuels in Oregon between 2005 and 2014, a period of time that included the recent national recession); Record 330 (staff finding citing a 2016 federal forecast of national energy consumption indicating a relatively flat outlook for petroleum fuels, decline for coal, and moderate growth for natural gas and renewables); Record 247 (2015 graph from the federal Energy Information Administration projecting a relatively lower profile of future increases in national oil consumption, compared to a much higher 2003 projection); Record 2127 (state clean fuels program is expected to reduce the consumption of petroleum fuels).

However, none of the cited evidence supports the finding that future fossil fuel demand in the region may plateau or decline "with implementation of climate resilience goals and strategies," or "with a continued shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction [*67] strategies." While the cited evidence suggests that future demand for fossil fuel over the region or state may be lower than earlier projections or historical increases, there is nothing cited to us

23 The city council findings state, in relevant part:

"The potential impacts of the code amendments on constraining the fossil fuel supply to meet regional demand is uncertain. Fossil fuel demand in this growing region has been relatively flat over the last 15 years. At best, the demand for fossil fuel may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with a continued shift to other modes of transportation, more fuel-efficient vehicles, electric vehicles and other carbon reduction strategies." Record 17.

24 In addition, petitioners argue that the city's findings are contradicted by projections in the Oregon Freight Plan (OFP), to the effect that statewide demand for fossil fuels is projected to increase over the next 15 to 25 years. However, as explained, the OFP is not in the evidentiary record, and data contained in the OFP cannot be considered by LUBA to support or controvert evidence in the record to resolve an evidentiary dispute. That said, if the city is again called upon to evaluate evidence regarding future demand for fossil fuels in the region or statewide, we note that the projections in the OFP would seem to be highly probative to that inquiry.
suggesting that the demand may plateau or decline. Based on the portions of the record cited to us, that finding appears to represent pure speculation on the city's part.

Projecting future demand for fossil fuels is an uncertain enterprise, and if the question were merely a matter of estimating local demand for fossil fuels, the city might have wider leeway for applying speculation and assumptions, given the inherent uncertainty of forecasts, in a normative effort to bend the trajectory of the local economy toward a desired policy objective, i.e., reduced local reliance on fossil fuels. However, as explained elsewhere in this opinion, the city is in a unique geographic and logistical position with respect to regional, statewide, interstate and international markets in fossil fuels. We held, above, that the city has obligations under Goal 12 and the Goal 12 rule to ensure that its plan and zoning regulations comply with the obligation to facilitate the flow of goods within the region [*68] and statewide. Further, as explained below, the federal dormant Commerce Clause constrains the city's ability to limit interstate or international trade in fossil fuels. Under these circumstances, we do not believe the city can limit the scope of its evidentiary inquiry to evaluating only the local or even regional demand for fossil fuels. The above-quoted findings acknowledge the "wide margin between the size of recently proposed crude oil, coal, and LNG terminals in the Pacific Northwest and the scale of expected growth of existing Portland fuel terminals that generally serve the regional market area," Record 45, but purport to evaluate and address only the latter. However, even focused exclusively on the local or regional demand, the findings essentially ignore uncontradicted projections of moderate growth in demand for fossil fuels, and instead rely on what are no more than unsupported speculations that demand will actually plateau or decline. The city's findings on that point, which appear to be key support for the prohibition on any expansion of existing terminals to meet even local or regional needs, are not supported by substantial evidence, and hence not supported by an adequate [*69] factual base.

The first assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR 25

Petitioners argue that the city's new restrictions on FFTs are inconsistent with Statewide Planning Goal 9 (Goal 9) (Industrial Land).

Goal 9 is:

"To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens."

Goal 9 also provides:

"Comprehensive plans and policies shall contribute to a stable and healthy economy in all regions of the state. Such plans shall be based on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability and cost * * *[.]" (Emphasis added.)

Goal 9 is implemented by administrative rules at OAR 660, chapter 009. OAR 660-009-0005(3) defines "industrial use" to include facilities that [*70] provide storage, importation, distribution and transshipment, and states that industrial uses "may have unique land, infrastructure, energy, and transportation requirements."

Petitioners and WWC contend that the restrictions on FFTs violate the Goal 9 requirement to adopt plans and policies that consider "energy availability and cost[,]" Further, petitioners and WWC argue that the FFT

25 WWC incorporates petitioners' eighth assignment of error as its third assignment of error.
amendments violate the Goal 9 requirement to provide "adequate opportunities for a variety of economic activities" by effectively creating a bottleneck for the multimodal movement and storage of fossil fuels. As noted, 90 percent of the petroleum consumed in the state of Oregon arrives via the Olympic pipeline, and is then transloaded and distributed to the rest of the state by the FFT terminals at the end of the pipeline. By prohibiting expansion of existing FFTs and siting of new FFTs, petitioners argue that the amendments not only restrict a key industrial activity in the city, but also effectively impose economic and energy supply restrictions on the rest of the state, as well as interstate and international market interests.

The city responds that Goal 9 does not require local governments to provide [*71] for every and any specific kind of economic use, or protect every economic interest from harm, but only to provide an adequate inventory of land zoned for industrial use, and adequate opportunities for a variety of economic activities. Home Depot USA, Inc. v. City of Portland, 37 Or LUBA 870, aff’d 169 Or App 599, 10 P3d 316 (2000), rev den 331 Or 583, 19 P3d 355 (2001); Setniker v. Oregon Department of Transportation, 66 Or LUBA 54, 68 (2012). The city argues that the FFT amendments do not reduce the supply of inventoried industrial lands, nor threaten the city's ability to provide an adequate opportunity for a variety of economic activities. With respect to the alleged bottleneck, the city argues that nothing in the amendments prohibit the existing terminals from increasing throughput to the rest of the state.

Goal 9 and the Goal 9 rule are largely focused on comprehensive planning, and rather light on specific obligations. The most rigorous and specific obligation is to adopt and maintain an adequate inventory of lands zoned for [*72] industrial use. However, the FFT amendments do not reduce at all the city's inventory of industrials lands. The city is correct that Goal 9 does not require a local government to accommodate any and all economic activities, or prevent local governments from restricting some economic activity, based on a balancing of competing economic interests or other policy objectives.

It is less clear whether it is consistent with Goal 9 to balance competing policy objectives in a manner that arguably would cause the city to become a bottleneck for the intermodal transportation and storage of fossil fuel supply that 90 percent of the state depends upon, as well as the impact on interstate and international market interests. Because of its unique geographic situation, any restrictions the city places on FFTs has the potential to affect a much greater sphere beyond the city's own infrastructure and industrial capability. If future demand for fossil fuel increases statewide, and no source is available other than the Olympic Pipeline, serious economic consequences could follow for the state. The city's decision does not address the possibility that the FFT amendments could inadvertently cause the [*73] city to act as a fossil fuel chokepoint for the entire state. 26 On appeal, the city's response that nothing in the FFT amendments prevents terminals from increasing throughput assumes, without any evidence, that the existing terminals have extra capacity or can otherwise significantly increase throughput using the existing storage capacity and infrastructure.

However, petitioners identify no [*74] specific obligation under Goal 9 or the Goal 9 rule compelling the city to consider whether and how amendments to its zoning ordinance may indirectly impact the state's economy (much less interstate and international fossil fuel markets). Absent such an obligation, petitioners

26 The city's only finding regarding Goal 9 states:

"Goal 9, Economic Development, requires provision of adequate opportunities for a variety of economic activities vital to public health, welfare and prosperity. The amendments are consistent with this goal because these changes and restrictions only apply to a new land use category, Bulk Fossil Fuel Terminals, and do not have a significant effect on the other allowed uses in industrial and employment zones. There are no changes proposed to the [PCP] or Zoning Map that will impact the overall size or intensity of development in the industrial areas of Portland." Record 19.
have not demonstrated that the city erred in concluding that the FFT amendments are consistent with Goal 9.

The eighth assignment of error is denied.

**NINTH ASSIGNMENT OF ERROR**

In the ninth assignment of error, petitioners argue that the FFT amendments violate the dormant Commerce Clause of the United States Constitution because the ordinance impermissibly discriminates against or unduly burdens interstate trade in fossil fuel. For the following reasons, we agree with petitioners.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power * * * [t]o regulate Commerce * * * among the several states." US Const [*75] Art I, § 8, cl 3. Where Congress has explicitly exercised that grant of power, states are of course bound to conform to federal law. The "dormant" aspect of the Commerce Clause protects Congress's latent ability to regulate interstate commerce, even in areas where Congress has not spoken, by prohibiting states (including the municipal arms of a state) from adopting legislation that, by design or effect, regulates or burdens interstate commerce in certain impermissible ways. Or. Waste Sys. v. Dep't of Envtl. Quality, 511 US 93, 114 S Ct 1345 (1994); Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 US 353, 361, 112 S Ct 2019 (1992) ("[A] State (or one of its political subdivisions) may not avoid the Commerce Clause's strictures by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.")

The courts have generally adopted a two-tiered approach to Commerce Clause challenges: When a state or local law directly regulates or facially discriminates against interstate commerce, or when its purpose or practical [*76] effect is to favor in-state economic interests over out-of-state interests, courts have generally struck down the law without further inquiry, under an elevated level of scrutiny. Rocky Mt. Farmers Union v. Corey, 730 F3d 1070, 1087 (9th Cir 2013) (a law may violate the dormant Commerce Clause if it "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect,"]) (citing Maine v. Taylor, 477 US 131, 138, 106 S Ct 2440 (1986)). Discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Id. (quoting Or. Waste Sys., Inc., 511 US at 99). Where a law is discriminatory in practical effect, the government must demonstrate that the law is supported by a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Hunt v. Wash. State Apple Adver. Comm'n, 432 US 333, 353, 97 S Ct 2434 (1977) ("When discrimination against commerce of the type we have found [*77] is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." (Internal citations omitted.)).

On the other hand, where the law is facially non-discriminatory, and does not discriminate against out-of-state economic interests in its purpose or practical effect, the courts engage in a balancing test, subject to a lesser level of scrutiny, that weighs the state's interest against the indirect burden on interstate commerce. Such a law will only be struck down when the burden on interstate commerce is "clearly excessive" in relation to the local benefits. Pike v. Bruce Church, 397 US 137, 142, 90 S Ct 844 (1970).

Petitioners argue, and we agree, that the city's FFT amendments fail the Commerce Clause analysis under either test.

**A. Discriminatory Purpose or Practical Effect**

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27 WWC incorporates petitioners' ninth assignment of error as its fourth assignment of error.

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In the present case, no party argues that the FFT amendments facially discriminate against interstate commerce. The FFT amendments are silent regarding the origin or final destination of fossil fuels \[^{78}\] stored or transloaded in the affected FFTs. Petitioners argue, however, that it is clear from the record that one of the purposes of the amendments, if not the primary motivating force, was to forestall the possibility that a particular vehicle of interstate and international commerce--fossil fuel export terminals--would be established within the city. The apparent impetus for the FFT amendments was a recent proposal to site a propane export terminal in a north Portland industrial area, the Pembina proposal. As the city mayor explained in the proceedings leading to adoption of the FFT amendments:

"The rapid development of fossil fuel resources in the western part of our country and Canada has put a lot of pressure on Portland and other cities and has sought to transport and move huge quantities of fossil fuels through and into our communities. As we all experienced with the [P]embina proposal last year, the zoning code actually allows fossil fuel terminals as a warehouse and freight movement use in our zoning code today without any limit on the size of these terminals. We, of course, passed [Resolution 37168] saying we're going in a different direction and today is the proposal \[^{79}\] to put that into city law, into our code." Record 206.

The Pembina proposal in north Portland was ultimately abandoned in the face of significant local opposition. However, as the mayor notes, one consequence of the Pembina proposal was adoption of Resolution 37168, which resolved that the city council would actively oppose expansion of infrastructure whose primary purpose is the transporting or storing of fossil fuels in Portland or adjacent waterways. The city council later adopted a new comprehensive plan policy, Policy 6.48, which states that the city's policy is to "limit fossil fuel distribution and storage facilities to those necessary to serve the regional market." Record 3317.

Even though Policy 6.48 is not yet in effect, the city's findings state that the FFT amendments "specifically implement[]" Policy 6.48. Record 324. As adopted, the FFT amendments have the practical effect of precluding the siting of new fossil fuel export terminals within the city, and indeed it is clear that the city intended that result. \(^{28}\) Notwithstanding the facial neutrality of the amendments regarding the origin or destination of fossil fuels, it is clear that the city intended the amendments \[^{80}\] to preclude construction of new or expanded terminals that store and transload fossil fuels to serve interstate or international markets, such as the Pembina proposal (i.e., demand beyond that "necessary to serve the regional market."). As the commentary to the definition of "Bulk Fossil Fuel Terminal" explains, terminals subject to the FFT amendments function as "regional gateway facilities, where fossil fuels enter and exit the region." Record 370. Further evidence of the intent to preclude fossil fuel export terminals is the fact that the size of terminals subject to the amendments was deliberately set to capture facilities large enough to handle "unit trains," i.e., trains with a single load of a bulk fossil fuel that is transported as a unit and not intended for local distribution, but for transloading for more distant markets. See n 6. In the amendments, the city

\(^{28}\) As noted earlier, the city's findings explain:

"The energy distribution market in the Pacific Northwest is changing. Production of crude oil and natural gas, particularly from North Dakota, has substantially increased in the U.S. since 2009, as shown in Figure 1. In turn, several large new fuel distribution terminals have been proposed in the Pacific Northwest to access West Coast and export markets, as shown in Figure 2. Similar trends have occurred in Alberta and British Columbia.

\[The FFT amendments] propos[e] a prompt, focused response to these market changes. The recommended code amendments will restrict development of new fossil fuel terminals and limit the expansion of existing terminals, consistent with City and State objectives on climate change and public safety." Record 316 (emphasis added).

Reducing Impacts from Fossil Fuel Projects

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The question before us is whether legislation with that intent and that practical effect is consistent with the dormant Commerce Clause. The parties cite a number of dormant Commerce Clause cases, discussed below, to support their respective positions. Before turning to that discussion, we first note that the city emphasizes that the stated purposes of the FFT amendments include (1) addressing safety issues stemming from vulnerability of many existing FFTs to seismic events in the city's northwest industrial area, and (2) reducing the city's contributions to climate change. The city argues that these are legitimate local interests that outweigh any incidental impact on interstate commerce. We address the cited purposes below, both under the discriminatory practical effect analysis, and under the Pike balancing test. However, in evaluating discriminatory purpose or practical effect, we note that the Ninth Circuit states that it will "assume that the objectives articulated by the legislature are the actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation. But we will not be bound by the stated purpose when determining the practical effect of the law." Rocky Mt. Farmers, 730 F3d at 1097-98 (citing Minnesota v. Clover Leaf Creamery, 449 US 456, 463 n 7, 101 S Ct 715 (1981); Hughes v. Oklahoma, 441 US 332, 336, 99 S Ct 1727 (1979) (internal citations and quotation marks omitted)). Similarly, in the present case, even if the two purposes stated above are among the actual purposes of the FFT amendments, it does not follow that they are the exclusive purposes, or that those two stated purposes limit the analysis of the practical effect of the FFT amendments.

We make one other preliminary observation. Most of the dormant Commerce Clause cases cited to us involve claims of economic protectionism in one guise or another. The present case does not involve economic protectionism in the classic sense of a state or municipality trying to favor local economic interests by restricting or burdening competition from out-of-state actors. See, e.g., Hunt v. Wash. State Apple Adver. Comm'n, 432 US 333, 351 (regulations that burdened out-of-state apple growers, to the indirect economic benefit of in-state growers). The city, and Oregon, have no local refineries or sources of fossil fuel to promote or protect against competitors. Nonetheless, we believe that the FFT amendments embody elements of economic protection for local interests--protections from the burdens that the city is willing to impose on interstate commerce--and the city's attempt to shield local interests from the burden of obstacles it places in the path of interstate commerce is one of the fatal flaws of the FFT amendments. Raymond Motor Transportation, Inc. v. Rice, 434 US 429, 445-47, 98 S Ct 787 (1978) (exceptions in favor of local interests "weaken the presumption in favor of the validity of [a regulation], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce.")

In the FFT amendments, the city attempts to limit its participation in the traffic of fossil fuels, which the city clearly deems to be an undesirable commodity. The city is indifferent to the sources of that commodity (none of which are local), but is concerned with the ultimate destinations for fossil fuels that enter the city.

29 It is true, as the city argues, that nothing in the FFT amendments expressly prohibits changing the 11 existing large FFTs into export terminals, i.e., using existing facilities to store and transship fossil fuels to interstate or international markets, rather than store and transship fossil fuels for local or regional markets, as is the current state of affairs. However, the city cites no evidence that such redevelopment would be a practical or economic reality. Such changes would likely require new facilities and changes in modality, e.g., shifting from a train to truck modality to a train to ship modality, and perhaps different fuels (e.g., petroleum to coal) with different storage and handling characteristics. It seems unlikely that it would be economically feasible to abandon long-standing investments in existing facilities serving local and regional markets in order to redevelop those facilities to handle different modalities or types of fossil fuels.
for storage or transloading. As Policy 6.48 indicates, the city's policy goal is to limit fossil fuel storage and transloading to the quantities needed to meet local and regional demands. The concomitant (and expressly-stated) goal is to preclude establishment or expansion of FFTs that would store or transload fossil fuel for destinations outside the state. Because the status quo at present is that the city's FFTs adequately serve current local and regional demands, the city chose to advance both these policy goals together by simply prohibiting new and expanded FFTs. To shield local users from the consequences of a more comprehensive ban on new or expanded FFTs, the city adopted a number of exceptions and exclusions, listed in the margin. The net effect is that the city has done all it can, short of an express prohibition on export terminals, to effectively restrict interstate or international commerce in fossil fuels, while at the same time shielding its citizens and local end-users to some extent from the adverse consequences of the restrictions on new or expanded terminals. While not a classic form of economic protectionism vis-a-vis out-of-state competitors, in our view a law that embodies the above goals represents a species of protectionism and burden-shifting that infringes on Congress's latent authority under the Commerce Clause. Pac. Merch. Shipping v. Goldstene, 639 F3d 1154, 1177 (9th Cir 2011) ("[T]he whole objective of the dormant Commerce Clause doctrine is to protect Congress's latent authority from state encroachment.")

30 PCC 33.920.300.D. lists exceptions to the definition of "bulk fossil fuel terminal," (FFTs) many of which appear calculated to shield local fossil fuel storage facilities and end users from harm that could otherwise be inflicted by the FFT amendments. The exceptions include:

2. Truck or marine freight terminals that do not have transloading facilities and have storage capacity of 2 million gallons or less are classified as Warehouse and Freight Movement uses. However, multiple fossil fuel facilities, each with 2 million gallons of fossil fuel storage capacity or less but cumulatively having a fossil fuel storage capacity in excess of 2 million gallons, located on separate parcels or land will be classified as a Bulk Fossil Fuel Terminal when two or more of the following factors are present:

a. The facilities are located or will be located on one or more adjacent parcels of land. Adjacent includes separated by a shared right-of-way;

b. The facilities share or will share operating facilities such as driveways, parking, piping, or storage facilities;

or

c. The facilities are owned or operated by a single parent partnership or corporation.

3. Gasoline stations and other retail sales of fossil fuels are not Bulk Fossil Fuel Terminals.

4. Distributors and wholesalers that receive and deliver fossil fuels exclusively by truck are not Bulk Fossil Fuel Terminals.

5. Industrial, commercial, institutional, and agricultural firms that exclusively store fossil fuel for use as an input are not Bulk Fossil Fuel Terminals.

7. The storage of fossil fuels for exclusive use at an airport, surface passenger terminal, marine, truck or air freight terminal, drydock, ship or barge servicing facility, rail yard, or as part of a fleet vehicle servicing facility are not Bulk Fossil Fuel Terminals.

8. Uses that recover or reprocess used petroleum products are not Bulk Fossil Fuel Terminals.*

31 The city's ability to significantly impact interstate and international commerce in fossil fuels is, of course, limited. Export terminals can still be located in other cities throughout the region. Indeed, as the findings note, at least eight export terminals have been proposed in the region in places other than Portland. Record 317. Nonetheless, as Ordinance No. 188142 recognizes, the city enjoys several geographical and logistical advantages, including a location at the western end of a low-gradient railroad and barge route for heavy cargo through the Cascades, a corridor that is an economical conduit for fossil fuels from interior states for transshipment to overseas destinations. Record 48. Few other cities in the region are as well-placed as Portland to disturb the flow of fossil fuels in interstate commerce.
[*87]

With those observations, we turn to the cases cited by the parties. Dormant Commerce Clause jurisprudence is highly fact-specific, and the analysis often turns on identifying the most analogous fact patterns. In general, the cases cited by the city are distinguishable. The city relies [*88] heavily on Chinatown Neighborhood Ass’n v. Harris, 794 F3d 1136 (9th Cir 2015), in which the United States Court of Appeals for the Ninth Circuit upheld the State of California’s “Shark Fin Law,” which made it unlawful for any person to possess, sell, trade, or otherwise distribute shark fins anywhere in the state. The plaintiffs argued that the law violated the dormant Commerce Clause by curbing commerce in the flow of shark fins through the state to out-of-state markets. Id. at 1145. The Ninth Circuit rejected that argument, concluding that the law simply regulates conduct within the state, and any extraterritorial impacts of the law are incidental. Id. at 1146. The city argues for the same conclusion here: the FFT amendments simply regulate conduct within the state, and any extraterritorial impacts are incidental.

However, a critical difference between the present case and Chinatown Neighborhood Ass’n, is that in the latter case the state law did not purport to shield state residents from the impacts of an otherwise comprehensive prohibition. We believe it doubtful that the Ninth Circuit [*89] would have affirmed a statute that allowed state residents to possess, sell, or trade shark fins, and thus protected the existing domestic market in shark fins, but had the intent and effect of restricting the storage or transport of shark fins for interstate or international markets. 32 Similarly, in the present case, we think the Ninth Circuit would not affirm regulations that are intended and have the practical effect of prohibiting the storage or transloading of fossil fuel for interstate and international markets, but which largely protect the local fossil fuel economy and local end-users from the impacts of those regulations.

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Another Ninth Circuit case cited by the city, Rocky Mt. Farmers Union v. Corey, 730 F3d 1070, is also distinguishable. In Rocky Mt. Farmers Union, the California Air Resources Board adopted a low carbon fuel standard regulation for ethanol, an additive in fossil fuel. Id. at 1079-83. To comply with the fuel standard, a fuel blender had to keep the average carbon intensity of its total volume of fuel below the fuel standard’s annual limit, taking into account various credits available under a cap-and-trade scheme. Id. Out-of-state suppliers filed suit, arguing that the fuel standard violated the dormant Commerce Clause. Id. at 1086. The district court concluded that the fuel standard facially discriminated against out-of-state energy firms, because it took into account the origin of the fuel and the distance fuel travels to reach California. Id.

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32 Another significant difference is that in Chinatown Neighborhood Ass’n, the Ninth Circuit noted that Congress had adopted legislation prohibiting “finning” or the taking of shark fins in all U.S. waters. Id. at 1140. Thus, the state law prohibiting the possession, etc., of shark fins of any origin within the state was entirely consistent with federal legislation. Id. at 1144. Indeed, the Ninth Circuit first had to determine whether congressional legislation had already preempted or occupied the field of shark finning. Id. In the present case, as far as we are informed Congress has passed no law restricting interstate or international commerce in fossil fuels. If anything, it is more probable that federal statutes foster the free flow of fossil fuels in interstate (and international) commerce. See Raymond Motor Transp., Inc., 434 US at 440 (“[I]t never has been doubted that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. In areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause--where local and national powers are concurrent--the Court in the absence of congressional guidance is called upon to make delicate adjustment of the conflicting state and federal claims.” (Internal citations and quotation marks omitted.)); see also Pac. Merch. Shipping Ass’n, 639 F 3d at 1178 (“The foreign commerce context places further constraints on state power because of the special need for federal uniformity.”).
The Ninth Circuit disagreed, concluding that the fuel standard did not facially discriminate against interstate commerce, because the state based its standards on the carbon intensity of fuel sold in the state, not on the fuel's origin. [*91] 730 F3d at 1078. The Ninth Circuit remanded to the district court for a determination of whether the regulation's ethanol provisions discriminated in purpose or practical effect. Id. If not, it was to apply the *Pike* balancing test. *Id.*

The city argues that, like the state fuel standard at issue in *Rocky Mt. Farmers Union*, the FFT amendments are facially neutral regarding the origin of fossil fuels, with no motive to protect local economic actors from out-of-state competition. However, we have already concluded that the FFT amendments are not facially discriminatory, or designed to protect in-state economic actors from direct out-of-state competition. The question is whether the FFT amendments discriminate against interstate commerce in purpose or practical effect. We fail to see how the holding or facts in *Rocky Mt. Farmers Union* assists the city. The facts in *Rocky Mt. Farmers Union* would be closer to all fours with the present case if the fuel standard had limited fuel terminals in the state in a manner that effectively prohibited storage or transloading of high-carbon fuels intended for other states or to international markets. [*92] but allowed high-carbon fuels to continue to be stored, transloaded and sold at current levels to California residents, with numerous exemptions to protect local economic actors from the impacts of the restriction on commerce in high-carbon fuels effectively imposed on fuel that passes through to other states. 33 One of the signal characteristics of a law that discriminates in purpose or practical effect in violation of the dormant Commerce Clause, and is thus subject to elevated scrutiny, is unequal treatment between in-state and out-of-state economic actors or markets. *Or. Waste Sys., 511 US at 99* (discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"); see also *Philadelphia v. New Jersey, 437 US 617, 628, 98 S Ct 2531 (1978)* (*"It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate [*93] trade."). Despite the facial neutrality of the FFT amendments, the city has done all it can to effectively eliminate any city role in the export of fossil fuels, while continuing to provide for existing and projected local consumption of fossil fuels. *Hunt v. Wash. State Apple Adver. Comm'n, 432 US 333, 350,* (referring to "the Commerce Clause’s overriding requirement of a national "common market"" (internal citations omitted)). Nothing cited to us in *Rocky Mt. Farmers Union*, or any other case, suggests that a law with that purpose and that practical effect can avoid elevated levels of scrutiny under the dormant Commerce Clause analysis.

[*94]

Among the dormant Commerce Clause cases cited to us are two cases involving zoning or land use regulations. The city relies on *Wal-Mart Stores, Inc. v. City of Turlock, 483 F Supp 2d 987, 991-92 (E D Cal 2006)*, which involved a city zoning text amendment that created three new categories of commercial retail land uses: discount stores, discount clubs, and discount superstores. Under the amendments, the first two categories were allowed as conditional uses in commercial zones, but the last category, discount superstore, was not allowed in any city zone. *Id.* Wal-Mart, which operated a discount store in the city but sought to establish a discount superstore, argued that the prohibition on establishing a discount superstore in any zone discriminates against interstate commerce in practical effect, because it prevents Wal-Mart, an out-of-state retailer, from operating within the city in Wal-Mart's preferred superstore format. *Id. at 1009-14.* However, the district court rejected those arguments, concluding that the facially neutral ordinance did not

33 In addition, the Ninth Circuit recognized that the federal Clean Air Act expressly authorizes California to adopt its own fuel standards. 730 F 3d at 1078. Again, in the present case, no party cites us to any act of Congress authorizing a city or state to regulate the size or number of fossil fuel transportation facilities in a manner that has the practical effect of prohibiting export terminals.
discriminate against interstate commerce because any retailer, in-state or out-of-state, can locate retail operations in the city, and offer any products, except in the discount superstore format. Id. The court held that the Commerce Clause does not protect the preferred structure or methods of a retail operation, or the right to conduct business in the most efficient manner. Id. In the present case, the city argues likewise that FFT owners are not entitled to establish terminals in any preferred format or conduct terminal operations in the most efficient manner.

Like the present case, Wal-Mart Stores, Inc., involved creation of a new land use category, which the ordinance then prohibits within the city. However, the resemblance mostly ends there. In the present case, the city deems a particular commodity in interstate commerce (fossil fuels) to be undesirable and therefore adopts steps to freeze the number and size of facilities that meet local demands for that undesirable commodity, and to preclude facilities that would store and transload the undesirable commodity for further shipment to interstate and international markets. In Wal-Mart Stores, Inc., the commodities at issue were desirable, it was only the size and format of the building in which the goods would be sold to which the city objected. 483 F Supp 2d at 1012. Before and after the zoning amendments in Wal-Mart Stores, Inc., the same type and quantity of goods flowed from the stream of interstate commerce to enter the city and be sold. Id. The only difference was that after the amendments those goods would have to be sold in smaller retail outlets, not in the larger superstore format that Wal-Mart preferred. Id. at 1016. By contrast, in the present case, if the FFT amendments achieve the city's goals, the amendments strongly affect the type and quantity of fossil fuels that could potentially flow into and out of the city from the stream of interstate commerce. Prior to the FFT amendments, a new propane or coal export terminal could be sited within the city, to transload those types of fossil fuels from North Dakota or Montana for shipment to overseas markets. Under the FFT amendments, such facilities are effectively prohibited, and the types and quantities of fossil fuels that are stored and transloaded in the city are, as a practical matter, limited to those needed to satisfy the current and projected future local or regional demand. 34

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To put the circumstances in Wal-Mart Stores, Inc. on a closer footing with the present case, imagine that the City of Turlock objects to the import of goods manufactured overseas, and adopts amendments that prohibit new distribution centers that receive and transfer foreign-made goods to stores across the United

34 The city's findings recognize that the establishment of fossil fuel terminals in the region would significantly increase the quantity of fossil fuels flowing into, and out of, the state. As the findings note:

"There is a wide margin between the size of recently proposed crude oil, coal, and (LNG) terminals in the Pacific Northwest and the scale of expected growth of existing Portland fuel terminals that generally serve the regional market area." Record 330.

In other words, due to the large volumes of fossil fuel that could be transported via fossil fuel export terminals (like the Pembina project), if established in the city or elsewhere in the region or state, these export terminals would significantly increase the amount of fossil fuel that enters the state, compared to any increase attributed to local or regional consumption. Record 46 (Figure 7). Conversely, if the city succeeds in discouraging the establishment of fossil fuel export terminals in the city, that could effectively reduce the quantity of fossil fuels that would otherwise cross state lines, and which is intended to again cross state lines on its way to interstate or international markets. Generally, a law with the intent and the effect of reducing the free flow of commerce across state lines is viewed with suspicion under the dormant Commerce Clause. See Hughes v. Oklahoma, 441 US 322, 337-38, 99 S Ct 1727 (1979) (statute prohibiting the transport of minnows out of the state violates the dormant Commerce Clause, because it "overtly blocks" the flow of interstate commerce at the state's borders); but see Maine v. Taylor, 477 US 131 (state law prohibiting import of baits in order to protect health of unique and fragile state fisheries survives Commerce Clause challenge because the prohibition serves a legitimate local purpose that cannot be adequately served by available nondiscriminatory alternatives).
Petitioners argue, and we agree, that the circumstances in Island Silver Spice, Inc. v. Islamadora, 542 F3d 844 (11th Cir 2008), bear a closer resemblance to the present circumstances. In Island Silver Spice, Inc., a municipality adopted zoning amendments that effectively prohibited establishment of new "formula" restaurants and retail establishments, defined as a retail sale establishment required by contract to provide a standardized array of services or merchandise, décor, architecture, layout or similar standardized features, by limiting street level frontage and total square footage only for "formula" establishments, but not for similar retail uses. Id. at 845. The apparent target of the zoning prohibition was nationally and regionally branded formula retail stores, such as chain pharmacies. Id. The zoning amendment did not facially discriminate against out-of-state stores; nonetheless, the Eleventh Circuit concluded that by limiting the square footage and street frontage for "formula" establishments, the amendment had the practical effect of discriminating against interstate commerce, because it effectively [*100] eliminated the establishment of new regionally and nationally branded retailers, a quintessential type of interstate commerce. The Eleventh Circuit therefore applied the elevated scrutiny test and ultimately concluded that the amendment failed that test. Id. at 847.

The present circumstances are similar to those in Island Silver Spice, Inc., in that in both cases the city objects to a particular article or aspect of commerce that is intrinsically interstate in nature (nationally branded retail stores on the one hand, fossil fuels on the other hand), and adopts a zoning amendment that prohibits establishment of such uses, or the expansion of existing uses above a certain size, but allows existing undesirable uses to continue in the city essentially as nonconforming uses. 542 F3d at 846-47 (noting [*101] the municipality's existing zoning allowed the use of the subject property as a retail use comprising over 12,000 square feet of floor area, greatly exceeding the ordinance's dimensional limitations for "formula retail" businesses). In Island Silver Spice, Inc., the Eleventh Circuit had no trouble concluding that a municipality's efforts to prohibit new and expanded nationally branded formula retail uses (by limiting square footage and street frontage) had a discriminatory practical effect on interstate commerce. Id.

The Eleventh Circuit then considered whether the zoning amendment was supported by a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. 542 F3d at 847. In Island Silver Spice, Inc., the stated purposes of the zoning ordinance prohibiting "formula" retail included the protection of the municipality's small town character. Id. The Eleventh Circuit concluded that while preserving small town character is a legitimate purpose, the municipality had no small town character to preserve, because the town already included a number of pre-existing formula retail businesses, and

35 Indeed, the Eastern District of California rejected a similar argument made by Wal-Mart. As the court stated: "[The ordinance] leaves the market open to all local or foreign retailers of all local or foreign products, except in the discount superstore format. The Commerce Clause does not protect the particular structure or methods of operation of a retail market.") Wal-Mart Stores Inc., 483 F Supp 2d at 1012.

36 The Eleventh Circuit also affirmed findings that the zoning amendment failed under the Pike balancing test. Id. at 847 n 2.
had [*102] no historic district or affected historic buildings. *Id.* Further, the Eleventh Circuit noted that the zoning ordinance included exceptions that would allow smaller formula retail stores, as well as large non-formula retail establishments, none of which furthered preservation of a small town character. *Id.* at 847-48. Because the municipality failed to identify a legitimate local purpose to justify the amendment’s discriminatory practical effects, the Eleventh Circuit invalidated the amendments without considering whether the municipality could show that adequate, nondiscriminatory methods were available to achieve the legitimate local purpose. *Id.*

In the present case, the city argues that its stated interests in reducing vulnerability to seismic damage and reducing the city’s contribution to climate change caused by fossil fuel consumption are both legitimate local interests, and we agree. However, as explained below, the FFT amendments do not, in fact, appear to further those interests. Moreover, the city makes no effort to demonstrate that adequate, nondiscriminatory methods are unavailable to meet those interests.

With respect to vulnerability [*103] of existing FFTs to seismic events, the FFT amendments appear to do nothing to reduce that vulnerability. 37 With respect to new or expanded FFTs, such facilities would presumably comply with modern seismic codes, and it is not clear how a blanket ban on new or expanded FFTs serves the purpose of reducing vulnerability of FFTs to seismic events. It is also not clear why the city could not continue to allow new or expanded FFTs in industrial areas of the city that are not located on soils subject to liquefaction, instead of broadly prohibiting new and expanded FFTs everywhere in the city. Further, the FFT amendments allow without restriction (1) small fossil fuel terminals below two million gallons in size, (2) unlimited size mono-modal fossil fuel terminals served only by trucks, as well as (3) terminals of any size that handle non-fossil fuels such as bio-diesel and ethanol, in the same industrial areas that are vulnerable to seismic shocks. We are cited to no evidence that seismic damage to a biodiesel tank farm would be any less catastrophic than seismic damage to a tank farm of petro-diesel, or that an intermodal petroleum terminal is any more susceptible than a similarly [*104] sized mono-modal petroleum terminal served only by trucks. There is no evidence presented to us that the express target of the FFT amendments, intermodal terminals, is uniquely vulnerable to seismic damage compared to mono-modal facilities.

In short, although reducing vulnerability to seismic damage is a legitimate local interest, the FFTs amendments appear to do very little, if anything, to reduce that vulnerability, and are riddled with exceptions that appear to undermine any steps toward reducing vulnerability to seismic damage that the amendments might achieve. Further, and most importantly for our analysis here, the amendments appear to favor local interests, to the detriment of interstate and international market interests. Finally, as noted, the city makes no attempt to demonstrate that there are no adequate, nondiscriminatory [*105] alternatives to serve the local interest in reducing vulnerability to seismic damage to FFTs. Based upon the record before us, it is not clear that such a showing can be made.

The city’s other stated goal—reducing the city’s contribution to global warming and climate change—is an entirely laudable goal. However, the city identifies nothing in the FFT amendments directed at actually accomplishing that goal. The FFT amendments include no provisions designed to reduce the local consumption of fossil fuels, and thus the local emission of greenhouse gasses. In implementing Policy 6.48, the city attempted to limit local FFTs to serve only the regional demand for fossil fuels, but the amendments do not propose anything to reduce local or regional demand. As discussed with regard to Goal 12, the city’s working assumption is that local demand for fossil fuels will plateau and even decline in the foreseeable future, making new or expanded FFTs unnecessary. But the city does not identify anything in the FFT

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37 The PSC recommended draft offered existing FFTs an incentive to upgrade to current seismic standards, in exchange for a 10 percent expansion. However, the city council eliminated that incentive.
amendments that would cause or contribute to any plateau or decline in local fossil fuel demand and therefore reduce local greenhouse gas emissions. In other words, although [*106] the amendments prohibit new or expanded FFTs, under the city's assumptions—that local demand will plateau or decline—there is no basis to assume that new or expanded FFTs would ever be necessary to meet increased local demand. The prohibition on new or expanded FFTs appears to do little or nothing to further the city's interest in reducing local consumption or the carbon content of locally consumed fossil fuels.

The only scenario we can understand that could causally connect the prohibition on new or expanded FFTs with a reduction in local demand for fossil fuel (and a resulting reduction in local greenhouse gas emissions) would require that the city's working assumptions be incorrect, and in fact local demand for fossil fuel will increase in coming years beyond the capacity of the existing FFTs and of new small or mono-modal FFTs to accommodate. In that circumstance, the shortage of FFT capacity might cause a local shortage of fossil fuel that could raise prices, thus discouraging consumption and encouraging a transition to non-fossil fuel sources. However, that speculative chain of causation, contrary to the city's working assumptions, is a thin basis for meeting the city's burden [*107] of demonstrating the existence of a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

In any case, the most important impact of the FFT amendments for purposes of the dormant Commerce Clause analysis is the fact that the amendments are intended to and have the practical effect of precluding the establishment of new fossil fuel export terminals. We question whether the city's desire to preclude establishment of fossil fuel export terminals reflects a legitimate local interest. As noted, the city may well take responsibility for its own greenhouse gas emissions from local consumption of fossil fuels without running afoul of the dormant Commerce Clause (if those efforts create only incidental impacts on interstate commerce). However, we do not believe the city can, consistent with the dormant Commerce Clause, deliberately attempt to slow or obstruct the flow of fossil fuels from other states to consumers in other states or countries with the apparent goal of reducing generation of greenhouse gases elsewhere in the world, and justify that attempt as a legitimate local interest.

Finally, even if reducing fossil fuel [*108] consumption and emissions elsewhere in the world can be viewed as a legitimate local interest for purposes of the discriminatory practical effect analysis, as noted the city makes no effort to demonstrate that that purpose cannot be adequately served by reasonable nondiscriminatory alternatives.

In sum, we conclude that the FFT amendments are discriminatory in practical effect, and that the city has failed to demonstrate that the amendments serve a legitimate local interest or purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Accordingly, the FFT amendments violate the dormant Commerce Clause.

**B. *Pike* Balancing Test**

In the event that the FFT amendments are deemed to be nondiscriminatory and to have only indirect impacts on interstate commerce, we consider whether the FFTs amendments survive under the so-called "*Pike* balancing test." Under *Pike*, "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'" *Or. Waste Sys., 511 US 93, 99 [*109]* (quoting *Pike, 397 US 137, 142*).

As explained above, the FFT amendments appear to provide little if any local benefits with respect to reducing seismic vulnerability and reducing the city's local contributions to global warming. The city's other express goal of precluding export terminals is arguably the FFT amendments' most potentially significant burden on interstate commerce. It is difficult to evaluate how much of a burden the city's prohibition on new
or expanded FFTs would have on the establishment of new export terminals, or on the flow of fossil fuels into and through any future export terminals in the city or region, because the record includes no attempt to conduct that evaluation. Nonetheless, it is clearly the city’s intent that the impact on the interstate and international market in fossil fuels will be significant, and that few or no fossil fuel export terminals will become established in the city or perhaps even in the region. See Record 206 ("As we all experienced with the [P]embina proposal last year, the [city’s] zoning code actually allows fossil fuel terminals as a warehouse and freight movement use in our zoning [*110] code today without any limit on the size of these terminals. We, of course, passed [Resolution 37168] saying we’re going in a different direction and today is the proposal to put that into city law, into our code.")

Weighed against that burden are the putative local benefits. We understand the city and Riverkeeper to argue that precluding fossil fuel export terminals will provide local benefits in the form of reducing harm to its citizens caused by fossil fuel consumption in other countries, which are the final destination for fossil fuels that would be transloaded onto ships at the export terminals that the amendments effectively prohibit. The city argues that simply because "climate-change risks are ‘widely-shared’ does not minimize" a government’s interest in reducing contributions to global warming. Massachusetts v. EPA, 549 US 497, 522, 127 S Ct 1438 (2007) (concluding that Massachusetts has standing to file suit challenging denial of a petition for EPA rulemaking to adopt rules to reduce U.S. emissions that contribute to global warming and climate change). The city cites Rocky Mt. Farmers Union, 730 F3d at 1103, [*111] to argue that a state is free to regulate in-state commerce with the goal of influencing out-of-state choices of market participants. The city also cites Pac. Merch. Shipping Ass’n, 639 F 3d 1154, for the proposition that a state’s interest in protecting the health of its residents from air pollution far outweighs the federal interest in the free flow of commerce.

However, none of the cited cases support the proposition that a city or state can take steps to slow or block the flow of commerce to other states or countries, in an effort to prevent the blocked commodities from being consumed in those countries, causing air pollution in those countries that contribute to global warming, which in turn will adversely impact the citizens of the city or state (along with everyone else in the world). We do not believe that such attenuated benefits, which would literally apply to every person on the planet, can be reasonably described as "local" benefits, for purposes of the Pike balancing test.

The Massachusetts case held that the impacts of global warming on the state (e.g., increased erosion to coastlines) gave the state standing to challenge denial [*112] of a petition for the EPA to issue rulemaking directed at reducing national carbon emissions, given the United States' role as one of the world's biggest contributors to carbon emissions. 549 US 497, 521-526. However, nothing in the case suggests that the state has a uniquely "local" interest or benefit in preventing the flow of fossil fuels across the state to other countries, in order to reduce the consumption of fossil fuels in those other countries, for purposes of the Pike balancing test.

As noted, Rocky Mt. Farmers Union involved state rules imposing low carbon fuel standards on fuel sold in the state. 730 F3d 1070. The standards took into account the full carbon costs of producing and transporting ethanol intended for the California market, and in so doing, also considered the origin of the ethanol. 730 F3d at 1088-93. As Riverkeeper argues, the Ninth Circuit observed that carbon emitted in manufacturing ethanol in Iowa or Brazil impacts Californians as much as carbon emitted in Sacramento, given the widespread impacts of global warming. Id. at 1081. [*113] 38 The Ninth Circuit concluded that the fuel standards did not facially discriminate or discriminate in practical effect, but remanded to the District Court to determine if the impacts on interstate commerce clearly exceeded the putative local benefits under the

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38 However, the Ninth Circuit also found that California is "uniquely vulnerable to the perils of global warming," due to its long coastline, and dry fragile forests and deserts. 730 F3d 1070, 1106.
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The Ninth Circuit did not, of course, reach the remanded issue, but there is certainly language in the opinion suggesting that the "local benefits" to be balanced under *Pike* could include reducing the state's unique vulnerability to the impacts of global warming, achieved in part using the state's economic leverage to persuade out-of-state ethanol producers to reduce the carbon used to produce and transport fuel for the California market. *Id.*

However, the salient [*114*] difference between *Rocky Mt. Farmers Union*, and the facts presented to us here is that California's regulatory efforts were entirely directed at fuel intended for consumption in California. *730 F3d at 1079-80*. In the present case, the city's effective prohibition on fossil fuel export terminals (like the proposed Pembina project) is intended to slow or obstruct the flow of fossil fuel from other states to international markets, presumably to discourage the consumption of fossil fuels in other countries. At best, that effort, if successful, might slightly reduce consumption of fossil fuels in other countries, but there is no evidence or argument that the city would receive any particular local benefit in doing so. The city does not argue that it is "uniquely vulnerable" to global warming, or that it stands to gain or lose more than any other city in the world from infinitesimal reductions or increases in global warming.

Finally, *Pac. Merch. Shipping Ass'n*, 639 F 3d 1154, also does not assist the city. In *Pac. Merch. Shipping Ass'n*, the Ninth Circuit upheld under the *Pike* balancing test state rules requiring [*115*] vessel operators calling at a California port to use low-sulfur marine fuels within the state's territorial waters--rules intended to reduce coastal air pollution caused by burning high-sulfur marine bunker fuel that the record showed directly affected the health of the state's citizens. *Id. at 1159*. Notably, the rules included an express exemption for vessels traveling through territorial waters toward non-state ports or markets (known as the "innocent passage" provision). *Id. at 1158*. The Ninth Circuit held that the impacts on interstate or international commerce did not clearly exceed the well-documented local benefits of preserving the health of the state's citizens against coastal air pollution. *Id. at 1180-1182*. The present case differs, again, in that the FFT amendments do little or nothing to reduce or change local consumption of fossil fuels or local contributions to global warming, and the effective ban on fossil fuel export terminals would have, at best, only the most attenuated connection to reduced global warming and concomitant effects on the health of the city's citizens.

Reduced [*116*] to essentials, the FFT amendments represent the city's attempt to isolate itself to some extent from the national and international economy in fossil fuels. See *Chemical Waste Management v. Hunt*, 503 US 334, 341-42, 112 S Ct 2009 (1992) ("The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition," or a tax discriminating against interstate commerce even when such tax was "designed to encourage the use of ethanol and thereby reduce harmful emissions," for "in all of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." (Internal citations omitted.)). Given the city's geographic and strategic position astride a major trade route, its attempts to isolate itself from the national and international market in fossil fuels have far greater potential impact on those markets than would the same efforts by a more geographically isolated city. Weighed against those potentially [*117*] significant burdens on interstate commerce are local benefits from the legislation that, based on this record, appear to be attenuated at best. We conclude therefore that the burdens on interstate commerce are "clearly excessive" in relation to the putative local benefits, and the FFT amendments also fail under the *Pike* balancing test.

The ninth assignment of error is affirmed.

DISPOSITION
OAR 661-010-0071 provides that LUBA shall reverse a land use decision when the Board finds that the decision is unconstitutional. We concluded under the ninth assignment of error that the FFT amendments are inconsistent with the dormant Commerce Clause. Accordingly, reversal is the appropriate disposition.

The city's decision is reversed.

Index -- Glossary

BPS Portland city Bureau of Planning and Sustainability

FFT Fossil Fuel Terminal

FMP City of Portland Freight Master Plan

GLISP Guild's Lake Industrial Sanctuary Plan

DLCD Department of Land Conservation and Development

Metro Metro Regional Government

ODOT Oregon Department of Transportation

OFP Oregon Freight Plan

OTC Oregon Transportation Commission

OTP Oregon Transportation Plan

PCC [*118] Portland City Code

PCP Portland 1980 Comprehensive Plan, as amended (2011)

2035 PCP Portland 2035 Comprehensive Plan

PSC City of Portland Planning and Sustainability Commission

TPR Oregon Transportation Planning Rule

TSP City of Portland Transportation System Plan

WWC Intervenor-petitioner Working Waterfront Coalition
Appendix 6:

Oregon Court of Appeals decision
6.6 Appendix 6: Oregon Court of Appeals decision

No Shepard’s Signal™
As of: January 29, 2018 12:56 AM Z

Columbia Pac. Bldg. Trades Council v. City of Portland

Court of Appeals of Oregon
October 13, 2017, Argued and Submitted; January 4, 2018, Decided
A165618

Reporter
2018 Ore. App. LEXIS 43 *; 289 Ore. App. 739


Prior History: [*1] 2017001. Land Use Board of Appeals.

Disposition: Reversed and remanded in part.

Core Terms

amendments, terminals, fuels, fossil-fuel, dormant commerce clause, out-of-state, city’s, land use, substantial evidence, fossil, interstate commerce, regional, export, fossil fuel, discriminate, in-state, transportation, commerce, transportation facilities, plateau, planned, zoning, bulk, local benefit, regulation, million gallons, land use regulation, interstate, requires, burdens

Counsel: Maura C. Fahey argued the cause for petitioners Columbia Riverkeeper, Oregon Physicians for Social Responsibility, Portland Audubon Society, and Center for Sustainable Economy. With her on the brief were Scott Hilgenberg and Crag Law Center.

Denis M. Vannier argued the cause for petitioner City of Portland. With him on the brief were Linly F. Rees, Maja K. Haium, and Lauren A. King.

Bruce L. Campbell and William L. Rasmussen argued the cause for respondents Columbia Pacific Building Trades Council, Portland Business Alliance, and Western States Petroleum Association. With them on the brief were Steven G. Liday and Miller Nash Graham & Dunn LLP.
In this review of an order by the Land Use Board of Appeals (LUBA), we first consider whether certain zoning code amendments enacted by the City of Portland violate the dormant Commerce Clause of the United States Constitution. The amendments were designed to stop the expansion of existing fossil-fuel [*2] terminals and limit the size of some new terminals within the city. Contrary to LUBA’s opinion and order, we conclude that the amendments do not violate the dormant Commerce Clause. The other issues, more traditional to land use disputes, are whether the amendments are inconsistent with Statewide Planning Goal 2, OAR 660-015-0000(2), and Statewide Planning Goal 12, OAR 660-015-0000(12). As to those issues, we conclude, first, that LUBA’s order is not unlawful in substance when it concludes that the amendments violated Goal 2. However, we conclude that the portion of LUBA’s order indicating that the city did not comply with Goal 12 is unlawful in substance. As a result, we reverse LUBA’s opinion and order as it relates to the dormant Commerce Clause and Goal 12 and otherwise affirm.

THE BASIC PROCEDURAL HISTORY

The city and Columbia Riverkeeper (Riverkeeper), among others, petitioned for judicial review of a LUBA order that reversed City Ordinance No. 188142 (the ordinance).¹ That ordinance amends the city’s zoning code and, with some exceptions, prohibits new fossil-fuel terminals and caps the size of existing terminals within the city.² After the city enacted the ordinance, respondents, including the Columbia Pacific Building Trades Council (Columbia Pacific), appealed [*3] to LUBA. Among other things, Columbia Pacific argued that the amendments violate the dormant Commerce Clause and are inconsistent with Statewide Planning Goals 2 and 12. LUBA, sitting as a one-member panel,³ agreed and concluded that the amendments violate the dormant Commerce Clause and Goals 2 and 12.

THE BACKGROUND FACTS AND AMENDMENTS

¹ The city and Riverkeeper filed separate petitions for judicial review. However, because they raise the same assignments of error to LUBA’s order, we do not distinguish between the two petitions in our analysis.

² The amendments are formally known as the Fossil Fuel Terminal Zoning Amendments.

³ The two other LUBA members did not participate in the decision.
We begin with a background of the relevant material facts and the amendments. The following facts and background are taken from the LUBA opinion,\(^4\) the relevant city ordinance, the amendments, and the Portland City Council resolution.

Portland is one of the largest ports on the West Coast, located at the confluence of the Columbia and Willamette Rivers. In 2015, there were industry proposals to build large fuel distribution terminals in the Pacific Northwest, including in an industrial area of the city, to facilitate the distribution of fossil fuels throughout the West Coast and to export markets. Besides Portland, there were proposals to build at least eight other large export terminals in other parts of the Pacific Northwest for distribution to export markets.

In November 2015, the Portland City Council unanimously passed Resolution 37168. Because of the city council’s concerns regarding, among other things, (1) the risks of the location of fossil-fuel infrastructure in an earthquake zone and (2) reducing the city’s contribution to greenhouse gasses, pollution, and climate change, the city council stated that it would “actively oppose expansion of infrastructure whose primary purpose is transporting or storing fossil fuels in or through Portland or adjacent waterways.” The resolution directed the Bureau of Planning and Sustainability (BPS) to develop proposed zoning code amendments to advance the policies in the resolution.

Relatedly, in June 2016, the city adopted a new comprehensive plan. That plan included a new policy, Policy 6.48, which states that it is city policy to “[l]imit fossil fuel distribution and storage facilities to those necessary to serve the regional market.” That policy did not take effect until January 2018. However, the city cited it as guidance when adopting the amendments.

In response to Resolution 37168, BPS prepared the draft amendments and the city council then unanimously adopted them with some changes. The amendments amend the city zoning code to create a new land use category called “Bulk Fossil Fuel Terminals.” The amendments identify the areas\(^5\) in which bulk fossil-fuel terminals are permitted. The amendments permit all “Existing Bulk Fossil Fuel Terminals,” but those facilities cannot expand beyond the storage capacity that they had as of the effective date of the amendments. The amendments also prohibit new “Bulk Fossil Fuel Terminals,” essentially prohibiting new fossil-fuel terminals that store more than 2 million gallons of fossil fuel, but permitting those that store 2 million gallons or fewer. There are seven exceptions, discussed later in this opinion, that permit the construction of new bulk terminals that hold more than 2 million gallons. Those exceptions include allowances for construction of new bulk terminals in places like airports that store airplane fuel, retail gas stations, and terminals built for distributors and wholesalers who receive and deliver fuel solely by trucks.

The existing terminals consist of 10 petroleum terminals and one natural gas terminal clustered in industrial northwest Portland. Those are centrally located near the terminus of the Olympic Pipeline, which delivers petroleum products from refineries in the Puget Sound that are bound for markets in Oregon and southwest Washington. The terminals\(^6\) sit in an area that is in a moderate- to high-risk earthquake liquefaction zone. In enacting the amendments, the city noted that Portland had experienced numerous earthquakes in the past, ranging from magnitude 4.5 to 9.0, and that it is certain to experience seismic events in the future. Many of the individual storage tanks were built before seismic design requirements were adopted.

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The existing terminals hold from 11.6 to 67 million gallons and supply approximately 90 percent of the fossil fuel for Oregon. The terminals have approximately 300 tanks that store petroleum products and gas, which are typically transloaded into other modes of transportation (trucks, trains, pipelines) for delivery throughout Oregon. As noted, much of the petroleum and gas coming through Portland is bound for Oregon, but some of the products go outside the state to places such as Washington. While Oregon is an importer of fossil fuels and gas, no fossil-fuel sources or refineries exist either in Portland or more generally in Oregon. As discussed more fully below, Oregon does not have companies or individuals who are competitors in the market for the export of fossil fuels to other states or countries. Oregon [*7] is not a participant in that export market.

THE AMENDMENTS DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The city and Riverkeeper contend that LUBA erred when it concluded that the amendments violate the dormant Commerce Clause. As discussed below, we agree.

We will reverse a LUBA order if we determine "[t]he order to be unlawful in substance." **ORS 197.850(9)(a).** The city and Riverkeeper contend that LUBA incorrectly applied the law when it held that the amendments violate the dormant Commerce Clause. Thus we turn to the law. As suggested by its title, the dormant Commerce Clause is not expressly stated in the United States Constitution. The Commerce Clause provides Congress the power "[t]o regulate Commerce * * * among the several States." **US Const, Art I, § 8, cl 3.** The dormant Commerce Clause is the negative implication of that provision, as developed through case law, that "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." **Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 98, 114 S Ct 1345, 128 L Ed 2d 13 (1994).**

The dormant Commerce Clause applies equally to state and local laws. **C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 389, 114 S Ct 1677, 128 L Ed 2d 399 (1994).** When applying the dormant Commerce Clause to a particular local law, "the first step * * * is to determine whether [the law] regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." **Oregon Waste Systems, Inc., 511 U.S. at 99** (internal quotation marks omitted). "Discrimination" under [*8] the dormant Commerce Clause "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." **Id.**

Discriminatory restrictions on commerce are "virtually per se invalid." **Id.** Nondiscriminatory local laws that have only "incidental" effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." **Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S Ct 844, 25 L Ed 2d 174 (1970).** The burden of demonstrating that a regulation discriminates against interstate commerce "rests on the party challenging the validity" of that regulation. **Hughes v. Oklahoma, 441 U.S. 322, 336, 99 S Ct 1727, 60 L Ed 2d 250 (1979).** Here, that party is Columbia Pacific.

Thus, the first legal question we must address is whether the amendments differentially treat in-state and out-of-state economic interests such that the amendments benefit the former and burden the latter. The dormant Commerce Clause discrimination analysis examines whether the local regulation discriminates against interstate commerce "either on its face or in practical effect." **Hughes, 441 U.S. at 336** (emphasis added). Columbia Pacific does not appear to argue before us, and did not contend before LUBA, that the amendments discriminate against interstate commerce on their face. Rather, it contends that [*9] the practical effect of the amendments is to discriminate against interstate commerce in a way that violates the
dormant Commerce Clause. Accordingly, we examine whether the practical effect of the amendments is to discriminate against interstate commerce in a way that violates the dormant Commerce Clause. We determine that they do not.

To address whether the amendments discriminate in effect, we must define the economic interests at stake because, under the dormant Commerce Clause, “any notion of discrimination assumes a comparison of substantially similar entities.” General Motors Corp. v. Tracy, 519 U.S. 278, 298, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997) (footnote omitted); see also United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 342, 127 S Ct 1786, 167 L Ed 2d 655 (2007) (stating same). “[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market, there can be no local preference *** to which the dormant Commerce Clause may apply.” General Motors Corp., 519 U.S. at 300.

Columbia Pacific argued before LUBA, and we understand it to contend before us, that the amendments disfavor out-of-state economic sellers, fossil-fuel refineries and distributors that might build large fossil-fuel export terminals in the city to export fuel through the city to national or international markets beyond just Oregon and regional northwest markets. In contrast, it contends that the amendments favor local, in-state purchasers [*10] and end users of bulk fossil-fuel shipments by allowing size exceptions for facilities that serve local end users of fuel. LUBA, in its dormant Commerce Clause analysis, made a somewhat similar comparison, stating that the effect of the amendments was

"to effectively restrict interstate or international commerce in fossil fuels [through Portland], while at the same time shielding its citizens and local end-users to some extent from the adverse consequences of the restrictions on new or expanded terminals."

Columbia Pacific Building Trades Council v. City of Portland, Or LUBA (LUBA No 17-001, July 19, 2017) (Columbia Pacific) (2017 Ore. Land Use Bd. App. LEXIS 63 at *85). As discussed below, that is not an apt comparison of purportedly "substantially similar entities" under the dormant Commerce Clause.

Here, it is inappropriate to compare out-of-state bulk exporters of fossil fuels (refineries and distributors of fuel) to in-state end users of bulk fossil fuels in a claim of economic discrimination. That is not the comparison that the United States Supreme Court has insisted upon when comparing "substantially similar entities" in and out of state. General Motors Corp., 519 U.S. at 298-99. In Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125, 98 S Ct 2207, 57 L Ed 2d 91, reh'g den, 439 U.S. 884, 99 S. Ct. 232, 99 S. Ct. 233, 58 L. Ed. 2d 200 (1978), the Court rejected an argument that a Maryland law discriminated against out-of-state petroleum refiners and producers by prohibiting them from operating their [*11] company-owned retail gas stations within the state of Maryland. In rejecting that claim of economic discrimination, the Court stated:

"Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless."

Id.

Columbia Pacific contends that the city discriminates against out-of-state producers and refiners of fossil fuels when compared to the in-state end users of those fuels because the city generally prohibits fossil-fuel terminals that store over 2 million gallons of fuel, which Columbia Pacific contends will effectively prevent producers and refiners from creating an international distribution site, but allows for a number of exceptions
that permit end users of fuel in Oregon to store over 2 million gallons of fuel for local use, such as airport storage, agricultural use, and local retail use.\(^5\) We conclude that that cannot constitute discrimination under the dormant Commerce Clause because it is not discrimination between substantially [*12] similar out-of-state and in-state economic entities.

A more apt comparison in this case would be to examine how the amendments affect out-of-state versus in-state bulk exporters of fossil fuels. However, even looking at that relationship, the amendments are not discriminatory "in practical effect." As noted, Oregon has no in-state economic entities that are involved in the refining or distribution of fossil fuels. As LUBA correctly recognized, "[t]he city, and Oregon, have no local refineries or sources of fossil fuel to promote or protect against competitors." *Columbia Pacific, Or LUBA at ___* (2017 Ore. Land Use Bd. App. LEXIS 63 at *84). As a result, the amendments cannot disfavor out-of-state exporters when compared to "substantially similar" in-state exporters because there are no producers, refiners, or distributors in Portland or Oregon, much less ones that export fuel to national or international markets. See *Exxon Corp., 437 U.S. at 125* (holding that Maryland law did not discriminate against out-of-state producers and favor in-state ones because there "are no local producers or refiners" to protect).

*Columbia Pacific also contends that the amendments violate the dormant Commerce Clause because Portland cannot regulate or effectively prevent "unwanted commerce" from reaching its confines, which [*13] Columbia Pacific argues is a form of economic discrimination under the dormant Commerce Clause. LUBA similarly concluded that, even if the amendments are "not a classic form of economic protectionism vis-à-vis out-of-state competitors," the amendments are a "species of protectionism" that improperly shield Portland from certain trade, the national and international export of fossil fuels, that undermines the dormant Commerce Clause. *Columbia Pacific, Or LUBA at ___* (2017 Ore. Land Use Bd. App. LEXIS 63 at *86).*

In support of its contention that it is economic discrimination for states or local governments to bar "unwanted commerce," even if there is no discrimination against out-of-state interests and in favor of in-state interests, *Columbia Pacific significantly relies upon Philadelphia v. New Jersey, 437 U.S. 617, 98 S Ct 2531, 57 L Ed 2d 475 (1978).* In that case, a New Jersey law, with limited exceptions, banned the import of out-of-state waste for disposal within New Jersey. *Id. at 628.* While *Philadelphia* notes that New Jersey may not isolate itself from the national economy through its laws, it ultimately holds that the New Jersey law violated the dormant Commerce Clause because it discriminated against substantially similar out-of-state and in-state economic interests. *Id. at 627-29.* The law barred all waste originating out-of-state from being disposed of in New Jersey landfills, but allowed [*14] disposal of in-state waste. *Id. at 629.* The Court concluded that the New Jersey law blocked the importation of out-of-state waste "in an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause." *Id.*

\(^5\) The exceptions are fossil-fuel storage for (1) freight terminals that have storage capacity of 2 million gallons or less and that do not have transloading facilities; (2) gasoline stations and other retail distributors of fossil fuels; (3) distributors and wholesalers that receive and deliver fossil fuels exclusively by truck; (4) industrial, commercial, institutional, and agricultural firms that exclusively store fossil fuel for use as an input; (5) uses that involve the transfer or storage of solid or liquid wastes; (6) exclusive use at an airport, surface passenger terminal, marine, truck or air freight terminal, rail yard, or as part of a fleet vehicle servicing facility; and (7) uses that recover or reprocess used petroleum products.
We conclude that the amendments in this case do not bar out-of-state commerce from entering or operating within the state in the same manner that that New Jersey law improperly prevented out-of-state commerce from reaching New Jersey in Philadelphia. Unlike in that case, the amendments do not bar the interstate delivery of out-of-state products, here fossil fuels, into Oregon. Indeed, the amendments do not prohibit fuel exports to or through Portland, but place restrictions on the size of certain fuel terminals that may be used as export facilities. As discussed, they also do not discriminate against similarly situated out-of-state and in-state economic interests. As a result, LUBA’s conclusion that the amendments violate the dormant Commerce Clause because they discriminate against interstate commerce is unlawful in substance.

Finally, Columbia Pacific contends that [*15] the amendments discriminate in violation of the dormant Commerce Clause because United States Supreme Court precedent prohibits states from providing their own consumers advantages over out-of-state consumers. See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 581, 117 S Ct 1590, 137 L Ed 2d 852 (1997) (holding that a Maine property tax exemption that favored camps that served mostly local residents and penalized camps that had almost all out-of-state campers facially discriminated against interstate commerce). But, as with the analysis above, those cases consider the effect of the state or local statute on similarly situated economic actors—i.e., in-state and out-of-state consumers. In Camps Newfound/Owatonna, Inc., for instance, the Maine property tax at issue did not tax Maine camps that served largely in-state campers, but did tax Maine camps that served otherwise similarly situated out-of-state campers. Id. That resulted in a greater financial burden on out-of-state campers in Maine than on in-state campers. Id. The amendments here do not favor Oregon consumers when compared to out-of-state consumers. They do not regulate the conduct of out-of-state consumers in Oregon, nor do they regulate out-of-state consumers’ conduct in their states.

Having concluded that the amendments [*16] do not discriminate as that term is understood under the dormant Commerce Clause, we turn to whether the amendments survive the balancing test set forth in Pike.

As noted, nondiscriminatory local laws that regulate "even-handedly to effectuate a legitimate local * * * interest" and have only "incidental" effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142. In full, the United States Supreme Court describes the test as follows:

"Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Id. (internal citation omitted). Here, the amendments are an exercise of local authority over a particularly local concern, [*17] land use regulations regarding the size and location of large fossil-fuel terminals.

LUBA concluded that the amendments impose burdens on interstate commerce that are clearly excessive in relation to the putative local benefits. Columbia Pacific, Or LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *113). We disagree and, in contrast, conclude that Columbia Pacific did not meet its burden to demonstrate that the claimed burdens on interstate commerce are clearly excessive in relation to the putative local benefits.
The burden remains on Columbia Pacific, as the party challenging the local law, to demonstrate that any burden imposed by the law on interstate commerce is clearly excessive in relation to the putative local benefits. See, e.g., Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F3d 391, 399 (9th Cir), cert den, 515 U.S. 1143, 115 S. Ct. 2580, 132 L. Ed. 2d 830 (1995) (stating same); cf. Shaffner et al. v. City of Salem et al., 201 Ore. 45, 52-53, 268 P2d 599 (1954) (stating that local zoning ordinances have a presumption of validity and reasonableness and the burden is on the challenging party to show the ordinance is invalid or unconstitutional).

As an initial matter, we conclude that the amendments provide legitimate putative local benefits, which include limiting the number of very large fossil-fuel terminals in a moderate- to high-risk earthquake liquefaction zone. The amendments also seek to reduce the risk of potential explosions, accidents, and [*18] fire at large fossil-fuel terminals and to reduce the similar risk of a catastrophic accident from the larger trains that transport fossil fuels to the terminals. In addition, the amendments seek to protect local public health and limit exposure to coal containing heavy metals linked to cancer, birth defects, and other problems. In considering the amendments, the city noted the recent 2016 derailment of a train carrying oil through the Columbia Gorge, which led to a large oil spill, fire, and the evacuation of a significant portion of the city of Mosier. Of course, as LUBA noted, a significant degree of that risk remains because the city will still have existing fossil-fuel terminals that hold up to 67 million gallons, new terminals with a 2 million gallon capacity, and some new, larger terminals allowed by the city's exceptions. However, the amendments do seek to "effectuate[ ] legitimate local public interest[s]" in placing some limits on the extent of that risk and seeking to promote local health and safety. [*19] "[H]ealth and safety considerations [may] be weighed in the process of deciding the threshold question whether the conditions entailing [the] application of the dormant Commerce Clause are present." General Motors Corp., 519 U.S. at 307.

In applying the Pike test, the difficulty arises upon reaching the second step of the test, which involves assessing whether any burdens that the amendments impose on interstate commerce are clearly excessive in relation to the putative local benefits, and whether the local interest could be promoted through some lesser burden on interstate commerce. However, as LUBA noted:

"It is difficult to evaluate how much of a burden the city's prohibition on new or expanded FFTs would have on the establishment of new export terminals, or on the flow of fossil fuels into and through any future export terminals in the city or region, because the record contains no attempt to conduct that evaluation."

6 Portland's riverfront plateau areas, which account for over 90 percent of its industrial-zoned land, have a high susceptibility for soil liquefaction.

7 The city and Riverkeeper contend that the city's interest in reducing its contribution to climate change and effecting broader environmental interests are legitimate local interests. LUBA concluded that the city's efforts to restrict the city from becoming a national or international export site for fossil fuels, with the apparent goal of limiting greenhouse gasses elsewhere, was not a legitimate local interest. Columbia Pacific, Or. LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *107). We do not decide whether the city's interest in restricting the use of its land to prevent potential large fuel-export facilities and, thus, possibly reduce greenhouse gasses, is a legitimate local interest. Rather, we conclude that the amendments have other legitimate putative local health, safety, and land use benefits as discussed above.

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Columbia Pacific, Or LUBA at (emphasis added) (2017 Ore. Land Use Bd. App. LEXIS 63 at *109). In so concluding, LUBA placed the burden on the city to prove that the burden on interstate commerce is not clearly excessive in comparison to the local putative benefits. As noted, under the dormant Commerce Clause analysis, Columbia Pacific bears the burden of creating a record to demonstrate that the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. Kleenwell Biohazard Waste and General Ecology Consultants, Inc., 48 F3d at 399.

There is some discussion in the record that there was a prior proposal to locate a [*20] large propane gas terminal in Portland, later abandoned due to local opposition. There is also a reference to a number of proposals for large-scale petroleum, gaseous fuels, and coal terminals and facilities outside the city in other parts of the Northwest region, including in Washington. But there is no record developed to demonstrate how, presuming that they would be built in the city, the absence of large fossil-fuel terminals used for international or national export purposes in industrial land in the city would affect interstate commerce in fossil-fuel distribution or how that burden, to the extent demonstrated, compares to the local benefits in reducing the risks associated with the large terminals used to facilitate that trade. Absent such a showing, Columbia Pacific has not met its burden to demonstrate that the amendments are unconstitutional under Pike. For that reason as well, we disagree with LUBA that the amendments violate the dormant Commerce Clause and conclude that its order on that matter is "unlawful in substance." ORS 197.850(9)(a).

LUBA DID NOT ERR WHEN IT CONCLUDED THAT THE AMENDMENTS DO NOT COMPLY WITH GOAL 2

The city and Riverkeeper next contend that LUBA erred in concluding that the city's decision [*21] was not supported by an "adequate factual base" as required by Goal 2. Specifically, they argue that LUBA erred when it concluded that a portion of Finding 21 in the amendments lacked the requisite adequate factual base. We reject that argument because, under our standard of review, LUBA's opinion on this point was not "unlawful in substance." ORS 197.850(9)(a).

Finding 21 states:

"The potential impacts of the code amendments on constraining the fossil fuel supply to meet regional demand is uncertain. Fossil fuel demand in this growing region has been relatively flat over the last 15 years. At best, the demand for fossil fuel may increase moderately, as indicated by trend-based forecasts, or may plateau and decline with a continued shift to other modes of transportation, more fuel efficient vehicles, electric vehicles, and other carbon reduction strategies."

Before LUBA, Columbia Pacific argued that that finding was essential to the city’s decision not to allow expansion of existing bulk fossil-fuel terminals and that the specific finding that use of fossil fuels may

8 As noted above, existing bulk fossil fuel terminals and fossil-fuel terminals that store up to 2 million gallons continue to be permitted. While not an ideal structure, the existing terminals could, of course, be used for international or national export purposes even if they are currently used for regional distribution. The dormant Commerce Clause protects the interstate market and not "the particular structure or methods of operation in a * * * market." Exxon Corp., 437 U.S. at 127-28. "There is no constitutional right to do business in a[n] * * * optimally profitable * * * configuration" if the resulting operation burdens local land-use-planning interests. Wal-Mart Stores, Inc. v. City of Turlock, 483 F Supp 2d 987, 1012 (ED Cal 2006). Regardless, we need not decide whether the amendments burden the interstate market as opposed to only burdening particular structures or methods of operation. Columbia Pacific has not presented a record or met its burden to demonstrate the extent of any burdens on interstate commerce or how any such burdens are clearly excessive to the putative local benefits.
"plateau and decline" with a continued shift to other modes of transportation, more fuel efficient vehicles, electric vehicles, and other [*22] carbon reduction strategies was not supported by an adequate factual base as required by Goal 2. Columbia Pacific, Or LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *62). LUBA agreed with Columbia Pacific, concluding that Finding 21 was "key support for the prohibition on any expansion of existing terminals to meet * * * local or regional needs" and its conclusion that fossil-fuel use "may plateau and decline" was "not supported by substantial evidence, and hence not supported by an adequate factual base." Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *62).

In coming to those conclusions, LUBA examined the parts of the record that the city and Riverkeeper argued—both to LUBA and us—support Finding 21. Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *63). After reviewing that evidence, LUBA concluded that, "while [it] suggest[ed] that future demand for fossil fuel over the region or state may be lower than earlier projections or historical increases," it did not "suggest[ ] that the demand may plateau or decline" with the implementation of climate resilience goals and strategies. Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *63). As a result, LUBA noted that Finding 21 "essentially ignore[s] uncontradicted projections of moderate growth in demand for fossil fuels, and instead rel[ies] on what are no more than unsupported speculations that demand will actually plateau or decline" as justification for [*23] not allowing expansion of existing fossil-fuel terminals. Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *65).

"Goal 2 * * * requires that land use decisions have an 'adequate factual base.'" 1000 Friends of Oregon v. LCDC, 244 Ore. App. 239, 268 n 11, 259 P.3d 1021 (2011). "[A]n 'adequate factual base' is synonymous with the requirement that a decision be supported by substantial evidence." Id. When reviewing a record for substantial evidence, LUBA asks whether "the local government's decision * * * is based on facts that are * * * supported by substantial evidence in the whole record." Stevens v. City of Island City, 260 Ore. App. 768, 772, 324 P3d 477 (2014) (internal quotation marks omitted). That means, LUBA must decide "[i]f, viewing the record as a whole, a reasonable person could make the disputed factual finding." Id. Only then is the finding "supported by substantial evidence." Id.

Our judicial review is more limited. We review "LUBA's application of the substantial evidence rule for legal correctness and do[ ] not review the evidence independently for substantiality." Reinert v. Clackamas County, 286 Ore. App. 431, 446, 398 P3d 989 (2017). Thus, where LUBA "properly articulates the substantial evidence standard of review, we will affirm unless the evidence is so at odds with [LUBA's] evaluation that we can infer that [LUBA] misunderstood or misapplied the proper standard." Barkers Five, LLC v. LCDC, 261 Ore. App. 259, 348, 323 P3d 368 (2014) (internal quotation marks omitted).

Turning back to this case, we conclude [*24] that LUBA articulated and applied the correct legal standard. In its opinion, LUBA noted that, to comply with the "adequate factual base" requirement of Goal 2, a land use decision must be "supported by substantial evidence, i.e., findings of fact supported by evidence in the record which, viewing the record as a whole, would permit a reasonable person to make that finding." Columbia Pacific, Or LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *62). As a result we must turn to the evidence in the record to determine if it is "so at odds with [LUBA's] evaluation that we can infer that [LUBA] misunderstood or misapplied" that standard. Barkers Five, LLC, 261 Ore. App. at 348 (internal quotation marks omitted). Applying that standard here, we conclude that nothing in the record is "so at odds with" LUBA's decision that we can infer that LUBA misunderstood or misapplied the substantial evidence standard. Significantly, the only evidence in the record projecting future fossil-fuel demand cited to us by either party or LUBA are trend-based forecasts indicating that demand will moderately increase over time.
As a result, we conclude that LUBA's opinion is not "unlawful in substance" as it relates to Goal 2. **ORS 197.850(9)(a).**

On judicial review, the city and Riverkeeper present three additional arguments as to why LUBA's [*25*] decision regarding Goal 2 was flawed. First, Riverkeeper argues that LUBA incorrectly concluded that the city's finding that demand for fossil fuel may plateau and decline over time was not supported by substantial evidence because, in Finding 21, the city also recognized that projecting fossil-fuel demand was uncertain and that trend-based forecasts indicated that fossil-fuel demand may in fact rise instead. Second, the city and Riverkeeper argue that LUBA's decision was unlawful in substance because it placed undue weight on the city's conclusion regarding fossil-fuel demand. Specifically, they argue that, because the city's decision was also based on other findings that were supported by substantial evidence, the fact that one of the city's factual findings was not supported by substantial evidence does not mean the whole decision was not supported by substantial evidence. Third, Riverkeeper argues that LUBA's decision on Goal 2 is totally derivative of other arguments and, thus, does not provide an independent basis for remand. For the reasons discussed below, we reject all of those arguments.

First, we reject Riverkeeper's argument that the city's finding that demand for fossil [*26*] fuels may plateau and decline over time was supported by substantial evidence because, in Finding 21, the city also recognized that trend-based forecasts in the record contradicted that conclusion. As we have previously noted, those trend-based forecasts are the only evidence projecting future fossil-fuel demand in the record. Recognizing that countervailing evidence exists cannot, by itself, overcome a substantial evidence challenge. See *Barkers Five, LLC*, 261 Ore. App. at 362 (noting that an LCDC decision indicating that a county decision was supported by substantial evidence was unlawful in substance where, although LCDC recognized that there was "weighty, countervailing evidence," it disregarded that evidence by relying upon "speculative reasoning"). If a locality recognizes that evidence contradicting its decision exists and disregards it based upon "speculative reasoning," that decision lacks substantial evidence. *Id.*

That is exactly what happened in this case. The city recognized the "trend-based forecasts" in the record that projected a moderate increase in fossil-fuel demand. However, it disregarded that evidence, concluding instead that demand for fossil fuels may plateau or decrease over time based on a shift [*27*] to other transportation methods and away from fossil-fuel usage. While the city may, in fact, be correct that demand for fossil fuels may plateau or decline in the region based on a shift to other transportation and away from fossil fuel usage, the city fails to point to anything in the record that indicates that that may actually be the case. Other factors besides technological advances, such as population growth and changes in the import and export of goods in a region, affect fossil-fuel demand. Further, as Columbia Pacific correctly points out, the city made no effort to address whether the trend-based forecasts in the record already accounted for shifts in technology. Without any evidence in the record indicating how technological changes interact with those other factors to affect fossil-fuel demand, the city's conclusion is merely speculative, and no "reasonable person could make" that factual finding. *Stevens, 260 Ore. App. at 772.* As a result, given that recognizing countervailing evidence alone does not bring a decision within the auspices of "substantial evidence," we cannot conclude that LUBA's decision was "unlawful in substance" when LUBA determined that, despite that recognition, the city's finding [*28*] was not supported by substantial evidence.

We similarly reject the city and Riverkeeper's argument that LUBA's decision is unlawful in substance because it places undue weight on the city's conclusion that "demand for fossil fuel may * * * plateau and decline." According to the city and Riverkeeper, the city's decision to limit expansion of existing terminals and to cap the size of new terminals was supported by a number of factors other than the finding that demand for fossil fuel may plateau or fall. They point to evidence demonstrating that the city also considered...
safety, health, livability, and the industry's reluctance to retrofit seismically existing fossil-fuel terminals as additional support for the city's decision to restrict expansion of existing fossil-fuel terminals and cap the size of new terminals. As a result, they argue that the city's decision is supported by substantial evidence because no one disputes that the city's findings regarding those additional factors are supported by substantial evidence.

As we have noted, "[w]hen reviewing a land use decision, LUBA may reverse or remand the local government's decision if the decision is based on facts that are not supported [*29] by substantial evidence in the whole record." Stevens, 260 Ore. App. at 772 (internal quotation marks omitted; emphasis added). As noted, that means that, "[i]f, viewing the record as a whole, a reasonable person could make the disputed factual finding, then the finding is supported by substantial evidence." Id. (emphasis added). As a result, where a local government made a decision that is based on a critical finding that was not supported by substantial evidence, regardless of whether other adequately supported findings were also relied upon in making that decision, LUBA is required to reverse and remand that decision. See Barkers Five, LLC, 261 Ore. App. at 362 (holding that, "although the designation of land as urban reserve must be based on consideration of * * * factors, which requires, among other things, that the factors are weighed and balanced as a whole" and "although Metro and the counties need not demonstrate 'compliance' with any [one] factor," a land use decision still lacked substantial evidence where just one of those factors was weighed based on "speculative reasoning" in the face of "weighty, countervailing evidence squarely at odds" with that reasoning). LUBA's decision is not "unlawful in substance" insofar as LUBA correctly concluded [*30] that the decision lacked substantial evidence where that decision was made based on a finding that was not supported by substantial evidence.

Finally, we reject Riverkeeper's argument that LUBA's decision on Goal 2 is totally derivative of other arguments in other assignments of error and, thus, does not provide an independent basis for remand. Riverkeeper's argument is based on statements in LUBA's opinion indicating that, because of the city's "unique geographic and logistical position with respect to regional, statewide, interstate and international markets in fossil fuels," "the city has obligations" under Goal 12 and the Commerce Clause "to ensure that its plan and zoning regulations comply with the obligation to facilitate the flow of goods within the region and statewide" and that the city only purported to evaluate and address the local or regional flow of goods. Columbia Pacific, Or LUBA at ___ (2017 Ore. Land Use Bd. App. LEXIS 63 at *67). However, LUBA indicated that its holding regarding Goal 2 did not rely on that reasoning, stating, "even focused exclusively on the local or regional demand, the findings essentially ignore uncontradicted projections of moderate growth in demand for fossil fuels," and that, as a result, the city's findings on local and regional [*31] demand, which were "key support for the prohibition on any expansion of existing terminals," were "not supported by substantial evidence." Id. at ___ (2017 Ore. Land Use Bd. App. LEXIS 63 at *68). Accordingly, because the reasoning to which Riverkeeper objects is dictum, Riverkeeper's argument that LUBA's holding on Goal 2 is derivative and, thus, does not provide an independent basis for reversal and remand is unconvincing. Accordingly, we reject that argument as well.

LUBA's opinion is not "unlawful in substance" insofar as LUBA held that the city's finding that fossil-fuel demand may plateau and decrease over time was not supported by an "adequate factual base" as required by Goal 2. Accordingly, we affirm LUBA's conclusion that the amendments do not comply with Goal 2.

LUBA ERRED WHEN IT HELD THAT THE AMENDMENTS DO NOT COMPLY WITH GOAL 12

Finally, the city and Riverkeeper argue that LUBA erred when it held that the amendments did not comply with Goal 12. Specifically, they argue that, absent a showing that a land use regulation significantly affects
a transportation facility under OAR 660-012-0060, Goal 12 does not apply to that land use regulation. In response, Columbia Pacific argues—as LUBA concluded in its opinion—that OAR 660-012-0060 is narrower than Goal 12 and, [*32] thus, a land use amendment can comply with OAR 660-012-0060 and still violate Goal 12. We agree with the city and Riverkeeper and, accordingly, reverse LUBA's order because, insofar as it discusses Goal 12, the order is "unlawful in substance." ORS 197.850(9)(a).

LUBA concluded that the fossil-fuel terminals subject to the amendments are "transportation facilities" under Goal 12 and OAR 660-012-0060, Columbia Pacific, Or LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *35). LUBA then concluded that, although the fossil-fuel terminals are transportation facilities, the amendments do not "significantly affect an existing or planned transportation facility" under OAR 660-012-0060. Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *35). Nonetheless, LUBA concluded that the amendments violated Goal 12 because "there [was] no indication in the city's decision or in the record that the city * * * evaluated [the] considerations" specified in Goal 12. Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *53).

Specifically, LUBA noted that, even though the amendments—unquestionably land use regulations—did not "significantly affect an existing or planned transportation facility" under OAR 660-012-0060, the city was still required to address Goal 12 because "[a] plan or zoning amendment that changes the zoning classification for a specific type of transportation facility, particularly one that has regional and statewide significance, could potentially [*33] affect whether the local [transportation plan] remains in compliance with applicable Goal 12 * * * requirements that are in addition to those imposed under OAR 660-012-0060." Id. at (2017 Ore. Land Use Bd. App. LEXIS 63 at *51). LUBA was especially focused on the fact that OAR 660-012-0060 "is not particularly concerned * * * with [the] Goal 12 * * * requirements intended to facilitate the safe, efficient and economic flow of freight and other goods and services within regions and throughout the state through a variety of modes including road, air, rail and marine transportation." 2017 Ore. Land Use Bd. App. LEXIS 63 at *49 (internal quotation marks and brackets omitted) (2017 Ore. Land Use Bd. App. LEXIS 63 at *49).

LUBA's opinion and order is at odds with the plain text of Goal 12 and OAR chapter 660, division 12 (the Transportation Planning Rule or TPR). The text of Goal 12 states, "A transportation plan shall * * * facilitate the flow of goods and services so as to strengthen the local and regional economy." (Emphasis added.) Thus, Goal 12 is applicable only when a transportation or transportation system plan (TSP) is affected by a regulation. Here, neither the parties nor LUBA dispute that the amendments are not regulations that directly alter a TSP. Thus, for Goal 12 to apply, the amendments must be in some way inconsistent with the city's TSP. [*34] See Woodard v. City of Cottage Grove, 225 Ore. App. 282, 294-95, 201 P3d 210, rev den, 346 Ore. 362, 211 P.3d 931 (2009) (noting that a "plan inconsistency" identified under OAR 660-012-0060 "creates [the] need * * * to evaluate [the land use regulation] under the policies of Goal 12").

The Department of Land Conservation and Development (DLCD) created the TPR to implement Goal 12. OAR 660-012-0000; see also 1000 Friends of Oregon v. Yamhill County, 203 Ore. App. 323, 328, 126 P3d 684 (2005) ("OAR chapter 660, division 12, sets out rules implementing Goal 12, the 'Transportation' goal."); Citizens Against Irresponsible Growth v. Metro, 179 Ore. App. 12, 22 n 11, 38 P3d 956 (2002) ("OAR 660, division 12, is a * * * rule compilation that implements Goal 12."). The TPR requires cities and counties to adopt local TSPs that comply with the TPR. OAR 660-012-0015(3). The TPR also requires that all TSPs comply with Goal 12. OAR 660-012-0025(2). Finally, the TPR requires periodic review of TSPs to ensure continued compliance with the TPR—including continued compliance with Goal 12. OAR 660-012-0055(6).
Within the TPR, DLCD also contemplated a way to identify land use regulations that are inconsistent with, and thus affect, a locality’s adopted TSP between periodic reviews—\textit{OAR 660-012-0060}. See \textit{Woodard, 225 Ore. App. at 294-95} ("\textit{OAR 660-012-0060} regulates amendments to the comprehensive plan or land use regulations that are inconsistent with functional classification or performance standards of a transportation facility that are part of the transportation * * * plan."). \textit{OAR 660-012-0060(1)} provides that, "[i]f * * * a land use regulation [*35] * * * would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in * * * this rule, unless the amendment is allowed under [other sections] of this rule." It goes on to note that a land use regulation "significantly affects a transportation facility if it would * * * [d]egrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan." \textit{OAR 660-012-0060(2)(c)(B)}.

As noted, all TSPs must comply with Goal 12. \textit{OAR 660-012-0025(2)}. As a result, "the performance standards" of an "existing or planned transportation facility" "identified in [a] TSP" must, by law, comply with all of Goal 12's requirements. That includes the specific Goal 12 requirement that concerned LUBA in this case—\textit{i.e.}, that the TSP "facilitate the flow of goods and services so as to strengthen the local and regional economy." As a result, if a land use regulation does not ":[d]egrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan," as LUBA concluded the amendments did [*36] not in this case, that regulation also necessarily must not degrade those transportation facilities' ability to "facilitate the flow of goods and services so as to strengthen the local and regional economy" in a way that violates Goal 12. As a result, LUBA's order is unlawful in substance insofar as it concludes that the amendments do not degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP in violation of \textit{OAR 660-012-0060}, but also "potentially affect whether the local TSP remains in compliance with" Goal 12. \textit{Columbia Pacific, Or LUBA at (2017 Ore. Land Use Bd. App. LEXIS 63 at *51)}. Therefore, we must reverse LUBA's decision regarding Goal 12.

CONCLUSION

In sum, LUBA's opinion is unlawful in substance insofar as it incorrectly concludes that the amendments violate the dormant Commerce Clause. Further, the opinion is also unlawful in substance insofar as it concludes that the amendments comply with \textit{OAR 660-012-0060}, but do not comply with Goal 12. However, LUBA's decision is not unlawful in substance in determining that the amendments do not comply with Goal 2. Accordingly, on both Riverkeeper's and the city's petitions, we reverse and remand LUBA's order with respect to their assignments of error pertaining [*37] to the dormant Commerce Clause and Goal 12, but affirm with respect to Goal 2.

Reversed and remanded in part.
Appendix 7:

U.S. Corps of Engineers 2016 Memorandum for Record
6.7 Appendix 7: U.S. Corps of Engineers 2016 Memorandum for Record

CENWS-OD-RG 9 May 2016

MEMORANDUM FOR RECORD

APPLICATION: NWS-2008-260 Pacific International Holdings LLC (PIH) (previously Pacific International Terminals, LLC)

SUBJECT: Gateway Pacific Terminal Project and Lummi Nation’s Usual and Accustomed Treaty Fishing Rights at Cherry Point, Whatcom County

A. EXHIBITS—SEE ENCLOSURES

B. CHRONOLOGY OF REFERENCED SUBMITTALS

1. By letter dated 5 January 2015, the Lummi Nation of the Lummi Reservation (Lummi) submitted a request to Seattle District U.S. Army Corps of Engineers (Corps) to deny the Gateway Pacific Terminal (GPT) Section 404/10 permit application because of a greater than *de minimis* impact on their usual and accustomed (U&A) treaty fishing rights at Cherry Point, Whatcom County, Washington. With that request, the Lummi submitted (1) resolution #2014-154; (2) selections from the Vessel Traffic and Risk Assessment Study prepared by Glosten Associates dated 4 Nov 2014 (Glosten Vessel Traffic Study) and; (3) Lummi Fishermen’s Declarations. (Exhibits 4, 6, and 7).

2. By letter dated on 3 February 2015, the Corps requested additional information from the Lummi to assist with evaluating the impact to their treaty fishing right. To evaluate impacts on treaty fishing rights, the Corps conducts a *de minimis* determination to determine whether the impacts to treaty fishing rights are of legal significance. If it is legally significant, then Congressional authorization would be required to allow the impact. The process includes request for specific information in the form of declarations regarding the Lummi’s fishing and crabbing activities at or near the proposed project. (Exhibit 5)

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1 The references cited do not represent the entire administrative record for the NWS-2008-260 application.
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3. By letter dated 5 March 2015, the Lummi submitted additional fishermen declarations and maps, in addition to a declaration from the Lummi’s Fisheries Harvest Manager, Benjamin Starkhouse, explaining the fishing and crabbing productivity at Cherry Point. On 13 March 2015, the Lummi submitted one additional declaration inadvertently omitted from the 5 March 2015 submittal. (Exhibits 6-7)

4. By letter dated 10 April 2015, the Corps provided the Lummi information to the applicant, PIH, for a response. (Exhibit 9). On 5 May 2015, PIH requested an extension for submission of a response, and on 28 May 2015, the Corps granted a 60 day time extension.

5. By letter dated 21 July 2015, Ben Starkhouse, Lummi Fisheries Harvest Managers, sent stating that tribal fishers only keep catch data by the management areas 7A and 20A, and “the Lummi Natural Resources Department does not collect [more precise harvest location of fish and shellfish].” (Exhibit 10)

6. By letter dated 27 July 2015, PIH submitted a response to the Lummi information. The response included summaries of the Lummi declarations, declarations from previously litigated treaty fishing right court cases, documents from other permits with treaty fishing issues, information about vessel traffic rules, information regarding gear loss, a crab technical information report, a salmon technical information report, Cherry Point pacific herring technical information report, herring spawning report, clams technical information report, halibut technical information report, geoduck technical information, and sea cucumber technical information report. (Exhibit 11)

7. The Corps provided the information PIH had submitted on 27 July 2015 to Lummi via letter dated 28 July 2015. (Exhibit 12)
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8. The Lummi replied by letter dated 27 August 2015 to PIH’s submittal with materials from the Lummi Nation Fishing Gear Loss Forum, declarations used in Northwest Sea Farms v. S. Army Corps of Engineers, 931 F. Supp. 1515 (W.D. Wash. 1996), Washington State Department of Fish and Wildlife (WDFW) trawl survey and report, derelict fishing gear reports, and a crab survey. (Exhibit 13)

9. The Corps provided the Lummi’s 27 August 2015 response to PIH via letter dated 18 September 2015. (Exhibit 14)

10. By letter dated 5 October 2015, PIH submitted a reply to Lummi’s 27 August 2015 submittal with a brief outlining its strengths and the Lummi’s perceived weaknesses. Included in the submittal were additional technical reports regarding PIH’s allegation of limited crab and herring at the proposed site and only occasional fishing by the Lummi at the proposed site. (Exhibit 15)

11. The Corps provided this 5 October 2015 response to the Lummi via letter dated 8 October 2015. (Exhibit 16)

12. By letter dated 21 October 2015, the Lummi submitted a brief reply to PIH’s submittal briefly stating that the applicant had “not provided any meaningful new evidence or argument” in its last submittal. (Exhibit 17)

13. PIH submitted a Joint Aquatic Resources Permit Application (JARPA) to the Corps on 22 December 2015 including an operations plan to address potential impact to tribal fishing at the site.² (Exhibit 18). The JARPA was modified on 15 January 2016 with corrections made to

²The application had been withdrawn by PIH/GPT due to timing issues with WQC one year presumed waiver, and NEPA EIS process; however the Corps continued with the NEPA process in accordance with 33 CFR 325 App B. Revised applications were received 22 December 2015, 15 January 2016, and 18 March 2016.

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the drawings in response to comments from the Corps. (Exhibit 19). A second revised JARPA was submitted on 18 March 2016 updating the applicant information (revised applicant name) and providing the CZM form. (Exhibit 24). The application was deemed to be completed on 18 March 2016.

14. The Corps provided the 15 January 2016 modified JARPA and attachments to the Lummi on 11 February 2016. (Exhibit 20)

15. The Lummi provided a response to the new PIH application on 12 February 2016 stating that after review of the PIH submittal and application, no new information was necessary from their perspective. (Exhibit 21)

16. PIH submitted additional information responding to the Lummi’s allegations on 19 February 2016, which included information obtained from WDFW and the operations plan originally submitted with the JARPA. This information was provided to the Lummi via letter on the same day. (Exhibit 22)

17. The Lummi provided a response to the PIH information on 1 March 2016 indicating after review of the PIH’s December 22, 2015 and January 15, 2016 submittals, no new information was necessary from their perspective and that PIH’s proposed mitigation was not acceptable to address the perceived impacts to the treaty fishing right. (Exhibit 23)

18. On March 18, 2016, PIH submitted a JARPA with a correct Coastal Zone Management form, thereby, making the JARPA technically complete. (Exhibit 24). The Corps provided the updated JARPA to the Lummi on 29 March 2016. (Exhibit 25)

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C. FACTS

1. In February 2011, the Corps and PIH began the pre-application processing (NWS-2008-260) for GPT, a multimodal marine terminal for export of multiple dry bulk commodities, including a deep-draft wharf with access trestle and other associated upland facilities. GPT would be developed at Cherry Point in Whatcom County on approximately 283 acres of the 1,520-acre project site and would consist of a three-berth, deep-water wharf, rail facilities commodity storage areas, material handling equipment, and other required bulk handling infrastructure. Cherry Point is a geographic location north of Sandy Point and south of Birch Bay. The new wharf is proposed to be 3,000 feet long and 107 feet wide built on 730 48-inch steel piling, with access provided by a 1,285-foot long by 50-foot wide trestle built on 64 steel piles, 24 to 30 inches in diameter.\(^3\) The trestle and wharf will extend out to a depth of -85 feet Mean Lower Low Water (MLLW) (NAVD 88 datum). Upland facilities would include open and closed commodity storage areas, each serviced by a rail loop. Each area would contain support facilities, such as roads, maintenance buildings and stormwater treatment systems. A shared services area would connect the storage areas to the access trestle and wharf and would contain a roadway, conveyors, and service buildings. Commodities would be delivered to the PIH project site by rail via the existing BNSF Railway Custer Spur line to the Bellingham subdivision main line. GPT’s initial targeted commodity is coal from Powder River Basin sources for export to Asian markets. Other bulk commodities include, but are not limited to, grains, potash, calcined...

\(^3\)The March 18, 2016 JARPA changed the wharf configuration from a 2,980 foot long by 105 foot wide wharf to a 3,000 foot long and 107 feet wide wharf. The trestle changed from a 1,100 foot long and 50 foot wide trestle to a 1,285 long by 50 foot wide trestle.
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petroleum coke, and ores originating from sources in the Pacific Northwest. (Exhibit 18 at Paragraph A11).

2. The Lummi are signatories to the Point Elliott Treaty and have adjudicated U&A treaty fishing rights to include “the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay...” U.S. v Washington, 384 F.Supp. 312, 360-61, (W.D.Wash.1974). The proposed GPT is located within the Lummi Tribe’s adjudicated U&A Treaty fishing area.

3. The Lummi’s adjudicated U&A treaty fishing rights in general, extends north from Puget Sound north to Point Roberts and west to the Haro Strait. (Exhibit 13 at 4 & 16; see also United States v. State of Washington, 384 F. Supp. 312, 360 (W.D. Wash. 1974)). In United States v. State of Washington, Barbara Lane, a heavily relied upon expert in the case, noted the Lummi reef net grounds were located off Shaw Island, Orcas Island, Maldron Island, and off Cherry Point on the mainland. (Exhibit 26 at 24). GPT would be located at Cherry Point and within the Lummi’s adjudicated U&A area. Cherry Point is approximately 12 miles from the Lummi’s Reservation.

4. The Lummi is a fishing tribe with the largest fishing fleet of all the northwest tribes, and in the 1980s, the peak of the Lummi fishing industry, approximately 2,000 Lummi members where employed in the fishing industry. (Exhibit 13 at sub-exhibit B).

5. In general prior to taking fish or shellfish from waters within the jurisdiction of the State of Washington, persons are required to register and report catches to WDFW. See Washington Administrative Code (WAC) 220-20-010; WAC 220-56-175; and WAC 220-69-236. Cherry Point is within Salmon Management and Catch Reporting Area 7A. See WAC 220-
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22-030. Cherry Point is within Fish-Shellfish Management and Catch Report Area 20A (includes both crab and herring). See WAC 220-22-400. As the Washington State Department of Fish and Wildlife explains the co-management: “A 1974 federal (U.S. v. Washington) court case (decided by U.S. District Court Judge George Boldt) re-affirmed the tribe's rights to harvest salmon and steelhead and established them as co-managers of Washington fisheries.” WDFW also explains that as part of this co-management “Tribal and state biologists also cooperate in analyzing the size of fish runs as salmon and steelhead migrate back to their native rivers and hatcheries. This so-called “in-season management” ensures sport, tribal, and non-Indian commercial fisheries are appropriate for the actual salmon returns and allow optimum numbers of fish to spawn.”

WDFW explains that “Dealers participating in tribal fisheries send a fish ticket copy to WDFW and the Northwest Indian Fisheries Commission (NWIFC) to be entered into NWIFC’s Tribal Online Catch Account System (TOCAS).”

6. NWIFC also explains the co-management as “each tribe manages their own fisheries for salmon, other fin-fish and shellfish within guidelines jointly developed jointly with Washington Department of Fish and Wildlife (WDFW). Each tribe issues, and is responsible for enforcing, their own fishing regulations. All catch is verified and recorded by the respective tribal fisheries management departments, and the data entered to a computer database jointly maintained by the tribes and WDFW.”

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7. The Lummi’s submittals included 14 declarations from enrolled members of the Lummi Nation. (Exhibits 4, 6, and 7). Table 1 below is a summary of the fishing techniques, types of fish caught, and whether the declarant associates a cultural significance to the Cherry Point area, as described in each declarations. In addition to the declarations, each declarant included an annotated Cherry Point site map showing the areas where the declarant harvest fish and shellfish. The declarants indicated that they fished both by purse seine as well as by gill net and that they fished at the proposed project location at Cherry Point.\(^8\)

**TABLE 1**

<table>
<thead>
<tr>
<th>Name</th>
<th>Fishing Technique</th>
<th>Crabling Technique</th>
<th>Types of Fish/Shellfish</th>
<th>Cultural Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard Solomon</td>
<td>gill net</td>
<td>crab pots</td>
<td>herring, cod, salmon, clams, crabs</td>
<td>family/cultural heritage</td>
</tr>
<tr>
<td>Bernard Finkbonner</td>
<td>gill net, seine</td>
<td>not mentioned</td>
<td>salmon, crab</td>
<td>family/cultural heritage</td>
</tr>
<tr>
<td>Robert Finkbonner</td>
<td>gill net, reef netting, open skiff</td>
<td>not mentioned</td>
<td>herring, salmon, crab</td>
<td>family/cultural heritage</td>
</tr>
<tr>
<td>Cyril Andrew Morris</td>
<td>gill net, skiff, seine</td>
<td>crab pots</td>
<td>salmon, crab, halibut</td>
<td>family/cultural heritage</td>
</tr>
</tbody>
</table>

\(^8\)A purse seine is a large wall of netting deployed around an entire area or school of fish. The seine has floats along the top line with a lead line threaded through rings along the bottom. Once a school of fish is located, a skiff encircles the school with the net. The lead line is then pulled in, “pursing” the net closed on the bottom, preventing fish from escaping by swimming downward. The catch is harvested by either hauling the net aboard or bringing it alongside the vessel. [http://www.nmfs.noaa.gov/pr/interactions/gear/purseseine.htm](http://www.nmfs.noaa.gov/pr/interactions/gear/purseseine.htm), accessed 20 April 2016.

A gillnet is a wall of netting that hangs in the water column, typically made of monofilament or multifilament nylon. Mesh sizes are designed to allow fish to get only their head through the netting, but not their body. The fish's gills then get caught in the mesh as the fish tries to back out of the net. As the fish struggles to free itself, it becomes more and more entangled. A variety of regulations and factors determine the mesh size, length, and height of commercial gillnets, including area fished and target species. There are two main types of gillnets:

- Set gillnets are attached to poles fixed in the substrate or an anchor system to prevent movement of the net
8. As explained by the Benjamin Starkhouse, the Fisheries Harvest Manager for the Lummi Nation:

Lummi fishers primarily harvest salmon by purse seine and gill net. Purse seining typically involves a skiff and a larger boat deploying a wall of netting around a school of fish. The net typically has floats along the top and weights along the bottom, along with a lead line that can be pulled to “purse” the net closed on the bottom. The two ends of the net are brought together in order to encircle the school of fish. Gill netting involves hanging netting in the water straight up and down with a float line on the top and a lead line on the bottom. The size of the mesh on the gill net helps determine the size of the fish caught. Gill nets typically drift with the current, but can also be set in place with anchors or stakes.

Lummi fishers primarily harvest crab by pot fishing. Lummi fishers typically set 30 to 100 pots and utilize either a single line buoy or, by permit, a ground line. Ground lines typically contain 10 to 15 pots per line and consist of one buoy on each end of the line, and can vary significantly in length.
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The amount of time needed to process catch, whether fish or shellfish, depends on a number of factors and can vary significantly. Depending on the processing method, the amount caught, and the technique used. Lummi fishers may be unable to change positions on the water during the time needed to process the catch. Additional variables (e.g., weather, tides, etc.) may significantly influence the amount of space and time needed by Lummi fishers to effectively exercise their treaty right.

9. Bernard Finkbonner in his declaration explaining his concerns that “I have had many close calls in this area. You can only pick up your nets so fast. It takes about an hour. It is hard fishing at night because you have to stay awake because you don’t want to get run over.” (Exhibit 4 at 78)

10. Also included in the Lummi’s submittal dated 5 January 2015 was the Glosten Vessel Traffic Study. The study addressed GPT’s impact on the Cherry Point and the impact on the Lummi’s fishing activities. (Exhibit 1). GPT has a proposed full operational capacity of 487 total annual vessel calls (318 Panamax ships and 169 Capesize ships). The study divided the area being analyzed into seven subareas and grouped those subareas into three larger groupings. The Cherry Point subarea includes the southern waters of the Strait of Georgia, from Orcas Island in the south, north to the Canadian border, including Boundary Bay. The proposed GPT facility located at Cherry Point is within the Cherry Point subarea. The study found the Lummi Fishers spend 1/3 of their time in the Cherry Point subarea for fishing

9 A settlement agreement was reached in 1999 between the above parties that resolved the appeals to the 1997 Shoreline Substantial Development] permit issued [by Whatcom County]. An agreement made during the 1999 settlement required that the Washington Department of Ecology oversee an analysis by PIT of the additional ship traffic brought by the proposed GPT. In addition, during 2011 the Lummi Nation, which was not a party to the 1999 Settlement Agreement, identified additional topics that it wanted addressed as part of a vessel traffic analysis for the modified version of the GPT project proposed during 2011. Both Ecology and PIT agreed to include the topics identified by the Lummi Nation in the vessel traffic analysis.”(Exhibit 1 at .xix).

10 For additional detail regarding the subareas and groupings review the Glosten report’s definitions. (Exhibit 1 at pg xx).
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activities, and predicted GPT would increase the Lummi fishing disruption by 76% in the Cherry Point subarea, and 19% in the Saddlebag subarea which is south of the Cherry Point subarea, when compared to the predicted baseline vessel traffic in 2019. (Exhibit 1 at 259). The report also concluded that for every 5% increase in vessel traffic, Lummi fishermen would expect to lose an additional two or three crab pots or traps. (Exhibit 1 at 269). The report also concluded “the facility disruption in Cherry Point is attributable to the physical area that the proposed GPT facility will occupy.” (Exhibit 1 at 280).

11. As noted above in paragraph 5-6, the State of Washington has set up catch reporting areas for salmon and crab management. Salmon catch Area 7A includes the Cherry Point area and is from about Sandy Point north to the Canadian Border and west to into the Strait of Georgia to the Canadian Border. Crab management catch area 20A likewise includes the Cherry Point area but does not follow the same boundaries as the salmon catch area 7A; catch area 20A extends north to the Canadian border and south to Lummi Island. These catch areas are different than the subareas established in the Glosten vessel traffic study. However, all areas include Cherry Point and the footprint of the GPT project.

12. In the Lummi’s 5 March 2015 submittal, Fisheries Harvest Manager for the Lummi Nation, Benjamin Starkhouse, submitted a declaration with a summary of fish and shellfish catch data from “fish tickets.” (Exhibit 6). Using the Tribal Online Catch Accounting System (TOCAS) database, Starkhouse compiled catch data from Lummi fishermen for the period of 1975 to 2014. The data submitted showed that for the period of 1975 to 2014, the Lummi fishermen caught 10,739,762 chinook, chum, coho, pinks, and sockeye. In catch area 20A for
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the period of 1975 to 2014, Lummi fishermen caught 24,376,546 Dungeness crab. In catch area 20A for the period of 1975 to 1987, the Lummi fishermen caught 9,463,636 herring.

13. On 21 July 2015, Mr. Starkhouse provided an additional letter informing the parties precise harvest location of fish and shellfish is not required under the regulations, and therefore is not collected by the Lummi Natural Resources Department. (Exhibit 10)

14. On 27 July 2015, PIH submitted a response arguing the Lummi’s declarations were inadequate and inaccurate and could not meet the de minimis threshold; the project area is not a productive U&A fishing site; the project area is a small percentage of the Lummi’s U&A area; and mitigation efforts included with the proposal will offset impact to U&A fishing. (Exhibit 11). PIH’s response argues the declarations are not specific in terms of when, what, and where Lummi fishermen caught fish or shellfish, and it argues the aggregate catch data from Mr. Starkhouse is too generalized to be used to infer the GPT footprint is a productive fishing site. (Exhibit 11 at 6). PIH argues the declarations provided in Muckleshoot v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1998), and Northwest Sea Farms, Inc. v. U.S., 931 F. Supp. 1515 (W.D. Wash. 1996), provide necessary details required to meet the de minimis threshold, while the Lummi declaration are formulaic and not useful for making a de minimis determination. (Exhibit 11 at 7-9). PIH also argues the Lummi declarations do not explain why the proposed mitigation efforts do not offset the Lummi concerns. (Exhibit 11 at 9-11).

15. PIH, in its 27 July 2015 response argues the GPT’s impacts are of inconsequential effect because the trestle, wharf, three ships at birth, and new vessel approach lane only occupy 122 acres within the 910,890 acres of the total Lummi U&A area. (Exhibit 11 at 9-10). Moreover, PIH alleges the 122 acres is not a productive U&A fishing area. PIH alleges that 93%
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of the Lummi’s 7A fishing effort occurs at Point Roberts, not Cherry Point. (Exhibit 11 at 19-20). PIH evidences their argument by comparing 7A areas to other catch areas and using derelict gear data to draw an inference of where fishermen actually fish. Similarly, PIH alleges crabbing in Cherry Point is not productive or regularly crabbed, and PIH relies, in part, on derelict gear data from Northwest Straits Initiative and video surveillance of the project site. PIH also notes that the Cherry Point herring are a subpopulation of the Georgia Strait meta-population of Pacific Herring, and have experienced a long-term decline since the 1970’s. PIH notes the fishery does not presently exist at the project site and maintains its restoration is speculative. PIH concludes the building of GPT will not prevent or limit re-colonization. (Exhibit 11 at 25). PIH also argues clams, halibut, geoduck, and cucumbers populations at Cherry Point are limited. (Exhibit 11 at 26).

16. PIH argues the impacts from increased vessel traffic and the project footprint can be avoided, minimized, or mitigated. PIH’s mitigation measures are primarily managing the flow of tug and tanker traffic transitioning from the shipping lanes into the Cherry Point area and to the GPT wharf. PIH would also implement a program to increase communication with the Lummi fishers to keep them informed of transiting vessels’ positions and intentions. Fishing would also generally be allowed shoreward of the wharf. (Exhibit 11 at 10-11).

17. On 27 August 2015, Lummi replied to PIH’s 27 July 2015 submittal. The reply stated additional concerns regarding the ballast water being transferred by the GPT destined ships and the increased vessel traffic due to increase bunker fuel needed for the increased bulk carriers coming into Cherry Point. The VTRAS predicts barrels of bunker oil to increase between 122% and 243%. (Exhibit 13).
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18. The 27 August 2015 Lummi submittal included a 2008 Gear Loss Forum summary by
Merle Jefferson, a Lummi member. (Exhibit 13 at sub-exhibit B). In that summary, it is
highlighted 40-50 crab pots per fisherman are lost annually at Cherry Point. The summary
asserts the economic ramification is approximately $750 per pot, not including lost opportunity
costs. The summary asserts that tug/barge traffic (460 barges at Cherry Point), and tanker traffic
(445 tankers at Cherry Point), as the primary cause of loss gear. The gear loss was attributed to
existing traffic; additional gear loss would occur with additional traffic.

19. In reply to the PIH’s allegation that Cherry Point is not productive crabbing area, the
Lummi submitted a WDFW 2001 trawl survey of the southern Strait of Georgia, San Juan
Archipelago and adjacent waters, which included Cherry Point. (Exhibit 13 at sub-exhibit D).
The survey found Dungeness crabs greatest station density was at Bellingham Bay, south of
Lummi Island, off Cherry Point, Point Roberts Reef, Birch Bay, Padilla Bay, and East Lopez
Sound. (Exhibit 13 at Exhibit D). The Lummi also submitted a day survey conducted on 18 Aug
2015 during a 24-hour tribal crab fishery to evidence the Lummi fishermen crab at Cherry Point.
(Exhibit 13 at sub-exhibit F).

20. In reply to PIH’s allegation that a lack of derelict fishing gear at the Cherry Point area
indicates little U&A fishing at the project site, the Lummi submitted the Northwest Strait
Initiative Department of Defense Diver Training Derelict Fishing Gear Removal Project report
dated 31 October 2008, and argue that this report did not extensively scan the Cherry Point area.
(Exhibit 13 at sub-exhibit E). According to Joan Drinkwin, director of Northwest Straits
Foundation, the Foundation surveyed only areas at the depths where current divers can retrieve
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derelict fishing gear, which is why the foundation does not thoroughly survey the Cherry Point area. (Exhibit 13 at sub-exhibit E).

21. The Lummi also discuss the cultural significance of the Cherry Point as a site and U&A fishing as “inextricably linked to the Lummi Schelangen (“Way of Life”). (Exhibit 13 at 1). The Lummi also acknowledge the serious decline of the herring stock, and, as evidenced in their declarations, assert that they would fish for herring should the stocks ever rebound.

22. On 5 October 2015, PIH submitted a response to the Lummi’s 27 August 2015 submittal. (Exhibit 15). In PIH’s response, it emphasizes tug and barge traffic at GPT will not occur and thus, will not contribute to gear loss, and the proposed mitigation factors adequately address the Lummi’s U&A concerns. PIH again emphasizes the GPT project’s footprint and operation is proportionally a very small area of Cherry Point and consequently the impact of the project is de minimis. PIH highlights the Glosten Vessel Traffic Study concluded the percent of total Lummi fishing “vessel days-area” affected will only be an absolute increase from 0.11% to 0.19% noting the absolute increase in disruption is only 0.08% (0.19 – 0.11 = 0.08). (Exhibit 15, at 5). In general, the Glosten study calculated “vessel days-areas” by using vessel traffic days combined with the area the vessel traffic occupies in nautical miles.

23. The 5 October 2015, PIH submittal also argued the Lummi currently avoid vessel traffic lanes and therefore additional traffic in these lanes should not interfere with current Lummi fishing practices. Similarly, PIH argued the wharf will not block access to fishing areas because the wharf’s design will allow the Lummi to fish next to the wharf, and the operation of the facility’s tugs and tankers will be managed so the Lummi can effectively fish in the occupied area. (Exhibit 15 at 4-6). PIH also argues that “while not being able to set drift nets within the
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perimeter of the wharf itself may be considered exclusionary by the Lummi, there is no evidence that fishing directly adjacent to the wharf is not effective, recognizing that Fraser River salmon migrate through the area but are not resident there.” (Exhibit 15 at 8).

24. The 5 October 2015, PIH submittal also supplements its argument that the Lummi evidence does not show the Lummi regularly fish or crab at the Cherry Point area. To support this assertion, PIH highlights the information provided is not specific to the Cherry Point area and other catch areas are fished more frequently than Cherry Point. In particular, PIH asserts Point Roberts, Boundary Bay, Birch Point, Point Whitehorn, and Sandy Point, respectfully, are where the Lummi regularly fish and where 80% of their salmon catch is from. PIH again emphasizes derelict gear is not found at Cherry Point, which evidences the Lummi do not fish or crab in the area on more than an occasional basis.

25. Regarding the Cherry Point herring, PIH states there is no herring fishery at this time and there has not been for many years. PIH also states that any issues regarding access to any future fishing for herring can be addressed in the future. (Exhibit 15 at 20).

26. On 21 October 2015, the Lummi’s responded to PIH’s 5 October 2015, submittal with a three page letter. (Exhibit 17). The letter did not provide additional information, but re-emphasized the Lummi’s position in its previous submittals.

27. The 22 December 2015 JARPA submittal contained a report “Port Operations and Safety Plan to Facilitate Tribal Fishing” (the Plan) dated 21 December 2015. (Exhibit 18). The Plan memorialized and provided more detail regarding the methods by which PIH proposes to avoid and/or minimize impacts to Lummi fishing. The Plan explains deep draft bulk carriers would be expected to arrive or depart the wharf, on average, every 18 hours throughout the year.
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Tugs would be present to assist vessels, but no barges would be present and no bunkering would occur on site. PIH proposes mitigation for these impacts by the establishment of an Inshore Traffic Zone, providing advance notification to tribal fishers of vessel position and movement, allowing crab fishing along the shoreward face and operating side of the wharf and underneath the trestle (using ground-lines), and installing a pendant on the last piling on both the north and south ends of the wharf for attachment points for gill nets. For crabbing on the operating side of the wharf, fishers would be encouraged to fish primarily during periods when a vessel is not present at berth and will be temporarily restricted when vessels are maneuvering. An Operational Safety Zone temporarily limiting fishers in the direct proximity of vessels during approach, moorage, and departing maneuvers would also be established.

28. On 12 February 2016, the Lummi’s responded to PIH’s JARPA submittal with a one page letter. (Exhibit 21). The letter did not provide additional information, and stated “no additional information is warranted” to process the de minimis determination.

29. On 19 February 2019, PIH provided a 3rd submittal of information. (Exhibit 22). Besides including the Plan submitted with the JARPA, PIH provided additional analysis based on information gathered from WDFW. PIH used information from WDFW’s aerial overflights, on-board observers, reports of derelict crab and salmon fishing gear, and enforcement investigations, to claim the GPT site is not regularly fished by anyone. The information shows there were more observations of fishing in 2002-2004 than within the last few years. (Exhibit 22 at 9).
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30. On 1 March 2016, the Lummi’s responded to PIH’s 3rd submittal with a one page letter. (Exhibit 23). The letter did not provide additional information, but re-emphasized the Lummi’s position in its previous submittals.

31. A second revised JARPA was submitted on 18 March 2016 updating the applicant information and providing the CZM form. (Exhibit 24). The application was deemed to be completed on 18 March 2016, and it was forward to the Lummi on 29 March 2016. (Exhibit 25).

32. While the above documents discuss vessel traffic impacts, the primary focus of the Corps analysis is on the physical impacts on tribal treaty rights caused by the proposed GPT wharf and trestle.

D. OVERVIEW OF INDIAN TREASURY LAW

A treaty is a binding agreement or contract between independent nations or sovereigns. Between 1778 and 1871, the United States entered into about 400 treaties with various Indian nations on a government-to-government basis. Under the United States Constitution, treaties are accorded precedence equal to federal law. Treaty rights are binding on all federal and state agencies, and take precedence over State constitutions, laws and judicial decisions. Treaty terms, and the rights arising from them, cannot be rescinded or cancelled without explicit Congressional consent. States cannot spontaneously regulate the exercise of treaty rights, but Congress does have the authority to provide federal regulation or authorize state regulation placing reasonable restrictions to achieve conservation purposes (for example, time, place or manner restrictions) on the exercise of treaty rights. U.S. v. State of Washington, 384 F.Supp. 312, 333-334 (W.D. WA 1974).
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The rights defined in Indian treaties were not a grant of rights from the United States to the tribes, but were instead a reservation of rights held by the tribe as a sovereign people from time immemorial. Indian treaty rights are property rights which may not be taken without an act of Congress.

The Lummi Nation is a signatory to the Treaty of Point Elliot. This treaty was negotiated and signed by Governor of the Washington Territory, Isaac I. Stevens, in 1855. The Stevens treaties, including the Treaty of Point Elliot, contain a standard clause regarding the tribe’s reserved right to fish:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory… Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens.”

In U.S. v. Washington (Boldt I), 384 F. Supp. 312, 360-61 (W.D. Wash. 1974), Senior Judge Boldt adjudicated the nature and extent of the Tribes’ off-reservation fishing rights with respect to anadromous fish. This decision established the locations of the Tribes’ U&A grounds and stations and found the Tribes were entitled to take fifty percent of the harvestable fish from those grounds and stations. The Lummi have adjudicated U&A grounds and stations in the Puget Sound, in particular, within, near and around the Cherry Point area. Id. Productive fishing locations change over time as fish populations and environmental conditions change. The tribes have the right to follow the fish to any place within the Boldt I boundaries. Therefore, any place within the boundaries set forth by Boldt I where tribal members have fished in the past, currently fish, or may fish in the future, is a “usual and accustomed” place. A tribe’s treaty right to fish at its U&A fishing grounds necessarily includes a right of access to those grounds, which is at issue with the GPT project.
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Further explanation of the analysis of U&A treaty fishing rights is found in *Northwest Sea Farms*, 931 F.Supp.1515 (W.D. Wash. 1996). In that case the court, affirmed the Corps fiduciary duty to take treaty rights into consideration in making its permit decisions. The court also held the right of access to fish and the right of taking a certain number of fish were mutually exclusive protections, and could not be balanced against each other; each must be considered independently.

The courts have also looked at what degree of impacts must be considered when looking at U&A treaty fishing rights. In *Lummi v. Cunningham* (Exhibit 27), the court acknowledged that in considering treaty rights, one need not look at *de minimis* impacts stating:

To accept the plaintiff’s contention that a *de minimis* interference with treaty rights is always a treaty violation is to accept a legal theory which would conceptually support such irrational ruling as, for example, injunctive relief against pleasure boats crossing usual and accustomed fishing areas like the disposal site at issue in this case. Such a theory would be neither reasonable nor legal.

The plaintiff is correct in asserting that "determination of the violation of a treaty fishing right is not a balancing test.” However, before the bright line test can be asserted, the interference with the treaty right must reach a level of legal significance . . . This conclusion can also be based on the plaintiff’s own formulation of an appropriate test as to whether treaty fishing rights have been violated: "[H]as the access right been impaired, limited, or eliminated?"

Thus the *de minimis* review, whether the impacts rise to the level of legal significance, applies to both Lummi’s U&A treaty right to access as well as their right to take fish. If the impact to either is greater than *de minimis*, in other words the impact is legally significant, the Corps would be required to deny the permit because only Congress can abrogate a treaty right.

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E. FINDINGS: GPT WOULD HAVE A GREATER THAN *DE MINIMIS* IMPACT ON THE LUMMI’S U&A TREATY RIGHTS.
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There is no dispute about whether Cherry Point or the proposal’s footprint is within Lummi’s U&A treaty fishing area, rather only whether the effects of the proposal will have a greater than de minimis impact on the Lummi’s treaty fishing rights. PIH contends (1) there is not enough evidence in the record to show a greater than de minimis impact; (2) GPT’s project area is not a productive area and is not fished or crabbed by the Lummi on more than an extraordinary basis; (3) GPT’s impact is proportionally insignificant compared to the total Lummi U&A areas; (4) potential future impacts to a potentially restored herring fishery should not be considered; (5) fishing and crabbing can occur effectively around the wharf, and the proposed mitigation reduces the impacts to a de minimis level. Each of these issues have been thoroughly evaluated and considered by the Seattle District.

(1) The evidence in the record supports the finding of a greater than de minimis impact. PIH contends the Lummi’s evidence is inadequate to establish GPT’s impacts would have greater than a de minimis impact on the Lummi’s U&A treaty rights, and also contends whether the Lummi actually exercise tribal treaty fishing rights at the site on greater than an extraordinary basis. The parties are not contesting whether the Cherry Point area is within the Lummi’s U&A territory.

The Lummi have provided 14 tribal declarations stating tribal members exercise their fishing treaty rights in the Cherry Point area. The declarations describe the methods on how tribal members fish; this includes gill netting, seine net fishing, and skiff net fishing with nets as long as 330 fathoms (1,980 feet). In general, these types of methods require a fishing net to be deployed and either dragged or left drifting through the water to capture fish. Additionally, the declarations describe the method on how tribal members crab; this includes the deployment of
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crab pots (up to 100 pots) on a buoyed line with different spacing ranging from 10 fathoms to 100 fathoms (60 feet to 600 feet). Accompanying the declarations are maps marked by the declarant showing where they have fished and/or where they currently fish for herring, cod, salmon, and halibut. Similarly, the maps also show where the tribe set crab pots. On the map is the footprint of GPT, and all the maps show fishing or crabbing within or near the footprint of GPT. Nine declarations describe past participation in the herring fisheries and two maps were provided showing herring fishing in the immediate vicinity of GPT.

In addition to the tribal members’ declarations, Benjamin Starkhouse, Fisheries Harvest Manager for the Lummi, provided a declaration and data establishing catch areas 7A and 20A, which are inclusive of Cherry Point and the GPT footprint, have resulted in millions of fish and shellfish catches by Lummi fishermen. In catch area 7A for the period of 1975 to 2014, the Lummi fishermen caught 10,739,762 chinook, chum, coho, pinks, and sockeye. In catch area 20A for the period of 1975 to 2014, Lummi fishermen caught 24,376,546 Dungeness crab. In catch area 20A for the period of 1975 to 1987, the Lummi fishermen caught 9,463,636 herring.

More precise location data for fish or shellfish caught at Cherry Point, in particular the location of the proposed GPT project, is not available because it is not required to be kept by WDFW and is not kept by the Lummi’s Fisheries. (Exhibit 10).

The Glosten Vessel Traffic Study found the Lummi spend at least 1/3 of their time in the Cherry Point subarea for various fishing and crabbing activities. The remainder of the time is spent the other six subareas identified by the Glosten report. The Glosten report goes on to concluded that if GPT is built and at full operation then Lummi fishing disruption will increase by 76% at Cherry Point. (Exhibit 1 at xlix). PIH admits that at full build out, GPT footprint and
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the new vessel approach lanes would occupy approximately 122 acres of physical space at Cherry Point. (Exhibit 11 at 13). At full operation, the GPT facility would handle at least 487 total annual tanker calls. (Exhibit 1 at 279). PIH argues that the Glosten Vessel Traffic Study concluded the percent of total Lummi fishing “vessel days-area” affected will only be an absolute increase from 0.11% to 0.19%. (Exhibit 15 at 5). In general, “vessel days-areas” are calculated using vessel traffic days combined with the area the vessel traffic occupies in nautical miles. Glosten recognizes the “vessel days-area” metric may not provide the clearest implications of the case results and, again, states there will be a 7% increase in vessel traffic disruption. (Exhibit 1 at 280-81).

PIH argues the Lummi declarations and maps are formulaic, general, and conclusory and attaches declarations used in Muckleshoot v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1998), to provide an example of the information that should be provided to the Corps for a de minimis determination. PIH argues the Muckleshoot declarations provide a level of information and detail not found in the Lummi declarations. A comparison of the two cases is not necessary or required as I have found the information provided by the Lummi is adequate for purpose of my decision.

However, after a comparison of the two different sets of declarations, it is my opinion the Lummi declarations are equal to if not more detailed than Muckleshoot declarations. In regards to location, the Muckleshoot declarations identify a U&A treaty area as between two points, Four Mile Rock and Pier 91. The Lummi declarations are more specific and identify an area with a map showing where tribal members fish and crab in the immediate vicinity of the proposed in-water structure. The Muckleshoot and Lummi declarations both speak to concerns of increased
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evessel traffic increasing fishing cost because of lost gear and reducing fishing efficiency. Similar to the *Muckleshoot* litigation, the Lummi submitted a declarations from the tribe’s Fisheries Manager explaining the productivity of the fishing area and the potential of a greater than *de minimis* impact. The Lummi’s fisheries manager went further and provided aggregate fish ticket data showing the productivity of the catch area 7A and 20A, while in comparison, the *Muckleshoot* declarations did not mention specific quantities in catch area 10 or 10A, which are the areas disputed in *Muckleshoot*. Neither the *Muckleshoot* declarations nor Lummi declarations provided site specific GPS catch data, primarily, because catch data is recorded by catch areas designated by the state of Washington. In this case, the project is located in catch areas 7A and 20A. The *Muckleshoot* declarations include in PIH’s 27 July 2015 submittal do not provide any maps showing where tribal members fished, and the *Muckleshoot* declarations were not as detailed as the Lummi declarations on how fishing methods would be disrupted by the project site or the increased vessel traffic. Finally, PIH argues the Lummi declarations were not specific enough on how often members fish the Cherry Point region or whether the fishing was a past or current practice, while the *Muckleshoot* declarations attempted to quantify time spent fishing in the U&A area in question. However, the Glosten report is credible technical report that surveyed Lummi tribal members and concluded Lummi tribal members spend 1/3 of their time fishing the Cherry Point area. While the Cherry Point area is larger than the GPT site, this report, commissioned by the applicant, nonetheless confirms the larger area is heavily fished. Taken together with the declarations that state tribal fishing occurs at the GPT site, the evidence becomes substantial. The Glosten report coupled with the Lummi’s declarations provide adequate evidence supporting the Lummi’s allegations.
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Based on the above explanation and the exhibits listed in Paragraph A, I find the
information the Lummi have presented is sufficient to support a finding that the construction of
GPT would have greater than a *de minimis* impact on Lummi U&A treaty fishing rights.

(2) The area need not be the most “productive area” to be relevant, and the Lummi have
shown they fish/crab the area on more than an extraordinary basis

PIH argues an area must be productive U&A fishing area in order for the Lummi to make
a claim there is a greater than *de minimis* effect on a U&A fishing area. This is legally and
factually incorrect. In *Northwest Sea Farms*, 931 F. Supp at 1521-1522, lack of productivity of
the area was put forth as an argument, and the court held:

The site in question need not be the primary or most productive one for fishing.
Instead, the correctness of the Corps’ determination that the proposed site should
presently be afforded treaty protection depends upon whether the record supports
the conclusion that the site is fished by members of the Lummi Nation on more
than an extraordinary basis.

Factually, there is adequate evidence presented by the Lummi to show Cherry Point to
include the location of the proposed dock, is fished on more than an extraordinary basis. It is
recognized the catch data covers a much broader physical area than the Cherry Point/location of
the proposed GPT project. However, the documented catch numbers coupled with the
declarations submitted by the Lummi support a finding that the area is fished on more than an
extraordinary basis. Mr. Starkhouse’s declaration and aggregate catch data show approximately
45 million shellfish and fish have been harvested in or around the Cherry Point area to include
the location of the proposed dock. The Lummi have provided 14 tribal declarations stating
fishermen and their families have been fishing the area, to include the location of the proposed
dock, for decades. PIT submits circumstantial evidence (derelict fishing gear reports, species
technical reports, catch per unit of effort analysis, etc.) that requires an inference to determine
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that the exact location of the GPT wharf and trestle is not productive or regularly fished, but the Lummi’s direct evidence, tribal declarations and catch data, evidence the site is productive and regularly fished. Furthermore, the Barbara Lane in U.S. v. Washington found the Lummi use the Cherry Point area, to include the GPT site, was fished by the Lummi. (Exhibit 26 at 24). I find the Lummi’s evidence on this issue more persuasive than PIH’s evidence. The declarations provide details of how, when, and where the tribe have fished at Cherry Point to include the area of the proposed dock. PIH itself concludes the Lummi fish the area on an occasional basis, which is more than on an extraordinary basis. (Exhibit 11 at 12). While there may not be the volume of derelict crabs pots found in more frequently fished areas, there are derelict pots still found at Cherry Point.

It is also important to note the Cherry Point area is known to the Lummi as Xwe’chi’eXen, which is part of a larger traditional cultural property. (Exhibit 4, 6, & 7 at declarations). Fishing in this area is important to the Lummi Schelangen (Way of Life), in addition to being a part of the Lummi’s U&A relied on for commercial or subsistence fishing. Id. Based upon the declarations, the facts support a finding the area is fished on more than an extraordinary basis, for commercial, subsistence, and spiritual purposes.

(3) GPT’s impact is proportionally insignificant compared to the total Lummi U&A areas is not an argument that is supported by case law.

PH argues the impact is de minimis when the project area is compared to the entire Lummi U&A fishing area. However, PIH’s argument incorrectly moves the issue from the Lummi’s right to access its U&A fishing area at Cherry Point to an issue of ratio impact to the Lummi’s total U&A fishing area in the Puget Sound. This argument was put forth in Muckleshoot, 698 F. Supp. at 1514-15, and rejected. The Lummi have a right to access their
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U&A treaty fishing areas at Cherry Point to include the site or the proposed GPT project. It is irrelevant whether the portion eliminated is small when compared to the total U&A area. The trestle/wharf will have a physical over-water impact of at a minimum 122 acres. I consider this size of an impact to be greater than de minimis.

(4) Potential future impacts to a potentially restored herring fishery should be considered in the de minimis analysis.

PIH argues potential future impacts to a potentially restored herring fishery should not be considered because there currently is not an active herring fishery. I disagree. As discussed in Paragraph D above, the Boldt I decision requires analysis of tribal treaty rights to include those areas where the tribes may fish in the future. Therefore, any analysis of potential impacts to U&A areas must including potential future fishing and be completed at the time a proposal is being reviewed, prior to construction. I acknowledge that herring fishing has not been allowed at Cherry Point since 1996. See 2012 Washington State Herring Stock Status Report, WDFW (July 2014). Furthermore, WDFW states the current condition of the Cherry Point herring is less than 1,000 tons in 2010 (average of 2,800 tons from 1986-2010) and a minimum spawning biomass of 3,200 tons is needed before harvest is considered. The Puget Sound Partnership has a goal of increasing the amount of spawning herring at Cherry Point to 5,000 tons by 2020 (see psp.wa.gov, accessed 20 April 2016). In nine declarations the Lummi documented past fishing of herring in the immediate vicinity of GPT and a desire to fish for herring again in the future.

Considering the ongoing recovery effort and the stated intent of the Lummi in the event the fishery is restored, the Corps does not need to disregard the Lummi’s statements regarding fishing for herring in the future.
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(5) Fishing and crabbing will be impaired/eliminated if the wharf/trestle is constructed, and the proposed mitigation does not reduce impact to de minimis level.

PIH argues fishing and crabbing can occur effectively around the wharf and with the increased vessel traffic. Only an act of Congress can eliminate a part of the Lummi’s U&A fishing grounds. Regulation on the time and manner of the Lummi’s fishing in its U&A fishing grounds has only been found appropriate when needed to protect the fishery resource or sanctioned by an act of Congress. PIH’s suggested limitations on fishing and crabbing are not for the purpose of conservation.

At full build out, the over-water impacts of the project will include a trestle, wharf, three ship berths, and new vessel approach lane covering 122 acres and handling 487 total annual vessel calls, one vessel arrival or departure every 18 hours. This does not include the incidental vessel traffic needed to operate a deep water export facility of this magnitude. Therefore, at minimum, 122 acres of the Lummi’s U&A fishing grounds will be impacted by the proposed project by eliminating the Lummi’s access to their U&A fishing grounds. PIH’s solution to the area occupied by the trestle, wharf, or birthed tankers is a directive on when and how the Lummi should fish and crab. On pages 7-8 of PIH’s 5 Oct 2015 submittal, PIH argued crabbing will not be impacted because the crabbing techniques do not require the pot to be placed where the wharf and trestle sit in order to be effective. PIH explains pots attract crab from 300 feet away; therefore, the Lummi can place pots near the wharf and trestle and still effectively crab the area under the wharf and trestle. The Lummi declarations state they, in part, currently crab by placing crab pots where the project’s construction footprint would be located. On pages 7-8 of PIH’s 5 Oct 2015 submittal, PIH argues fishing will not be impacted because the Lummi can effectively fish around the wharf and trestle. PIH acknowledges the Lummi cannot set drift nets within the
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perimeter of the wharf and trestle, but conclude it is not necessary to effectively fish the area. The Lummi declarations state they, in part, currently set or drift their nets where the project’s construction footprint would be located. Essentially, PIH’s solution to the Lummi’s impact concerns is to have the Lummi exercise their crab and fish techniques in a manner different than what is currently being used.

The Lummi declarations establish the Lummi fishermen fishes where GPT will be physically located. The fishing techniques described by the Lummi declarations require unobstructed water for fishing nets to successfully drift or for their nets not be interfered with by moving vessels. The wharf, trestle, and additional vessel traffic eliminates the Lummi from being able to successfully executing their fishing techniques; at minimum, GPT will cause the Lummi’s current fishing or crabbing techniques to not be as effective.

PIH argues its proposed mitigation will avoid and minimize any adverse impact caused by GPT to less than a de minimis impact on the Lummi’s exercise of its treaty rights. PIH describes its mitigation measures in detail in the “Port Operations and Safety Plan To Facilitate Tribal Fishing” report submitted with the JARPA and in their 3rd submittal. [Exhibit 24]. The main elements of the mitigation are (1) vessel traffic management, (2) vessel traffic communications, (3) limiting the vessel types calling at GPT, and (4) locations for, but limitations on, fishing at the wharf and trestle. All of these mitigation elements help to minimize the impacts to access caused by vessel traffic, but not the physical trestle and wharf. The dedicated traffic lanes help to minimize impacts as the Lummi fishermen would know where the vessels would be transiting. The communication plans help to minimize the impacts as the Lummi fishermen would be alerted to the position and movements of the vessels and could
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change their fishing plans to avoid impacts. Eliminating tug-and-barge tow operations does avoid one of the more impacting operations contributing to gear loss. Fishermen could be aided in fishing by being able to tie off to the north and south ends of the wharf. Crabbing would be allowed on both sides of the wharf and under the trestle. But even with the mitigation, it still continues to impair or limit the Lummi’s access to its U&A fishing grounds.

The pier itself eliminates a geographic area where fishing and crabbing occurs, which I find to be greater than de minimis. That alone is sufficient to be a greater than de minimis impact on the Lummi’s tribal treaty rights. The mitigation efforts proposed focus on mitigating impacts caused by the operation of the facility and the increased vessel traffic. The mitigation efforts do not address the physical impacts of wharf and trestle. Stated differently, even with the PIH’s proposed mitigation, there would still be impediments to fishing because the physical presence of the wharf and trestle interferes with the Lummi’s U&A fishing. Only two fishermen could tie up to the pendants at the north and south ends of the pier at a time. Crabbing would be limited to those times when vessels are either moored or are not at the wharf. Fishing would be restricted in the Operational Safety Zone during certain times when vessels were maneuvering. The elements of the proposed mitigation are regulations on the time and manner of when and how the Lummi should fish and crab with the project in place and operating; the proposed mitigation efforts regulate the time and manner on how the Lummi currently exercise its treaty rights to which the Lummi’s have specifically rejected. The Lummi insist the proposed mitigation would not offset the commercial or subsistence impacts caused by a change in current fishing practices or the physical loss of U&A area at Cherry Point where the proposed GPT project is located. The Lummi also repeatedly insist that aside from the commercial impacts caused by the
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proposed project there are cultural and spiritual impacts that are not addressed by the proposed mitigation.

Based upon the foregoing, there remains impacts to the Lummi’s exercise of fishing rights that I consider to be greater than de minimis. While the Corps can and did consider avoidance and minimization measures as factors in whether the impacts are greater than de minimis, the Corps determined the proposed mitigation does not reduce the impacts to the Lummi U&A treaty fishing right to a de minimis amount. Furthermore, this proposed regulation on the time and manner of fishing at the U&A fishing ground is an impairment or limitation that is only appropriate by an act of Congress or for the conservation of the fishery resource.

Additionally, should herring fishing return to the area, it too would be impacted in a greater than a de minimis manner restricting as noted above.

F. DETERMINATION

The work proposed in this application has been analyzed with respect to its effects on the treaty rights described above. Based upon the facts and findings, the Corps’ determination is that the proposed overwater structure would have greater than a de minimis impact on the Lummi Tribe’s access to its usual and accustomed fishing grounds for harvesting fish and shellfish.

Each of the following impacts resulting from the construction of the GPT facility would violate the Lummi’s U&A treaty fishing rights by:

1. Impairing and eliminating part of their U&A treaty fishing and crabbing area (with or without the herring);

2. Impairing and eliminating the time and manner in which the Tribe can fish in their U&A; and
Reducing Impacts from Fossil Fuel Projects

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3. Impairing and eliminating potential future herring fishing at the site.

Michelle Walker
Chief, Regulatory Branch
CENWS-OD-RG

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ENCLOSURES - EXHIBITS


5. Letter, Corps, 3 February 2015, subject: Request for additional information


7. Letter, Lummi Tribal Chairman Ballew, 13 March 2015, Subject: NWS-2008-260


9. Letter, Corps, 10 April 2015, subject: forwarding Lummi information to PIT


12. Letter, Corps, 28 July 2015, subject: forwarding PIT information to Lummi


14. Letter, Corps, 18 September 2015, subject: forwarded Lummi information to PIT

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16. Letter, Corps, 8 October 2015, subject: forwarded PIT 5 Oct 2015 information to Lummi


18. Joint Aquatic Resources Permit Application, Pacific International Terminals, 22 December 2015


24. Letter, PIT’s Skip Sahlin, 18 March 2016, Subject: USACE Reference Number NWS-2008-260; Gateway Pacific Terminal, Revised Joint Aquatic Resources Permit Application (JARPA)

25. Email, Corps, 29 March 2016, Subject: forwarded PIT’s updated JARPA

26. US v WA (Boldt Decision) Barbara Lane Lummi Report

Appendix 8:

Northwest Sea Farms v. United States Army

Corps of Eng'rs
6.8 Appendix 8: Northwest Sea Farms v. United States Army Corps of Eng’rs

United States District Court for the Western District of Washington, Seattle Division

May 8, 1996, Decided ; May 8, 1996, filed

CASE NO. C94-1621C

Reporter

Disposition: [**1] Northwest Sea Farms Inc.’s Motion for Summary Judgment DENIED. Corps of Engineers and Colonel Donald Wynn's Cross Motion for Summary Judgment GRANTED. Case DISMISSED.

Core Terms

treaty, rights, fishing, regulations, asserts, concludes, summary judgment, res judicata, issues, Tribe, collateral estoppel, permit application, proposed site, trust relationship, fiduciary duty, comments, parties, permits, Notice, argues, hearing examiner, de minimis, reconsideration, accustomed, decisions, agencies, site

Case Summary

Procedural Posture

Plaintiff corporation and defendants, the government and its official, sought summary judgment in the corporation's action based on defendants' denial of a required permit under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986).

Overview

The corporation claimed that the U.S. Army Corps of Engineers erred by taking into account Indian fishing rights under Article V of the Treaty of Point Elliot, 12 Stat. 927 (1855), when denying the corporation a permit to operation a fish farm. The court disagreed because the government and its agencies had a fiduciary duty to ensure that Indian treaty rights were given full effect and only Congress had the authority to abrogate or modify those rights. Examining the treaty's provisions, the court found that the rights of the Indians under that treaty would be interfered with if the government were to grant the requested permit.

Outcome

The court granted summary judgment in favor of defendants and dismissed the action.

LexisNexis® Headnotes
Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Federal Rule of Civil Procedure 56(c). Under the Rule, summary judgment must be entered against a party who 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. Judicial review of a U.S. Army Corps of Engineers’ decision is governed by the Administrative Procedure Act (APA) § 706(2) and limited to a review of the administrative record before the agency. In reviewing the record, a court must determine whether the Corps’ decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C.S. § 706(2)(A) (1977). Factually, this deferential standard of review is a narrow one. A court may not set aside the decision of the Corps unless there is no rational basis for the action in the record. Purely legal questions are reviewed de novo.

In carrying out its fiduciary duty, it is the government’s, and subsequently the U.S. Army Corps of Engineers’, responsibility to ensure that Indian treaty rights are given full effect. Only Congress has the authority to modify or abrogate the terms of Indian treaties.

The signing of a treaty only acts as a limitation on, not a taking of, rights previously held by Indians. As such, the act of signing the treaty is appropriately viewed as a reservation of rights by the Indians, rather
than a grant of rights from the United States. In interpreting these rights, a court must construe treaty language in the manner in which the Indians understood it.

Counsel: Attorney(s) for Plaintiff: James Johnson. 
Attorney(s) for Defendant: Brian Kipnis, David Kaplan.

Judges: The Honorable John C. Coughenour, United States District Judge

Opinion by: John C. Coughenour

Opinion

[*1518] ORDER

This matter comes before the Court on Northwest Sea Farms, Inc.'s ("Northwest") Motion for Summary Judgment and the Corps of Engineers and Colonel Donald Wynn's (hereinafter collectively referred to as "the Corps") Cross Motion for Summary Judgment. The Lummi Nation and the Nooksack Tribe have been granted leave to appear amicus curiae. Pursuant to the request of the parties, oral argument was heard on May 8, 1996.

I. GENERAL BACKGROUND

As the facts are extensively detailed in the memoranda of the parties and the Lummi Nation, the Court shall only briefly outline the factual and procedural history of this dispute.

Since the 1980's, Northwest has been involved in a project to operate a fish farm for the production of salmon in the waters of Puget Sound. The project would be comprised of a number of net pens \[^2\] to be placed in the Rosario Strait, west of the Lummi Islands and near the Lummi Rocks. The area required for anchorage would cover some 11.36 acres, while the total surface area coverage would not exceed 1.41 acres. \[^1\] Department of the Army Permit Evaluation and Decision Document, at AR 299.

In 1992, the Corps denied Northwest's application for a required permit under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986). The denial was based upon a finding that the project would be against the public interest because it would conflict with the Lummi Nation's fishing rights at one of its usual and accustomed fishing places under the Treaty of Point Elliot. Department of the Army Permit Evaluation and Decision Document, at AR 311. The Corps' conclusion was based upon two predicate \[^3\] findings from the record. First, the Corps found that the record established that members of the Lummi Nation presently fish the proposed site of the project on a "more than extraordinary basis." Id. at AR 308. Second, the Corps found that the record illustrated that the project would deny members of the Lummi Nation access to the site. Id. Accordingly, the Corps determined that, under the relevant legal precedent, the permit should be denied as infringing upon the Lummi Nation's treaty rights.

\[^1\] According to the site plans in the Public Notice of Application for Permits, the project would require .84 acres in total surface area coverage. U.S. Army Corps of Engineers, Public Notice of Application for Permits, at AR 316.
In addition to the § 10 permit, Northwest was also required to obtain a Substantial Development Permit and Conditional Use Permits under the State Shoreline Management Act, RCW 90.58.020, et seq. Initially, Northwest applied to Whatcom County for these permits. The matter was assigned to a hearing examiner who, after hearings in which the Lummi Nation participated, denied the permits. Whatcom County Hearing Examiner, Findings of Fact, Conclusions of Law, Decision and Permit, at AR 271. Among other considerations, the hearing examiner based this denial upon a finding that the project would interfere with the Lummi Nation’s fishing rights. Id. at AR 268. Following this decision, [**4] Northwest moved for reconsideration. In denying the motion, the examiner again relied upon the potential impact of the project on Lummi Nation fishing. Whatcom County Hearing Examiner, Decision on Reconsideration, at AR 336. As with the initial hearings, the Lummi Nation participated in the review on reconsideration. 2

Northwest appealed the decision of the examiner to the Shoreline Hearing Board (“SHB”). The Lummi Nation also filed a response in these proceedings. After considering the record before it, the SHB reversed the decision of [**5] the examiner and remanded for issuance of the permits. Shorelines [*1519] Hearing Board, Final Opinion, at AR 327. The SHB found that the project would not significantly interfere with commercial fishing in the area, including that of the Lummi Nation. Id. at AR 325. However, the SHB also expressly disavowed any consideration of Indian treaty rights, stating that such consideration was outside its jurisdiction. Id. at AR 324-25. Accordingly, the SHB found that “since the treaty issue is the County’s basis for denying the permits, that decision should be reversed.” Id. at AR 326. On remand, the state permits were issued. 3 However, the denial by the Corps stopped construction of the project.

Northwest filed this action for review of the Corps’ decision under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, et seq. Northwest asserts that the Corps wrongfully denied the § 10 permit because: [**6] (1) the Corps may not deny a § 10 permit based solely upon a determination that a project will be located in Puget Sound waters where a tribe has treaty fishing rights; (2) principles of res judicata bind the Corps and the Lummi Nation to previous determinations of “no significant impact on fishing;” (3) the Corps is bound by its own regulations to final state permitting and environmental determinations when it utilizes a coordinated review process; and (4) the Corps denied Northwest a fair hearing on the § 10 permit. Northwest requests that this Court declare that the proposed project complies fully with all applicable law and regulations and enjoin the Corps from refusing to issue the § 10 permit. The Corps moves for summary judgment that its decision must be upheld as consistent with the record and relevant legal precedent.

II. STANDARD OF REVIEW

HN1[移到] Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Under the Rule, summary judgment must be entered [**7] “against a party who fails to make a showing sufficient to establish the

2 During the interim between the original denial and the denial of reconsideration, a final Environmental Impact Statement (“EIS”) was issued. This EIS found no significant environmental impacts. Prior to its issuance, the Corps was provided an opportunity to review and comment on a draft EIS. This EIS was also included in the record before the Corps and referenced in its decision to deny the § 10 permit. The Lummi Nation and Nooksack Tribe also provided comments to the EIS.

3 Northwest also obtained a federally required Final NPDES permit prior to the decision of the Corps.
existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."  *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Judicial review of the Corps' decision is governed by the APA § 706(2) and limited to a review of the administrative record before the agency. *Friends of the Earth v. Hintz*, 800 F.2d 822, 828-29 (9th Cir. 1986). In reviewing the record, the Court must determine whether the Corps' decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (1977). Factually, this deferential standard of review is a narrow one. The Court may not set aside the decision of the Corps unless there is no rational basis for the action in the record. *Hintz*, 800 F.2d at 831. Purely legal questions are reviewed de novo. *Howard v. FAA*, 17 F.3d 1213, 1215 (9th Cir. 1994).

III. ANALYSIS

A. TREATY FISHING RIGHTS OF THE LUMMI NATION

In asserting that the Corps improperly denied the § 10 permit based upon its finding that the project would impinge [**8**] upon treaty fishing rights, Northwest initially challenges the Corps' authority to consider such rights in making its permitting decisions. The Corps opposes this argument by asserting that the "trust relationship" between it and the Lummi Nation mandates consideration of treaty fishing rights.

The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people."  *United States v. Mitchell*, 463 U.S. 206, 225, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983). This obligation has been interpreted to impose a fiduciary duty owed in conducting "any Federal government action" which relates to Indian Tribes. *Nance [*1520]* v. *Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), cert. denied, 454 U.S. 1081, 70 L. Ed. 2d 615, 102 S. Ct. 635 (1981), constitute "law to apply" consistent with *Heckler v. Chaney*, 470 U.S. 821, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). In previous cases, this Court has tacitly recognized that the duty extends to the Corps in the exercise of its permit decisions. *See e.g. Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1523 (W.D. Wash. 1988) (granting an injunction against the [**9**] construction of a marina in consideration of the effect upon Indian treaty rights).

HN2 In carrying out its fiduciary duty, it is the government's, and subsequently the Corps', responsibility to ensure that Indian treaty rights are given full effect. *See e.g. Seminole Nation v. United States*, 316 U.S. 286, 296-97, 86 L. Ed. 1480, 62 S. Ct. 1049 (1942) (finding that the United States owes the highest fiduciary duty to protect Indian contract rights as embodied by treaties). Indeed, it is well established that only Congress has the authority to modify or abrogate the terms of Indian treaties. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir. 1986). As such, the Court concludes that the Corps owes a fiduciary duty to ensure that the Lummi Nation's treaty rights are not abrogated or impinged upon absent an act of Congress.

Despite the existence of this trust relationship, Northwest argues that the Corps' reliance upon the Lummi Nation's treaty rights is unauthorized by its own regulations. Northwest notes that the term "Indian treaty rights" cannot be found in the Corps' regulations concerning what constitutes a "public interest." Thus, Northwest asserts that the Corps is [**10**] precluded from considering such rights in making its decision. The Court disagrees.
Northwest's argument is flawed in at least two important respects. First, Northwest's position ignores the duties imposed by the trust relationship owed by the Corps to the Lummi Nation. It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration. Second, even if the Corps were not bound by the trust relationship, Northwest's argument assumes by negative implication that the Corps' regulations allow it to make permitting decisions which would alter Indian treaty rights. This interpretation, however, is directly contrary to the principle that only Congress has such power. Accordingly, the Court concludes that the Corps properly considered the Lummi Nation's treaty rights in its permit decision-making process. 4 Thus, the Court must next consider Northwest's alternative argument that the Corps incorrectly determined that the project would impinge upon the Lummi Nation's rights under the Treaty of Point Elliot.

4 In its Opposition and Reply, Northwest argues that the Corps misinterpreted Indian treaty rights as "property rights" under the regulations on public interest. In its Reply, the Corps opposes this argument and treats it as a challenge to its authority to consider treaty rights. Given the Court's findings on the Corps' fiduciary duty, however, the question of whether treaty rights are "property rights" becomes irrelevant.

5 Northwest also asserts that the Corps should be bound by the determinations made during the state permitting process on the issue of the project's impact on fishing. This argument will be dealt with below.
such, these areas include "every fishing location where members of a tribe customarily fish[] from time to
time..." *Id.* Therefore, contrary to the assertions of Northwest, the site in question need not be the primary
or most productive one for fishing. Instead, the correctness of the Corps’ determination that the proposed
site should presently be afforded treaty protection depends upon whether the record supports the
conclusion that the site is fished by members of the Lummi Nation on more than an extraordinary basis.

The record contains numerous figures and statements [*14] concerning Lummi Nation fishing in the
proposed site of the project. Figures in the record indicate that sockeye salmon migration moves from the
Rosario Channel to the Lummi Rocks within the proposed area. *Id.* 610-11. These figures also show that
tribal purse seine fishing takes place in the proposed area. *Id.* Moreover, affidavits in the record state
that the area is used by members of the Lummi Nation at regular, but varying rates, depending upon various
uncontrollable factors. Affidavit of Alan Chapman, at 9; AR 403. Finally, the record also indicates the names
of numerous Lummi Nation members who have fished the area in recent years. AR 374. Accordingly, the
Court concludes that the determination that members of the Lummi Nation presently exercise treaty fishing
rights at the location of the proposed site is well supported by the record. As a result, the Court also
concludes that the Corps has shown that it correctly determined that the site should be afforded treaty
protection. Therefore, the only remaining issue is whether the Corps also correctly found that the project
would impair rights reserved in the treaty.

The right to take fish under Article V of the Treaty of Point [*15* Elliot has both a “geographical” component
and a “fair share” component. *United States v. Oregon,* 718 F.2d 299, 304 (9th Cir. 1983); *Muckleshoot
Indian Tribe v. Hall,* 698 F. Supp. 1504, 1511 (W.D. Wash. 1988). These aspects have been interpreted to
offer mutually exclusive protections of the right to access an area for fishing and the right to take a proper
quota of fish. *Oregon,* 718 F.2d at 303-04. As such, in reviewing treaty fishing rights, the Courts may not
conduct a balancing test which views the right to access in relation to the supply of the proper portion of
fish. *Id.* at 304 n.6.

[*1522* In arguing that its project will not affect or will have only de minimis effect upon Lummi Nation
fishing, Northwest focuses almost exclusively upon the impact upon overall fishing of the Lummi Nation and
the correlating impact on the amount of fish available. Northwest asserts that, unlike areas discussed in
other cases, the area in question is neither productive, nor one which the Lummi Nation uses primarily.
Accordingly, Northwest argues that the SHB correctly determined that the project would have “no
substantial impact on fishing” and that this finding illustrates a de minimis [*16*] effect on tribal fishing
rights under the treaty. The Court disagrees.

Northwest’s argument collapses the geographical aspect and the fair share aspect of the Lummi Nation’s
fishing rights under the treaty. Having found that fishing activity contemplated by the treaty occurs at the
proposed site, the Court concludes that the Corps’ decision need not be based upon a finding that the
project will substantially affect the amount of fish available to the Lummi Nation. Rather, the record need
only support the Corps’ conclusion that the project would affect the Lummi Nation’s right to access. 6

The Court finds that the record supports [*17*] the Corps’ conclusion that the Lummi Nation’s right to
access would be affected by the project. As noted above, the required area of the project, including

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6 Northwest also appears to argue that the coverage area of the project is de minimis in relation to the total area
available for fishing by members of the Lummi Nation. Accepting the argument that an area of obstructed access may
at times be so small as to be considered de minimis, the Court nonetheless concludes that the proposed area of
Northwest’s project rises above this standard.
anchorage, would cover some 11.36 acres. In numerous places, the record also indicates that this entire area would be obstructed to tribal members attempting to use nets and other gear. Affidavit of Alan Chapman, at 8; AR 403; Deposition of Bobby Davis, AR 727-28; Whatcom County Hearing Examiner, Decision on Reconsideration, at AR 332-34. Thus, the Court finds that the Corps has shown that it appropriately relied upon a determination that the project would interfere with treaty fishing rights of the Lummi Nation in denying the § 10 permit.

B. RES JUDICATA/COLLATERAL ESTOPPEL

As previously noted, Northwest argues that the Corps’ decision-making process must be bound by the findings of the SHB on the project’s potential effect on fishing. Initially, Northwest asserts that the doctrines of res judicata and collateral estoppel impose this binding effect.

In determining the extent to which state judgments are entitled to preclusive effect in the federal arena, the Court must look to the relevant state law standards of res judicata and collateral estoppel. Fernhoff v. Tahoe Regional Planning Agency, 803 F.2d 979, 986 n.8 (9th Cir. 1986). Under the doctrine of res judicata, a party is barred from litigating claims that were, or should have been, litigated in a former action. Schoeman v. New York Life Ins. Co., 106 Wash. 2d 855, 859, 726 P.2d 1 (1986). Washington law requires a common identity of four elements for res judicata to apply: (1) of subject matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made. Id.

The doctrine of collateral estoppel differs from res judicata in that it precludes re-litigation of specific issues actually litigated and necessary determined by a court. Shoemaker v. Bremerton, 109 Wash. 2d 504, 507, 745 P.2d 858 (1987). Four elements are required for the application of collateral estoppel: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the decision on the issue is asserted must have been a party to, or in privity with a party to, the prior litigation; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. Id.

In the present case, the Court concludes that neither the doctrine of res judicata nor collateral estoppel bind the decision of the Corps. Most importantly, the requirement of commonality of claims or issues is not met. As noted above, the SHB expressly disavowed any reliance upon the Lummi Nation's treaty rights in issuing its decision. Shorelines Hearing Board, Final Opinion, at AR 325. Accordingly, while the SHB's

[*1523] Procedural differences in the two proceedings at issue will not necessarily bar the application of collateral estoppel. Neff v. Allstate Ins. Co., 70 Wash. App. 796, 801, 855 P.2d 1223 (Div.1 1993). Instead, courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question. Id. If the prior adjudication was before an administrative body, additional factors may be considered in deciding whether to give a finding preclusive effect. These include: "(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." Shoemaker, 109 Wash. 2d at 508.

In the present case, the Court concludes that neither the doctrine of res judicata nor collateral estoppel bind the decision of the Corps. Most importantly, the requirement of commonality of claims or issues is not met. As noted above, the SHB expressly disavowed any reliance upon the Lummi Nation's treaty rights in issuing its decision. Shorelines Hearing Board, Final Opinion, at AR 325. Accordingly, while the SHB’s

[7] Northwest appears to argue the application of federal standards of estoppel. However, the Court would reach the same result under either formulation of the doctrines.
opinion may reflect a binding decision on issues of state law, it does not have the same effect upon the Corps' permitting decision and interpretation of the Lummi Nation's treaty rights.  

C. COORDINATED REVIEW

Northwest asserts that the Corps must be bound to the SHB's finding [**21] of no significant impact on fishing by its own regulations. In this regard, Northwest points to the Corps' regulations allowing satisfaction of NEPA requirements through a coordinated review process with state and local agencies. Northwest argues that these regulations mandate that the Corps be bound by the conclusions within state and local environmental evaluations. Factually, Northwest claims that the Corps became bound by the SHB's determinations in this case by "appending" the County's environmental impact statement and the SHB's final opinion into the § 10 permit decision document. The Court concludes, however, that Northwest's argument cannot withstand scrutiny.

The Corps' regulations for implementing NEPA specifically authorize it to cooperate with state and local agencies in environmental decision-making. 40 C.F.R. § 1506.2. Such cooperation is, at a minimum, strongly encouraged by the regulations. 40 C.F.R. § 1506.2(b) (stating that "agencies shall cooperate with state and local agencies to the fullest extent possible..."). If the Corps utilizes this "coordinated review" process, the regulations further authorize the use of a single EIS. 40 C.F.R. § 1506.2(c). The [**22] Corps may also incorporate the contents of state and local environmental evaluations by reference into decision documents. 33 C.F.R. § 325 App. B (incorporating 40 C.F.R. § 1506.4).

Assuming for purposes of summary judgment analysis that the relevant EIS contains a finding of no significant impact on fishing, an assertion which the Corps disputes, Northwest's argument must still fail. The Court finds that the record does not support the conclusion that the Corps utilized or adopted the state and local environmental process to meet NEPA obligations. Instead, the record illustrates that the Corps' decision to deny the permit was classified a "no action alternative." Department of the Army Permit Evaluation and Decision Document, at AR 311. Accordingly, the Corps appropriately determined that the decision would not have a "significant effect on the quality of the human environment" and any need to prepare an EIS [**23] under NEPA was not triggered. Id. Thus, the Court concludes that Northwest's [*1524] argument that the Corps adopted, and should be bound by, the County EIS to comply with NEPA obligations must be rejected. Indeed, the Court finds that the Corps has sufficiently shown that it reached its own NEPA determination that no EIS was required independent of the state and local process. 11

8 Considering its previous findings on whether the project would affect treaty rights, the Court also notes that application of these judicially created doctrines would allow the SHB decision to extinguish part of the Lummi Nation's treaty rights. Such a result would not only be barred by the principle that only Congress can extinguish treaty rights, it would also work an injustice upon the Lummi Nation and run contrary to public policy.

9 The provisions of 40 C.F.R. are incorporated by reference into the Corps' regulatory requirements.

10 Under 42 U.S.C. § 4332(c), environmental impact statements are required for "major Federal actions significantly affecting the quality of the human environment..."

11 The Court notes that its conclusions find further support in the fact that the final EIS under the state and local process was issued approximately four months prior to the time that Northwest applied to the Corps for the § 10 permit.
D. § 10 PERMITTING PROCEDURES

As a final argument, Northwest asserts that it did not receive a fair hearing on the § 10 permit decision due to numerous violations by the Corps of its permitting regulations.

The Corps’ regulations provide that a permit application comment period should extend for a "reasonable period of time" and "not be more than 30 days nor less than 15 days from the date of the notice [of a permit application]." The regulations further provide that the district engineer will issue an opinion on a permit application "not later than 60 days after receipt of the completed application..." This period may be extended, however, under any of a number of express exceptions. In issuing permitting decisions, the Corps is guided by the policy that it "is neither a proponent nor opponent of any permit proposal."

Northwest alleges that the Corps violated each of the regulations cited above. Specifically, Northwest claims that the Corps: (1) ignored the original comment and decision deadlines; (2) acted as an opponent to the project by soliciting comments from the Lummi Nation; and (3) refused to allow Northwest a chance to respond to the late comments of the Lummi Nation. Accordingly, Northwest asserts that the decision of the Corps should be reversed. The Court rejects this argument.

Northwest's argument on the Corps' deadlines is not supported by the law or the record. Although the regulations provide for a comment period of a certain length, they do not preclude the Corps from accepting or considering untimely submissions. Moreover, the record shows that the Corps requested submissions only after either the Lummi Nation or Northwest raised specific issues concerning treaty rights. The Court finds that this practice does not violate Corps' permitting regulations on deadlines. Similarly, the Court finds that Northwest's allegations that the Corps acted as an opponent and wrongfully refused to allow Northwest a final chance to respond to comments from the Lummi Nation also lack support.

12 The original Corps' "Public Notice of Application for Permit" is dated September 6, 1990, with an expiration date of October 6, 1990. US Army Corps of Engineers, Public Notice of Application for Permit, at AR 313. The Notice states that any comments should be received by the Corps no later than the date of the expiration. Id. at 314. On October 5, 1990, the Lummi Nation filed a comment which incorporated its Response filed in the state and local proceedings. This comment focused on the adverse environmental impacts of the project.

13 Northwest also asserts that the Corps failed to follow regulations providing for acceptance of favorable decisions from state permitting agencies. Essentially, this argument re-asserts Northwest's position that the Corps may not rely solely upon treaty rights to deny a § 10 permit. The Court has already rejected this argument above.

14 As a basis for these claims, Northwest contends that by mid-1991, the Corps' position was that only one issue remained to be resolved prior to issuing a permit decision: whether the Lummi Nation's fishing claim could block the project. Northwest alleges that, rather than making a prompt determination on this issue as required under the regulations, the Corps improperly solicited comments from the Lummi Nation and urged it to adopt a resolution against the proposed project.

15 The Court also notes that Northwest's arguments again fail to take the Corps' trust responsibility into consideration. This trust relationship has at least two fundamental implications to the present issue. First, it provides a legitimate explanation for the Corps' request for information from the Lummi Nation. Second, it requires that the Corps not abrogate the treaty rights without express Congressional authority. The Court is unaware of any such authority which...
IV. CONCLUSION

In accordance with the foregoing analysis, the Court hereby finds and ORDERS:

1) Northwest Sea Farms Inc.’s Motion for Summary Judgment is DENIED.

2) The Corps of Engineers and Colonel Donald Wynn’s Cross Motion for Summary Judgment is GRANTED.

3) This case is DISMISSED.

SO ORDERED this 8th day of May, 1996.

The Honorable John C. Coughenour

United States District Judge

would allow the Corps, or this Court, to take action impinging on Indian treaty rights for potential mistakes in a permitting process.
Appendix 9:

DNR Commissioner’s January 2017 Order Expanding Cherry Point Aquatic Reserve
6.9  Appendix 9: DNR Commissioner’s January 2017 Order Expanding Cherry Point Aquatic Reserve

Commissioner’s Order

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES
Peter Goldmark
Commissioner of Public Lands

AMENDED WITHDRAWAL AND DESIGNATION ORDER
FOR THE CHERRY POINT AQUATIC RESERVE

The State of Washington is owner of aquatic lands known as the Cherry Point Aquatic Reserve, consisting of tidelands and bedlands at Cherry Point in Whatcom County. Under statutory mandates, the Washington State Department of Natural Resources is responsible for managing state-owned aquatic lands in a manner that includes:

Ensuring environmental protection as a management objective for state-owned aquatic lands (RCW 79.105.050(3)), and

Considering natural values of state-owned aquatic lands as wildlife habitat, natural area preserves, representative ecosystems or spawning areas prior to the Department issuing any lease or authorizing any changes in use (RCW 79.105.210(3)), and

Withholding from leasing lands which the Department finds to have significant natural values (RCW 79.105.210(3)).

In accordance with such powers and obligations, certain state-owned aquatic lands possessing significant natural values near the Cherry Point Reach were withdrawn from general leasing on August 1, 2000 and identified as the Cherry Point State Aquatic Reserve.

Following creation of the Reserve, the Department worked with others to develop a plan to manage the Reserve in a manner that protects its unique resources. In November 2010, this effort resulted in completion of the Cherry Point Environmental Aquatic Reserve Management Plan. The Plan identifies the natural resources and addresses the proposed uses, future threats, and management actions that will be employed by DNR to protect the resources. Consistent with the objectives of the Plan, on November 18, 2010, the Commissioner of Public Lands rededicated the Cherry Point State Aquatic Reserve as the Cherry Point Environmental Reserve.

In 2016, the Department evaluated a request to change the Reserve boundary to add lands previously excluded under the August 1, 2000 and November 18, 2010 Orders. As supported by the November 2, 2016 Determination of Nonsignificance, and the November 20, 2016 recommendations of the technical advisory committee, as well as public comments received by the Department, the amendment of the Reserve boundary will further accomplish the purposes of the Reserve, is compatible with existing and projected uses of the area, and best serves the public interest.

Therefore, according to the powers vested in the office of Commissioner of Public Lands (RCW 79.105.050(3), RCW 79.10.210, and WAC 332-60-151), I, Peter Goldmark, hereby ORDER and DIRECT amendment of the Cherry Point Environmental Aquatic Reserve to include additional lands. Henceforth the Washington State tidelands and bedlands described below are withdrawn from the general leasing program and shall be managed according to the Final Cherry Point Aquatic Reserve Management Plan for 90 years from November 18, 2010.

That portion of the tidelands and bedlands of navigable waters owned by the state of Washington, fronting and abutting Sections 2, 11, 13, 14, and 24, Township 39 North, Range 1 West, Whatcom Meridian and fronting and abutting Sections 19, 20, 29 and 32, Township 39 North, Range 1 East, Whatcom Meridian described as follows:

Lying south of the south line of government lot 1, of said Section 2, Township 39 North, Range 1 West, W.M. being the south line of Birch Bay State Park; lying north of the south line of Township 39, Range 1 East; and extending waterward to a line which is 70 feet below mean lower low water OR 0.5 mile beyond extreme low tide, whichever line is further waterward;
EXCEPTING THEREFROM, the following Use Authorizations issued by the Department of Natural Resources; lease application numbers 20-A09122, 20-A11714, 20-A08488 and 20-010521;

ALSO EXCEPTING THEREFROM, any second class tidelands previously sold by the State of Washington.

Situated in Whatcom County, Washington

Dated this 3rd day of January, 2017.

STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

Peter Goldmark
Commissioner of Public Lands
Olympia, Washington
Appendix 10:

Magnuson Amendment, 33 USC 476
§476. Restrictions on tanker traffic in Puget Sound and adjacent waters

(a) The Congress finds that-
   (1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;
   (2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and
   (3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

(b) Notwithstanding any other provision of law, on and after October 18, 1977, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.

Appendix 11:
Franchise Authority
6.11 Appendix 11: Franchise Authority

Summary

The County may adopt a franchise ordinance relating to interstate pipelines, but it is unlikely that it could impose conditions beyond those relating to construction and maintenance. In other words, any attempt to impose safety conditions beyond those required by the federal government for interstate pipelines likely would be preempted.

Discussion

Counties may grant companies franchises for use of roads for “the construction and maintenance of waterworks, gas pipes, telephone, telegraph, and electric light lines, sewers and any other such facilities.” RCW 36.55.010. There is similar authority for municipalities. E.g., RCW 35A.47.040 (code cities). Franchise agreements typically cover such things as construction and maintenance of the facilities. There is a history of local governments exercising such authority for interstate as well as intrastate pipelines.

However, local governments have attempted with limited success to use their franchise authority to effect safety standards. The City of Seattle, after the Bellingham tragedy, declined to renew its franchise to Olympic Pipeline Company, seeking to impose some additional requirements such as testing requirements beyond those required by federal law. The Ninth Circuit Court of Appeals determined that such requirements were preempted by the federal Pipeline Safety Improvement Act (PSA) and were outside the City’s franchise authority. Olympic Pipe Line Co. v. City of Seattle, 437 F.3d 872 (9th Cir. 2006). The court distinguished between a local government’s proprietary authority and its regulatory authority. Franchise agreements that protect the government’s proprietary interests, such as construction and maintenance requirements, are permissible even for interstate pipelines. However, safety standards are not. The question is whether the local government is acting as proprietor or regulator. Id. at 881.
There can be a distinction with intrastate pipelines. In *Shell Oil Co. v. Santa Monica*, 830 F.2d 1052 (9th Cir. 1987), *cert denied*, 487 U.S. 1235 (1988), the Ninth Circuit upheld Santa Monica’s imposition of some safety standards in its franchise agreement. However, the *Olympic Pipeline* court distinguished that case because it involved an intrastate pipeline and was regulated under the Hazardous Liquid Pipeline Safety Act (HLPSA), rather than the PSA. While the PSA allows some state safety regulation if *intrastate* pipelines above beyond the federal requirements, that regulation must be done by the state authority certified by the federal Department of Transportation. In Washington, that is the Utilities and Transportation Commission. In contrast, the HLPSA permits more stringent regulation of *intrastate* pipelines by “any State agency,” and the *Shell Oil* court determined that “any State agency” could include the City of Santa Monica.
Appendix 12:

WAC 197-11-660, Substantive authority and mitigation
6.12 Appendix 12: WAC 197-11-660, Substantive authority and mitigation

WAC 197-11-660

Substantive authority and mitigation.

(1) Any governmental action on public or private proposals that are not exempt may be conditioned or denied under SEPA to mitigate the environmental impact subject to the following limitations:

(a) Mitigation measures or denials shall be based on policies, plans, rules, or regulations formally designated by the agency (or appropriate legislative body, in the case of local government) as a basis for the exercise of substantive authority and in effect when the DNS or DEIS is issued.

(b) Mitigation measures shall be related to specific, adverse environmental impacts clearly identified in an environmental document on the proposal and shall be stated in writing by the decision maker. The decision maker shall cite the agency SEPA policy that is the basis of any condition or denial under this chapter (for proposals of applicants). After its decision, each agency shall make available to the public a document that states the decision. The document shall state the mitigation measures, if any, that will be implemented as part of the decision, including any monitoring of environmental impacts. Such a document may be the license itself, or may be combined with other agency documents, or may reference relevant portions of environmental documents.

(c) Mitigation measures shall be reasonable and capable of being accomplished.

(d) Responsibility for implementing mitigation measures may be imposed upon an applicant only to the extent attributable to the identified adverse impacts of its proposal. Voluntary additional mitigation may occur.

(e) Before requiring mitigation measures, agencies shall consider whether local, state, or federal requirements and enforcement would mitigate an identified significant impact.

(f) To deny a proposal under SEPA, an agency must find that:

(i) The proposal would be likely to result in significant adverse environmental impacts identified in a final or supplemental environmental impact statement prepared under this chapter; and

(ii) Reasonable mitigation measures are insufficient to mitigate the identified impact.

(g) If, during project review, a GMA county/city determines that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city's development regulations or comprehensive plan adopted under chapter 36.70A RCW, or in other applicable local, state or federal laws or rules, provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action under RCW 43.21C.240, the GMA county/city shall not impose additional mitigation under this chapter.

(2) Decision makers should judge whether possible mitigation measures are likely to protect or enhance environmental quality. EISs should briefly indicate the intended environmental benefits of mitigation measures for significant impacts (WAC 197-11-440(6)). EISs are not required to analyze in detail the environmental impacts of mitigation measures, unless the mitigation measures:

(a) Represent substantial changes in the proposal so that the proposal is likely to have significant adverse environmental impacts, or involve significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; and

(b) Will not be analyzed in a subsequent environmental document prior to their implementation.

(3) Agencies shall prepare a document that contains agency SEPA policies (WAC 197-11-902), so that applicants and members of the public know what these policies are. This document shall include, or reference by citation, the regulations, plans, or codes formally designated under this section and RCW 43.21C.080 as possible bases for conditioning or denying proposals. If only a portion of a regulation, plan, or code is designated, the document shall identify that portion. This document (and any documents referenced in it) shall be readily available to the public and shall be available to applicants prior to preparing a draft EIS.

[Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. WSR 97-21-030 (Order 95-16), § 197-11-660, filed 10/10/97, effective 11/10/97. Statutory Authority: ROW 43.21C.110. WSR 84-05-020 (Order DE 83-39), § 197-11-660, filed 2/10/84, effective 4/4/84.]
Appendix 13:
Tacoma interim land use ordinance 28470
6.13 Appendix 13: Tacoma interim land use ordinance 2847

ORDINANCE NO. 28470

AN ORDINANCE relating to zoning; amending Title 13 of the Tacoma Municipal Code by amending Chapters 13.04, 13.05, 13.06, and 13.10 thereof, to enact interim land use regulations limiting the receipt and processing of applications for permits for the establishment of certain uses within certain zoning districts for an initial period of one year to protect the viability and effectiveness of the Tidflats subarea planning process and its outcomes.

WHEREAS the City periodically accepts applications to amend the Comprehensive Plan and Land Use Regulatory Code. As part of the 2017-2018 Comprehensive Plan and Land Use Regulatory Code amendment application period, the City received multiple applications/requests for zoning and land use process changes in the Tidflats area, including the Northeast Tacoma Buffer Zone application, the implementation of the Container Port Element of the City's Comprehensive Plan, and the Director's Rule relating to expanded notification for large industrial projects, and

WHEREAS in consideration of these numerous code amendment applications, on May 9, 2017, the City Council adopted Amended Resolution No. 39723, to initiate the subarea planning process for the Tidflats area, allocate resources necessary to move forward with the plan, and request the Planning Commission to immediately begin discussions regarding the need for interim regulations related to the Container Port Element while the subarea planning process is underway, and

WHEREAS subarea planning allows for the establishment of a shared, long-term vision, and a more coordinated approach to development, environmental review, and strategic capital investments in a focused area, and

-1-

Reducing Impacts from Fossil Fuel Projects Appendix 13, Page 235 of 293
January 30, 2018
WHEREAS as a designated Manufacturing and Industrial Center per the Puget Sound Regional Council's VISION 2040, the Port/Tideflats Subarea Plan must comply with VISION 2040 and the subarea planning requirements therein, as well as State law regarding the Port Container Element of the City's Comprehensive Plan, and

WHEREAS while the City bears full responsibility for implementing the requirements of the State's Growth Management Act within the Tideflats, the City has a work plan to conduct an inclusive subarea planning process including material participation by the Port of Tacoma, the Puyallup Tribe, community residents and businesses, and other stakeholders countywide, and

WHEREAS it is anticipated that the subarea planning process may take as long as three years, and

WHEREAS in the interim the existing broadly permissive land use regulations within the Tideflats area could allow substantial new uses, which might be subject to additional regulation under the completed subarea plan, to vest in the current regulations and endure for decades, and

WHEREAS the vesting of substantial new uses in the Tideflats during the development of the subarea plan, could have the effect of partially or wholly negating the effect of the subarea plan, and

WHEREAS State law confers on the City the authority to enact interim regulations as a procedural step to protect the viability and effectiveness of the subarea planning process and its outcomes, and
WHEREAS the City of Tacoma sent a letter of request for consultation to
Chairman Sterud of the Puyallup Tribe of Indians, inviting early involvement and
comments from the Puyallup Tribe throughout the development of the interim
regulations, and

WHEREAS following the City Council's direction in Amended Resolution
No. 39723, the Planning Commission studied the need for interim regulations
while the subarea planning process is underway, including conducting a public
hearing on September 13, 2017, and

WHEREAS on August 16, 2017, staff received a comment letter from
Chairman Sterud of the Puyallup Tribal Council in support of staff's initial
recommendations as presented to the Commission on August 2 and August 16,
2017, and

WHEREAS on August 29, 2017, the City of Tacoma sent an additional
letter to Chairman Sterud regarding the Planning Commission's public comment
period and hearing, and highlighting key changes to staff's recommendations
within the Commission's public review draft, and

WHEREAS on October 4, 2017 the Planning Commission issued Findings
of Fact and Recommendations to the City Council (attached hereto and
incorporated herein by reference as Exhibit E), recommending the adoption of
interim regulations to protect the viability and effectiveness of the subarea
planning process and its outcomes, and
WHEREAS on October 17, 2017, the City Council conducted a public
hearing on the proposed interim regulations, and

WHEREAS the City also received a great number written comments,
including additional comments from Chairman Sterud of the Puyallup Tribe of
Indians, a number of which were incorporated into this ordinance, and

WHEREAS the City Council carefully considered all verbal and written
comments, and they influenced the contents of this amended ordinance, and

WHEREAS the Tidflats is an area with multiple environmentally sensitive
areas, including fish and wildlife habitat conservation areas, streams, wetlands,
and aquifer recharge areas, and is also an area with potential risks of geologic,
flood, and other natural disasters, and

WHEREAS the new industrial uses for which limitations are included in the
interim regulations were determined with reference to the risks presented by
those uses on health, safety and welfare of the public and the local environment
in the event of an accident or natural or human caused disaster, and

WHEREAS the Tidflats also contain regionally significant manufacturing
and industrial areas supporting an important regional workforce, at a time in
which the regional supply of industrial land is dwindling, and

WHEREAS existing uses in the Tidflats, including industrial uses, are
significant employers within Pierce County, have a positive County-wide
economic impact, and support the operations other important organizations such
as Joint Base Lewis McChord, and
WHEREAS after consideration, the local and regional impact of extending
the interim regulations to existing uses is unknown, and the risk of significant
adverse economic and other impacts too high to justify application of interim
regulations to existing uses, and

WHEREAS interim regulations will not affect any expansions and
improvements that, at the time of adoption of this ordinance, had not yet been
constructed, but had already been reviewed and approved by the City through a
land use permit, development permit, or environmental review, and

WHEREAS new non-industrial and residential uses for which limitations
are included in the interim regulations were determined with reference to the
risks presented by those uses in encroaching on and conflicting with industrial
uses, or converting scarce industrial lands to non-industrial uses, and

WHEREAS the City Council having considered the testimony of the public
at the hearing on the proposed interim regulations and the work plan for the
development of a Tideflats subarea plan finds it in the interest of public health,
safety and welfare to enact interim Tideflats land use regulations; Now,

Therefore,

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. Legislative Findings. The recitals set forth above, including the
Findings of Fact and Recommendations of the Tacoma Planning Commission,
Exhibit E, are hereby adopted as the City Council’s legislative findings.

Section 2. That the interim land use regulations in Exhibit A (“Proposed
Expanded Notification for Heavy Industrial Uses”), Exhibit B (“Proposed Special

-5-
Use Restrictions for Non-Industrial Uses in the Port of Tacoma Manufacturing and Industrial Center”), Exhibit C ("Proposed Marine View Drive Residential Development Restrictions"), and Exhibit D ("Proposed Heavy Industrial Special Use Restrictions") are hereby enacted for an initial term of one year.

Section 3. Severability. If any section, subsection, paragraph, sentence, clause, or phrase of this Ordinance or its application to any person or situation should be held to be invalid or unconstitutional for any reason by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of the remaining portions of this Ordinance or its application to any other person or situation.

Section 4. Effective Date. This Ordinance shall be effective ten days after its publication.

Passed ____________________

______________________________
Mayor

Attest:

______________________________
City Clerk

Approved as to form:

______________________________
Deputy City Attorney
### Chapter 13.05 Land Use Permit Procedures

#### 13.05.020 Notice process.

***

H. Notice and Comment Period for Specified Permit Applications. Table H specifies how to notify, the distance required, the comment period allowed, expiration of permits, and who has authority for the decision to be made on the application.

#### Table H – Notice, Comment and Expiration for Land Use Permits

<table>
<thead>
<tr>
<th>Permit Type</th>
<th>Preapplication Meeting</th>
<th>Notice: Distance</th>
<th>Notice: Newspaper</th>
<th>Notice: Permit Site</th>
<th>Commencement Period</th>
<th>Decision</th>
<th>Hearing Required</th>
<th>City Council</th>
<th>Expiration of Permit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpretation of code</td>
<td>Recommended</td>
<td>100 feet for site specific</td>
<td>For general application</td>
<td>Yes</td>
<td>14 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>Uses not specifically classified</td>
<td>Recommended</td>
<td>400 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>30 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>Boundary line adjustment</td>
<td>Required</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years⁵</td>
</tr>
<tr>
<td>Binding site plan</td>
<td>Required</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years⁵</td>
</tr>
<tr>
<td>Environmental SEPA DNS⁴ (see TMC 13.05.020.1)</td>
<td>Optional</td>
<td>Same as case type</td>
<td>Yes if no hearing required</td>
<td>No</td>
<td>Same as case type</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>Environmental Impact Statement (EIS)⁴ (see TMC 13.05.020.1)</td>
<td>Required for scoping, DEIS and PEIS</td>
<td>1000 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>Minimum 30 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>None</td>
</tr>
<tr>
<td>Variance, height of main structure</td>
<td>Required</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>30 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Open space classification</td>
<td>Required</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>2</td>
<td>Hearing Examiner</td>
<td>Yes</td>
<td>Yes</td>
<td>None</td>
</tr>
</tbody>
</table>

Note: These amendments show all of the changes to existing Land Use regulations. The sections included are only those portions of the code that are associated with these amendments. New text is underlined and text that has been deleted is shown as strikethrough.
<table>
<thead>
<tr>
<th>Permit Type</th>
<th>Preapplicatio n Meeting</th>
<th>Notice: Distanc e</th>
<th>Notice: Newspape r</th>
<th>Notice : Post Site</th>
<th>Commen t Period</th>
<th>Decision Required</th>
<th>Hearing Required</th>
<th>City Counci l</th>
<th>Expiratio n of Permit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plats 10+ lots</td>
<td>Required</td>
<td>1000 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>21 days</td>
<td>Hearing Examine r</td>
<td>Yes</td>
<td>Final Plat</td>
<td>5 years²</td>
</tr>
<tr>
<td>Rezones</td>
<td>Required</td>
<td>400 feet; 1000</td>
<td>No; Yes for public</td>
<td>Yes</td>
<td>21 days</td>
<td>Hearing Examine r</td>
<td>Yes</td>
<td>Yes</td>
<td>None</td>
</tr>
<tr>
<td>Shoreline/CUP/ variance³ (see TMC 13.05.020.1)</td>
<td>Required</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>30 days²</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>2 years/ maximum⁶</td>
</tr>
<tr>
<td>Short plat (2-4 lots)</td>
<td>Required</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years³</td>
</tr>
<tr>
<td>Short plat (5-9 lots)</td>
<td>Required</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>14 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years⁶</td>
</tr>
<tr>
<td>Site approval</td>
<td>Optional</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>30 days²</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Conditional use⁴ (see TMC 13.05.020.1)</td>
<td>Required</td>
<td>400 feet; 1000</td>
<td>No</td>
<td>Yes</td>
<td>30 days²</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years⁴</td>
</tr>
<tr>
<td>Conditional use, correctional facility (new or major modification)</td>
<td>Required</td>
<td>1,000 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>30 days²</td>
<td>Hearing Examine r</td>
<td>Yes</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Conditional use, large-scale retail</td>
<td>Required</td>
<td>1,000 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>30 days²</td>
<td>Hearing Examine r</td>
<td>Yes</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Conditional use, master plan</td>
<td>Required</td>
<td>1000 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>30 days²</td>
<td>Director</td>
<td>Yes</td>
<td>No</td>
<td>10 years</td>
</tr>
<tr>
<td>Conditional Use, Minor Modification</td>
<td>Optional</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Conditional Use, Major Modification</td>
<td>Required</td>
<td>400 feet; 1000</td>
<td>No</td>
<td>Yes</td>
<td>14 days²</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Temporary Homeless Camp Permit</td>
<td>Required</td>
<td>400 feet</td>
<td>Yes</td>
<td>Yes</td>
<td>14 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>1 year</td>
</tr>
<tr>
<td>Minor Variance</td>
<td>Optional</td>
<td>100 feet</td>
<td>No</td>
<td>No</td>
<td>14 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Variance</td>
<td>Optional</td>
<td>100 feet</td>
<td>No</td>
<td>Yes</td>
<td>14 days</td>
<td>Director</td>
<td>No</td>
<td>No</td>
<td>5 years</td>
</tr>
<tr>
<td>Permit Type / FWHCA Minor Development Permits</td>
<td>Notice: Distance</td>
<td>Notice: Newspaper</td>
<td>Notice: Posting</td>
<td>Commen t Period</td>
<td>Decision</td>
<td>Hearing Required</td>
<td>City Council</td>
<td>Expiration of Permit</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>-----------------</td>
<td>------------------</td>
<td>-----------------</td>
<td>----------------</td>
<td>----------</td>
<td>-----------------</td>
<td>--------------</td>
<td>---------------------</td>
<td></td>
</tr>
<tr>
<td>Wetland/Stream</td>
<td>Required</td>
<td>400 feet</td>
<td>No</td>
<td>Yes</td>
<td>No*</td>
<td>No</td>
<td>5 years*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FWHCA development permits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wetland/Stream</td>
<td>Required</td>
<td>100 feet</td>
<td>No</td>
<td>Yes</td>
<td>No*</td>
<td>No</td>
<td>5 years*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FWHCA Minor Development Permits</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

INFORMATION IN THIS TABLE IS FOR REFERENCE PURPOSE ONLY.

* Programmatic Restoration Projects can request 5 year renewals to a maximum of 20 years total.

When an open record hearing is required, all other land use permit applications for a specific site or project shall be considered concurrently by the Hearing Examiner (refer to Section 13.05.040.E).

1. Conditional use permits for wireless communication facilities, including towers, shall expire two years from the effective date of the Director’s decision and are not eligible for a one-year extension.
2. Comment on land use permit proposal allowed from date of notice to hearing.
3. Must be recorded with the Pierce County Auditor within five years.
4. Special use permits for wireless communication facilities, including towers, are limited to two years from the effective date of the Director’s decision.
5. If a public meeting is held, the public comment period shall be extended 7 days beyond and including the date of the public meeting.
6. Refer to Section 13.05.070 for preliminary plat expiration dates.
7. Public Notification of Minor Variances may be sent at the discretion of the Director. There is no notice of application for Minor Variances.

I. Interim Expanded Notification for Heavy Industrial Projects

1. Per Ordinance No. 28470, on an interim basis, the following applies to all heavy industrial projects (as defined in TMC 13.06.700.1) and industrial uses identified in TMC 13.06.580, which require a discretionary permit ("designated projects") or SEPA determination.

2. Notice for designated projects will be emailed to all Neighborhood Councils and Business Districts, as well as the Community Council. In addition, notice will be sent to the SEPA contact for all adjacent jurisdictions (Federal Way, Fife, Fircrest, Lakewood, Pierce County, and University Place). This is in addition to all typically-notified parties and the Puyallup Tribe of Indians.

3. Notification of designated projects will be mailed by first-class mail to the applicant; property owner (if different than the applicant); neighborhood councils and business districts; qualified neighborhood or community organizations; the Puyallup Tribe of Indians; Local Governments in Pierce County; and to owners of property and/or taxpayers of record, as indicated by the records of the Pierce County Assessor/Treasurer.


(a) The notification distance for a project within the Port of Tacoma Manufacturing/Industrial Center (M/IC) will be 2,500 feet from the boundaries of that center.

(b) Notification distance for a project within the South Tacoma Manufacturing/Industrial Overlay District, as set forth in TMC 13.06.400, will be 2,500 feet from the boundaries of the Overlay District.
(c) Notification distance for a qualifying industrial project in any other zoning district, outside either of the above areas, will be 2,500 feet from the boundaries of the project site.

5. Upon determination of a Complete Application, the City will hold a community meeting to provide notification to the community that a significant project has been applied for. Further, the meeting will provide clarity on the public process (from all permitting agencies) and opportunities for public review and comment.

(a) For projects with an associated land use permit and public notice, this meeting will take place approximately two weeks after the start of the public notice period. Public notice will be extended to 30 days in the rare case that the TMC-required notice period is not already 30 days.

(b) For projects not associated with a land use permit, the meeting will take place after determination that a SEPA application is complete, but prior to issuance of a preliminary SEPA determination. The meeting will include a proposed SEPA timeline, including issuance of the preliminary determination, opportunity for comment, and the appeal process for this type of SEPA determination.

6. Upon determination of a Complete Application, the City will post the permit package and all relevant studies under “public notices” on www.tacomapermits.org.

7. Additional notification may be done as necessary (i.e., social media posts or separate project web pages) or as appropriate for the project type.
Chapter 13.06 Zoning

13.06.400 Industrial Districts.

***

C. Land use requirements.

***

3. Use Requirements. The following use table designates all permitted, limited, and prohibited uses in the districts listed.

Use classifications not listed in this section or provided for in Section 13.06.500 are prohibited, unless permitted via Section 13.05.030.C.

4. Use table abbreviations.

<table>
<thead>
<tr>
<th>Uses</th>
<th>M-1</th>
<th>M-2</th>
<th>PMI</th>
<th>Additional Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult family home</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use.</td>
</tr>
<tr>
<td>Adult retail and entertainment</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.525.</td>
</tr>
<tr>
<td>Agricultural uses</td>
<td>CU</td>
<td>CU/N*</td>
<td>CU/N*</td>
<td>Such uses shall not be located on a parcel of land containing less than 20,000 square feet of area. *Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Uses</td>
<td>M-1</td>
<td>M-2</td>
<td>PMI</td>
<td>Additional Regulations</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-------------------------</td>
</tr>
<tr>
<td>Airport</td>
<td>CU</td>
<td>CU/N*</td>
<td>CU/N*</td>
<td>*Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Ambulance services</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Animal sales and service</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Assembly facility</td>
<td>P</td>
<td>P</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Brewpub</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Building material and services</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Business support services</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Carnival</td>
<td>P/TU*</td>
<td>N</td>
<td>N</td>
<td>*Temporary use only within the South Tacoma M/IC Overlay District</td>
</tr>
<tr>
<td>Cemetery/interment services</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>New facilities are not permitted. Enlargement of facilities in existence prior to the effective date of this provision (May 27, 1975) may be approved in any zoning district subject to a conditional use permit. See Section 13.06.640.</td>
</tr>
<tr>
<td>Commercial parking facility</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Commercial recreation and entertainment</td>
<td>PICU*</td>
<td>PICU*</td>
<td>N</td>
<td>*Within the South Tacoma M/IC Overlay District, a conditional use permit is required for facilities over 10,000 square feet of floor area in the M-2 district and over 15,000 square feet in the M-1 district.</td>
</tr>
<tr>
<td>Communication facility</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Confidential shelter</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>See Section 13.06.535.</td>
</tr>
<tr>
<td>Continuing care retirement community</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>*Not permitted within the South Tacoma M/IC Overlay District. In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use.</td>
</tr>
<tr>
<td>Correctional facility</td>
<td>N</td>
<td>CU</td>
<td>CU</td>
<td>Modifications or expansions to existing facilities that increase the inmate capacity shall be processed as a major modification (see Section 13.05.080). A pre-application community meeting is also required (see Section 13.06.640.Q).</td>
</tr>
</tbody>
</table>

Appendix 13, Page 246 of 293

Reducing Impacts from Fossil Fuel Projects
January 30, 2018
<table>
<thead>
<tr>
<th>Uses</th>
<th>M-1</th>
<th>M-2</th>
<th>PMI</th>
<th>Additional Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Craft Production</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Cultural institution</td>
<td>P/CU*</td>
<td>P/CU*/N~</td>
<td>N</td>
<td>*Conditional use within the South Tacoma M/IC Overlay District, unless an accessory use. -Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Day care, family</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>*Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Day care center</td>
<td>P</td>
<td>P</td>
<td>N</td>
<td>Subject to development standards contained in Section 13.06.155.</td>
</tr>
<tr>
<td>Detoxification center</td>
<td>CU</td>
<td>CU</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Drive-through with any permitted use</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to the requirements of TMC 13.06.513.</td>
</tr>
<tr>
<td>Dwelling, single-family detached</td>
<td>P/N*~</td>
<td>N*</td>
<td>N*</td>
<td>In M-1 districts, single-, two- and three-family and townhouse dwellings are prohibited, except for residential uses in existence on December 31, 2008, the effective date of adoption of this provision.</td>
</tr>
<tr>
<td>Dwelling, two-family</td>
<td>P/N*~</td>
<td>N*~</td>
<td>N*~</td>
<td>In M-1 districts, new multi-family residential dwellings are permitted only within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use.</td>
</tr>
<tr>
<td>Dwelling, three-family</td>
<td>P/N*~</td>
<td>N*~</td>
<td>N*~</td>
<td>*In all districts, quarters for caretakers and watchpersons are permitted as is temporary worker housing to support uses located in these districts. -Not permitted within the South Tacoma M/IC Overlay District except for quarters for caretakers and watchpersons and temporary worker housing, as noted above. -Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC except for quarters for caretakers and watchpersons and temporary worker housing to support uses located in these districts. See 13.06.400.G.</td>
</tr>
<tr>
<td>Dwelling, multiple-family</td>
<td>P/N*~</td>
<td>N*~</td>
<td>N*~</td>
<td></td>
</tr>
<tr>
<td>Dwelling, townhouse</td>
<td>P/N*~</td>
<td>N*~</td>
<td>N*~</td>
<td></td>
</tr>
<tr>
<td>Dwelling, accessory (ADU)</td>
<td>P/N~</td>
<td>N</td>
<td>N</td>
<td>Subject to additional requirements contained in 13.06.150. -Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Eating and drinking</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Emergency and transitional housing</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008 the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>Uses</td>
<td>M-1</td>
<td>M-2</td>
<td>PMI</td>
<td>Additional Regulations</td>
</tr>
<tr>
<td>--------------------------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>------------------------</td>
</tr>
<tr>
<td>Extended care facility</td>
<td>P/N</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>Foster home</td>
<td>P/N</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Fueling station</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Funeral home</td>
<td>P</td>
<td>P</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Golf course</td>
<td>P/N</td>
<td>P/N</td>
<td>N</td>
<td>*Not permitted within the South Tacoma M/IC Overlay District. *Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Group housing</td>
<td>P/N</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Heliport</td>
<td>CU</td>
<td>CU</td>
<td>CU</td>
<td></td>
</tr>
<tr>
<td>Home occupation</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to additional requirements contained in Section 13.06.100.E</td>
</tr>
<tr>
<td>Hospital</td>
<td>P/CU</td>
<td>P/N</td>
<td>N</td>
<td>*Conditional use within the South Tacoma M/IC Overlay District. *Not permitted within the South Tacoma M/IC Overlay District. *Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Hotel/motel</td>
<td>P/N</td>
<td>N</td>
<td>N</td>
<td>*Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Industry, heavy</td>
<td>N</td>
<td>P</td>
<td>P</td>
<td>Animal slaughter, fat rendering, acid manufacture, smelters, and blast furnaces allowed in the PMI District only.</td>
</tr>
<tr>
<td>Industry, light</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Uses</td>
<td>M-1</td>
<td>M-2</td>
<td>PMI</td>
<td>Additional Regulations</td>
</tr>
<tr>
<td>------------------------------------------------------------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>-------------------------</td>
</tr>
<tr>
<td>Intermediate care facility</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>Juvenile community facility</td>
<td>P/N*</td>
<td>P/N2~</td>
<td>P/N*~</td>
<td>See Section 13.06.530 for resident limits and additional regulations. *Not permitted within the South Tacoma M/IC Overlay District. – Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Live/Work</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>Projects incorporating live/work in new construction shall contain no more than 20 live/work units. Subject to additional requirements contained in Section 13.06.570.</td>
</tr>
<tr>
<td>Marijuana processor, producer, and researcher</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>See additional requirements contained in Section 13.06.565</td>
</tr>
<tr>
<td>Marijuana retailer</td>
<td>P~</td>
<td>P</td>
<td>N</td>
<td>~Within the South Tacoma M/IC Overlay District, and within the M-2 District of the Port of Tacoma M/IC on an interim basis per Ordinance No. 28470 (See 13.06.400.G.), limited to 10,000 square feet of floor area per development site in the M-2 district and 15,000 square feet in the M-1 district. See additional requirements contained in Section 13.06.565.</td>
</tr>
<tr>
<td>Microbrewery/winery</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Mobile home/trailer court</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Nursery</td>
<td>P</td>
<td>P</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Office</td>
<td>P*</td>
<td>P*</td>
<td>P</td>
<td>*Within the South Tacoma M/IC Overlay District, unless an accessory use, limited to 10,000 square feet of floor area per development site in the M-2 district and 15,000 square feet in the M-1 district.</td>
</tr>
<tr>
<td>Parks, recreation and open space</td>
<td>P</td>
<td>P/N*</td>
<td>P/N*</td>
<td>Subject to the requirements of Section 13.06.560.D. *Per Ordinance No. 28470, on an interim basis, High Intensity/Destination facilities (see 13.06.560) are not permitted in the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Passenger terminal</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Personal services</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Port, terminal, and industrial; water-dependent or water-related (as defined in Chapter 13.10)</td>
<td>N</td>
<td>N</td>
<td>P*</td>
<td>*Prefered use.</td>
</tr>
</tbody>
</table>

Exhibit B – Proposed Special Use Restrictions For Non-Industrial Uses In The Port Of Tacoma Manufacturing And Industrial Center
<table>
<thead>
<tr>
<th>Uses</th>
<th>M-1</th>
<th>M-2</th>
<th>PMI</th>
<th>Additional Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public safety and public service facilities</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Religious assembly</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Repair services</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Research and development industry</td>
<td>P</td>
<td>P</td>
<td>N</td>
<td></td>
</tr>
<tr>
<td>Residential care facility for youth</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>Residential chemical dependency treatment facility</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>See Section 13.06.535. *Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Retail</td>
<td>P*</td>
<td>P*</td>
<td>P*</td>
<td>*Limited to 7,000 square feet of floor area, per development site, in the PMI District. Within the South Tacoma M/IC Overlay District, and within the M-2 District of the Port of Tacoma M/IC on an interim basis per Ordinance No. 28470 (see 13.06.400.G.), unless an accessory use, limited to 10,000 square feet of floor area per development site in the M-2 district and 15,000 square feet in the M-1 district. Outside of the South Tacoma M/IC Overlay District and Port of Tacoma M/IC, limited to 65,000 square feet per use, unless approved with a conditional use permit. See Section 13.06.640.J.</td>
</tr>
<tr>
<td>Retirement home</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>School, public or private</td>
<td>P/N*</td>
<td>P/N*</td>
<td>P/N*</td>
<td>*General K through 12 education not permitted in the PMI District or in the South Tacoma M/IC Overlay District. Per Ordinance No. 28470, on an interim basis, General K through 12 education is not permitted within the Port of Tacoma M/IC. See 13.06.400.G.</td>
</tr>
<tr>
<td>Seasonal sales</td>
<td>TU</td>
<td>TU</td>
<td>TU</td>
<td>Subject to development standards contained in Section 13.06.635.</td>
</tr>
<tr>
<td>Self-storage</td>
<td>P</td>
<td>P</td>
<td>TU</td>
<td>See specific requirements in Section 13.06.503.B.</td>
</tr>
<tr>
<td>Short-term rental</td>
<td>N</td>
<td>N</td>
<td>P</td>
<td></td>
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<tr>
<td>Uses</td>
<td>M-1</td>
<td>M-2</td>
<td>PMI</td>
<td>Additional Regulations</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-----</td>
<td>-----</td>
<td>-----</td>
<td>------------------------</td>
</tr>
<tr>
<td>Staffed residential home</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District. See Section 13.06.535.</td>
</tr>
<tr>
<td>Student housing</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>In M-1 districts, permitted only within residential or institutional buildings in existence on December 31, 2008, the effective date of adoption of this provision, or when located within a mixed-use building where a minimum of 1/3 of the building is devoted to industrial or commercial use. *Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Surface mining</td>
<td>CU</td>
<td>CU</td>
<td>CU</td>
<td></td>
</tr>
<tr>
<td>Temporary uses</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.635.</td>
</tr>
<tr>
<td>Theater</td>
<td>P/N*</td>
<td>N</td>
<td>N</td>
<td>*Not permitted within the South Tacoma M/IC Overlay District.</td>
</tr>
<tr>
<td>Transportation/freight terminal</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Urban Horticulture</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Utilities</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Vehicle rental and sales</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.510.</td>
</tr>
<tr>
<td>Vehicle service and repair</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.510.</td>
</tr>
<tr>
<td>Vehicle service and repair, industrial</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.510.</td>
</tr>
<tr>
<td>Vehicle storage</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to development standards contained in Section 13.06.510.</td>
</tr>
<tr>
<td>Warehouse/storage</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Storage and treatment facilities for hazardous wastes are subject to the state locational standards adopted pursuant to the requirements of Chapter 70.105 RCW and the provisions of any groundwater protection ordinance of the City of Tacoma, as applicable.</td>
</tr>
<tr>
<td>Wholesale or distribution</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td></td>
</tr>
<tr>
<td>Wireless communication facility</td>
<td>P*/CU**</td>
<td>P*/CU**</td>
<td>P*/CU**</td>
<td>*Wireless communication facilities are also subject to Section 13.06.545.D.1. **Wireless communication facilities are also subject to Section 13.06.545.D.2.</td>
</tr>
<tr>
<td>Work/Live</td>
<td>P</td>
<td>N</td>
<td>N</td>
<td>Projects incorporating work/live in new construction shall contain no more than 20 work/live units. Subject to additional requirements contained in Section 13.06.570.</td>
</tr>
</tbody>
</table>

Exhibit B – Proposed Special Use Restrictions For Non-Industrial Uses In The Port Of Tacoma Manufacturing And Industrial Center

Reducing Impacts from Fossil Fuel Projects Appendix 13, Page 251 of 293
January 30, 2018
### Uses

<table>
<thead>
<tr>
<th>Uses</th>
<th>M-1</th>
<th>M-2</th>
<th>PMI</th>
<th>Additional Regulations</th>
</tr>
</thead>
</table>
| Work release center                       | CU  | CU  | P/N | Subject to development standards contained in Section 13.06.550.  
*Per Ordinance No. 28470, on an interim basis, such uses are not permitted within the Port of Tacoma M/JC. See 13.06.400.G.* |
| Uses not prohibited by City Charter and not prohibited herein | N   | N   | P   |

### Footnotes:

1. For historic structures and sites, certain uses that are otherwise prohibited may be allowed, subject to the approval of a conditional use permit. See Section 13.06.640.F for additional details, limitations and requirements.

### F

F. Common requirements. To streamline the Zoning Code, certain requirements common to all districts are consolidated under Sections 13.06.500 and 13.06.600. These requirements apply to Section 13.06.400 by reference.

Refer to Section 13.06.500 for the following requirements for development in Industrial Districts:

- 13.06.502 Landscaping and buffering standards.
- 13.06.503 Residential transition standards.
- 13.06.510 Off-street parking and storage areas.
- 13.06.511 Transit support facilities.
- 13.06.512 Pedestrian and bicycle support standards.
- 13.06.520 Signs.
- 13.06.602 General restrictions (contains certain common provisions applicable to all districts, such as general limitations and exceptions regarding height limits, yards, setbacks and lot area)

### G

G. **Interim Special Use Restrictions for Non-industrial Uses in the Port of Tacoma M/JC.**

1. **Per Ordinance No. 28470,** on an interim basis, the intent of these special use restrictions is to place a pause on new non-industrial uses within the M-2 Heavy Industrial and PMI Port Maritime Industrial Zoning Districts of the Port of Tacoma M/JC until such time as the TideFlats subarea plan is complete.

2. The establishment of certain new non-industrial uses, specified in Table 13.06.400.C.5, is prohibited on an interim basis.

3. Existing uses, legally permitted at the time of adoption of this code, are allowed.
13.04.030 Policy.
A. It is hereby declared to be the policy of the City of Tacoma to consider the subdivision of land and the subsequent development of the subdivision as subject to the control of the City of Tacoma pursuant to the City’s land use codes for the orderly, planned, efficient, and economical development of the community.
B. Land to be subdivided shall be of such character that it can be used safely for building purposes without danger to health or peril from fire, flood, or other menace, and land shall not be subdivided until adequate public facilities and improvements exist or proper provision has been made for drainage, water, sewerage, and capital improvements such as schools, parks, recreation facilities, and active transportation facilities. While planning public facilities and improvements for proposed subdivisions of land, consideration shall be given to adopted City policies relating to sustainability, smart growth, urban forestry, complete streets, connectivity, and green infrastructure practices.
C. It is intended that these regulations shall supplement and facilitate the enforcement of the provisions, standards and policies contained in building and housing codes, zoning ordinances, the City of Tacoma’s Comprehensive Plan and applicable ordinances, manuals, design specifications, plans and guidelines, and elements thereof.
D. Per Ordinance No. 28470, on an interim basis, new residential platting and subdivision of land is prohibited along Marine View Drive and the adjacent slopes, as identified in the following map.
Chapter 13.06 Zoning

13.06.100 Residential Districts.

G. Townhouse Standards. Refer to Section 13.06.501.F for design standards that apply to all townhouse developments in R-Districts.

H. Common requirements. To streamline the Zoning Code, certain requirements common to all districts are consolidated under Sections 13.06.500 and 13.06.600. These requirements apply to Section 13.06.100 by reference:

13.06.501 Building design standards.
13.06.502 Landscaping and buffering standards.
13.06.510 Off-street parking and storage areas.
13.06.511 Transit support facilities.
13.06.512 Pedestrian and bicycle support standards.
13.06.520 Signs.
13.06.575 Short-term rental.
13.06.602 General restrictions (contains certain common provisions applicable to all districts, such as general limitations and exceptions regarding height limits, yards, setbacks and lot area).
I. Interim Residential Development Restrictions

1. Per Ordinance No. 28470, on an interim basis, all new residential development within the area identified in TMC 13.04.030.D is limited to one residential unit per legal lot as existing at the time of adoption of this ordinance.

2. As a condition of residential development, developers shall record a notice on title prior to initial sale which attests that the property is within proximity of an S-10, M-1, M-2, or PMI district in which industrial activities including but not limited to metal recycling, chemical storage and manufacturing, and container terminal facilities, are operating and will continue to operate and expand in the future. The distance of the unit from the nearest industrial zoning district shall be recorded.

***

13.06.200 Commercial Districts

***

C. Land use requirements.

***

5. District Use Table

<table>
<thead>
<tr>
<th>Uses</th>
<th>T</th>
<th>C-1</th>
<th>C-2</th>
<th>PDB</th>
<th>Additional Regulations(^{2,3}) (also see footnotes at bottom of table)</th>
</tr>
</thead>
<tbody>
<tr>
<td>***</td>
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<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Dwelling, single-family detached</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>Dwelling, two-family</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>Dwelling, three-family</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>Dwelling, multiple-family</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>Dwelling, townhouse</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>Dwelling, accessory (ADU)</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>Subject to additional requirements contained in 13.06.150. Per Ordinance No. 28470, on an interim basis, prohibited along Marine View Drive. See TMC 13.04.030.D for area of applicability.</td>
</tr>
<tr>
<td>***</td>
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</tr>
</tbody>
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***

Exhibit C – Proposed Marine View Drive Residential Development Restrictions
Chapter 13.10 Shoreline Management

CHAPTER 9 - DISTRICT-SPECIFIC REGULATIONS

Table 9-2. Shoreline Use and Development Standards

<table>
<thead>
<tr>
<th>GENERAL SHORELINE USE, MODIFICATION &amp; DEVELOPMENT STANDARDS TABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>District</strong></td>
</tr>
<tr>
<td>---------------</td>
</tr>
<tr>
<td>District Name</td>
</tr>
<tr>
<td>Shoreline Designation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Shoreline Uses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential Development</td>
</tr>
</tbody>
</table>

| Single Family | N | P |
| Multi-family stand-alone | N/C | N | N | N | N | N | N | N | N/C | N | N | N | N | P | N |
| Multi-family as part of a mixed-use area | P | N | N | N | N | N | N | N | N | N | P6 | N | N | N | P6 | N |

Exhibit C – Proposed Marine View Drive Residential Development Restrictions
### General Shoreline Use, Modification & Development Standards Table

<table>
<thead>
<tr>
<th>District Name</th>
<th>S-1</th>
<th>S-1b</th>
<th>S-2</th>
<th>S-3</th>
<th>S-4</th>
<th>S-5</th>
<th>S-6</th>
<th>S-6/7</th>
<th>S-7</th>
<th>S-8</th>
<th>S-9</th>
<th>S-10</th>
<th>S-11</th>
<th>S-12</th>
<th>S-13</th>
<th>S-14</th>
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<tr>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Western Slope Central</td>
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**Notes:**

1. Expansion of an existing marina shall be permitted consistent with the provisions of this Program, new marina development shall be a conditional use.
2. Boat ramps shall be permitted only in that area on the east side of the Foss Waterway north of the Centerline of 15th Street.
3. Water enjoyment and related commercial uses shall be permitted over-water only as a use of an existing structure or when located within a mixed-use structure.
4. Non-water-oriented commercial uses shall only be permitted in accordance with the regulations in TSMP Section 7.5.2 and only as a conditional use except where otherwise specified for the S-8 and S-15 Shoreline Districts.
5. New commercial development shall be limited to upland locations only. Existing water-oriented commercial uses at the Point Defiance Marina Complex may be continued and be modified provided modifications do not adversely affect ecological conditions and comply with all other provisions of this Program.
6. Non-water-oriented commercial uses shall be permitted as part of a mixed-use development with a water-oriented component; Non-water-oriented commercial uses in a mixed use development without a water-oriented component shall be permitted as a conditional use consistent with TSMP 9 (0D).
7. In all other circumstances, non-water-oriented uses shall be processed as a conditional use.
8. Non-water-oriented commercial uses shall be permitted outside 150' of OHWM only, except as specified in note 18. Commercial uses that are located outside shoreline jurisdiction and are consistent with the EIS for the Point Ruston development are allowed, those uses that are not consistent with the EIS shall be processed as a conditional use permit in accordance with the procedures in TMC 13.06.
9. New educational, historic, and scientific uses are permitted over-water or in the S-13 Shoreline District (Marine Waters of the State) only when water-dependent or as a use of an existing structure.
10. Water-dependent and related port/industrial uses shall be permitted only in existing structures.
11. Port and industrial development shall be permitted on the easterly side of the Thea Foss Waterway, north of the centerline of East 15th Street and in addition, in that area to the east of East D Street.
12. Non-water-oriented industrial uses shall only be permitted in accordance with the regulations in TSMP Section 7.6.2.
13. The “S-11” Shoreline District, new single-family and multi-family residential development is permitted only in that area north of 5410 Marine View Drive. Per Ordinance No. 28470, on an interim basis, new residential uses are prohibited. Existing residential uses may expand so long as the expansion is consistent with the requirements of TMC 13.10.
14. Detached single-family residential use and development is allowed in the S-15 shoreline district outside of shoreline jurisdiction.
15. New stand alone multi-family residential uses may be permitted as a conditional use in accordance with the regulations in TSMP Section 7.8.2.
16. Residential development shall be permitted in upland locations on the west side of the waterway and on the east side only south of the East 11th Street right of way, and shall be designed for multiple-family development only, excluding duplex and/or triplex development. Hotel/Motel uses are permitted on the west side of the Foss Waterway, and on the east side of the Foss Waterway only south of the centerline of 11th Street. Residential and Hotel/Motel uses are prohibited to the east of East D Street.
17. Multi-family residential uses shall be permitted in upland locations, outside 150’ of OHWM.

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**Exhibit C – Proposed Marine View Drive Residential Development Restrictions**

**January 30, 2018**

**Appendix 13, Page 257 of 293**
No more than 24 total townhouse units may be permitted in upland locations up to 100’ from OHWM as an outright permitted use so long as such townhouses are constructed on the southeasterly shoreline of the Point Ruston site. Townhouses may be permitted in upland locations up to 100’ from OHWM as a conditional use in all other locations. Townhouses in the S-15 may include an office use on the ground floor.

Helicopter landing pads are only allowed outside of shoreline jurisdiction as a conditional use and only as part of an approved structure.

Above ground utilities are only allowed consistent with TSMP 7.13.2.

New uses and development in the S-13 Shoreline District that are associated with an upland shoreline district shall only be permitted where the use or development is consistent with the permitted uses in the upland Shoreline District. Please see Section 9.15(D)(1)(a).

Structural shoreline stabilization shall be permitted only when necessity has been demonstrated as described in TSMP Section 8.2.2.

See application requirements in Section 2.4.4.

With the exception of the S-7, S-10 and S-11 Shoreline Districts, mooring buoys shall be designed, located and installed only for transient recreational boating, or in association with a single family residential development or a permitted marina. In the S-7, S-10 and S-11 Shoreline Districts mooring buoys may be designed, located and installed to accommodate port and industrial uses including the remote storage of ocean-going vessels and barges.

Buffer reductions allowed for water-dependent uses per TSMP 6.4.3(C).

Except that the buffer shall not extend beyond the centerline of Alaska street.

District specific height limitations shall not apply to bridges in the shoreline. Bridges should be kept to the minimum height necessary and shall provide a view study to determine whether the structure will cause any significant impacts to public views of the shoreline.

The maximum height standard excludes equipment used for the movement of waterborne cargo between storage and vessel or vessel and storage.

Any building, structure, or portion thereof hereafter erected (excluding equipment for the movement of waterborne cargo between storage and vessel, vessel and storage) shall not exceed a height of 100 feet, unless such building or structure is set back on all sides one foot for each four feet such building or structure exceeds 100 feet in height.

Maximum heights on Slag Peninsula are limited to 35 feet.

The side/yard corridor may be distributed between the two sides at the discretion of the proponent, provided a minimum 5 foot set back is maintained from either lot line.

New and/or expansion of an existing railroad siding is permitted when necessary to service a water-dependent port or industrial facility.
**PROPOSED HEAVY INDUSTRIAL SPECIAL USE RESTRICTIONS**

Note: These amendments show all of the changes to existing Land Use regulations. The sections included are only those portions of the code that are associated with these amendments.

New text is **underlined** and text that has been deleted is shown as *struck through*.

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**Chapter 13.06 Zoning**

Sections:

***

13.06.400 Industrial Districts.
13.06.400.A Industrial district purposes.
13.06.400.B Districts established.
13.06.400.B.1 M-1 Light Industrial District.
13.06.400.B.2 M-2 Heavy Industrial District.
13.06.400.B.3 PMI Port Maritime & Industrial District.
13.06.400.B.4 ST-MIC South Tacoma Manufacturing/Industrial Overlay District.
13.06.400.C Land use requirements.
13.06.400.D Building envelope standards.
13.06.410 Repealed.
13.06.420 Repealed.
13.06.430 Repealed.

13.06.500 Requirements in all preceding districts.
13.06.501 Building design standards.
13.06.502 Landscaping and buffering standards.
13.06.503 Residential transition standards.
13.06.510 Off-street parking and storage areas.
13.06.511 Transit support facilities.
13.06.512 Pedestrian and bicycle support standards.
13.06.513 Drive-throughs.
13.06.520 Signs.
13.06.521 General sign regulations.
13.06.522 District sign regulations.
13.06.525 Adult uses.
13.06.530 Juvenile community facilities.
13.06.535 Special needs housing.
13.06.540 Surface mining.
13.06.545 Wireless communication facilities.
13.06.550 Work release centers.
13.06.555 View-Sensitive Overlay District.
13.06.560 Parks, recreation and open space.
13.06.565 Marijuana Uses.
13.06.570 Live/Work and Work/Live.

***

Exhibit D – Proposed Heavy Industrial Special Use Restrictions

Reduction Impacts from Fossil Fuel Projects

January 30, 2018
13.06.400 Industrial Districts.

***

C. Land use requirements.

***

3. Use Requirements. The following use table designates all permitted, limited, and prohibited uses in the districts listed.

Use classifications not listed in this section or provided for in Section 13.06.500 are prohibited, unless permitted via Section 13.05.030.C.

4. Use table abbreviations.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>P</td>
<td>Permitted use in this district.</td>
</tr>
<tr>
<td>CU</td>
<td>Conditional use in this district. Requires conditional use permit consistent with the criteria and procedures of Section 13.06.640.</td>
</tr>
<tr>
<td>TU</td>
<td>Temporary Uses allowed in this district subject to specified provisions and consistent with the criteria and procedures of Section 13.06.635.</td>
</tr>
<tr>
<td>N</td>
<td>Prohibited use in this district.</td>
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5. District use table.

<table>
<thead>
<tr>
<th>Uses</th>
<th>M-1</th>
<th>M-2</th>
<th>PMI</th>
<th>Additional Regulations¹</th>
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</thead>
<tbody>
<tr>
<td>Industry, heavy</td>
<td>N</td>
<td>P/N</td>
<td>P/N</td>
<td>Animal slaughter, fat rendering, acid manufacture, smelters, and blast furnaces allowed in the PMI District only. *See section 13.06.580 Interim Industrial Use Restrictions for interim regulations.</td>
</tr>
<tr>
<td>Industry, light</td>
<td>P</td>
<td>P</td>
<td>P</td>
<td>*Preferred use. *See section 13.06.580 Interim Industrial Use Restrictions for interim regulations.</td>
</tr>
<tr>
<td>Port, terminal, and industrial; water-dependent or water-related (as defined in Chapter 13.10)</td>
<td>N</td>
<td>N</td>
<td>P/N</td>
<td>Storage and treatment facilities for hazardous wastes are subject to the state locational standards adopted pursuant to the requirements of Chapter 70.105 RCW and the provisions of any groundwater protection ordinance of the City of Tacoma, as applicable. *See section 13.06.580 Interim Industrial Use Restrictions for interim regulations.</td>
</tr>
<tr>
<td>Warehouse/storage</td>
<td>P</td>
<td>P/N</td>
<td>P/N</td>
<td>*See section 13.06.580 Interim Industrial Use Restrictions for interim regulations.</td>
</tr>
<tr>
<td>Wholesale or distribution</td>
<td>P</td>
<td>P/N</td>
<td>P/N</td>
<td>*See section 13.06.580 Interim Industrial Use Restrictions for interim regulations.</td>
</tr>
<tr>
<td>Uses not prohibited by City Charter and not prohibited herein</td>
<td>N</td>
<td>N</td>
<td>P/N</td>
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<tr>
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<td>1. For historic structures and sites, certain uses that are otherwise prohibited may be allowed, subject to the approval of a conditional use permit. See Section 13.06.640.F for additional details, limitations and requirements.</td>
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13.06.580 Interim Industrial Use Restrictions

A. Purpose: Per Ordinance No. 28470, on an interim basis, the purpose of this section is to pause the establishment of certain new industrial uses until such time as the Tidelands Subarea Plan is complete.

B. Applicability. These special use restrictions apply to the following primary uses in all zoning districts:

1. Coal terminals or bulk storage facilities;

   1. Oil, or other liquefied or gaseous fossil fuel terminals, bulk storage, manufacturing, production, processing or refining of oil or other liquefied or gaseous fossil fuels;

2. Chemical manufacturing;

   4. Mining and quarrying;

   5. Smelters.

C. Use Restrictions

1. New uses. The establishment of new uses as specified in 13.06.580.B are prohibited on an interim basis.

2. Existing uses. Legally permitted uses, listed in 13.06.580.B, at the time of adoption of this code are allowed.

3. Definitions. For the purpose of applying these special use restrictions, applicable North American Industrial Classification System (NAICS) codes and descriptions are cited and shall be interpreted broadly in accordance with the intent of the interim regulations.

   a. Coal terminals and bulk storage facilities.

      The bulk storage or wholesale distribution of coal and coal products or transfer of coal products via shipping terminal.

      b. Oil or other liquefied or gaseous fossil fuel terminals, bulk storage, manufacturing, production, processing or refining.

         (1) Petroleum bulk stations and terminals. This industry comprises establishments with bulk liquid storage facilities primarily engaged in the merchant wholesale distribution of crude petroleum and petroleum products. NAICS Code 424710.

         (2) Petroleum refineries. This industry comprises establishments primarily engaged in refining crude petroleum into refined petroleum. Petroleum refining involves one or more of the following activities: (1) fractionation; (2) straight distillation of crude oil; and (3) cracking. NAICS Code 324110.

         (3) Natural gas liquid extraction. This industry comprises establishments primarily engaged in the recovery of liquid hydrocarbons from oil and gas field gases. Establishments primarily engaged in sulfur recovery from natural gas are included in this industry. NAICS Code 211112.

         (4) Bulk storage, production, and wholesale distribution of natural gas liquids, liquefied natural gas, and liquefied petroleum gas.

   c. Chemical manufacturing. The Chemical Manufacturing subsector is based on the transformation of organic and inorganic raw materials by a chemical process and the formulation of products. This subsector distinguishes the
production of basic chemicals that comprise the first industry group from the production of intermediate and end products produced by further processing of basic chemicals that make up the remaining industry groups. For the purposes of these special use restrictions, this definition will apply to all industries classified as subcategories of NAICS Code 325 Chemical Manufacturing.

d. Mining and quarrying. This use category includes all industry sectors identified under NAICS Code 21 Mining, Quarrying, and Oil and Gas Extraction. The Mining, Quarrying, and Oil and Gas Extraction sector comprises establishments that extract naturally occurring mineral solids, such as coal and ores; liquid minerals, such as crude petroleum; and gases, such as natural gas. The term mining is used in the broad sense to include quarrying, well operations, beneficiating (e.g., crushing, screening, washing, and flotation), and other preparation customarily performed at the mine site, or as a part of mining activity.

e. Smelters.

1) Primary Smelting and Refining of Copper. This industry comprises establishments primarily engaged in (1) smelting copper ore and/or (2) the primary refining of copper by electrolytic methods or other processes. Establishments in this industry make primary copper and copper-based alloys, such as brass and bronze, from ore or concentrates. NAICS Code 331411.

2) Alumina Refining and Primary Aluminum Production. This industry comprises establishments primarily engaged in one or more of the following: (1) refining alumina (i.e., aluminum oxide) generally from bauxite; (2) making aluminum from alumina; and/or (3) making aluminum from alumina and rolling, drawing, extruding, or casting the aluminum they make into primary forms. Establishments in this industry may make primary aluminum or aluminum-based alloys from alumina. NAICS Code 331313.

3) Nonferrous Metal (except Aluminum) Smelting and Refining. This industry comprises establishments primarily engaged in (1) smelting ores into nonferrous metals and/or (2) the primary refining of nonferrous metals (except aluminum) by electrolytic methods or other processes. NAICS Code 331410.

f. Terminal. A “terminal” is a point of interchange between land and water carriers, such as a pier, wharf, or group of such, equipped with facilities for care and handling of cargo and/or passengers.
A. **SUBJECT:**

Tideflats Interim Regulations

B. **SUMMARY OF PROPOSED AMENDMENTS:**

The proposed Tideflats Interim Regulations consists of the following elements:

*Category 1: Expanded Notification for Heavy Industrial Uses*

- These amendments would expand notification of heavy industrial use permits to taxpayers and interested parties.
- The notification distances are expanded to 2500’ from the subject parcel. For projects located within a designated manufacturing and industrial center, the 2500’ notification distance is measured from the boundary of the applicable M/IC boundary.
- This expanded notification applies to all heavy industrial projects city-wide that require a discretionary permit or SEPA determination.
- The amendments are proposed to TMC 13.05.020 Notice process

*Category 2: Non-industrial Uses in the Port of Tacoma M/IC*

- These amendments would pause certain new non-industrial uses within the Port of Tacoma M/IC. The amendments would apply to the M-2 Heavy Industrial and PMI Port Maritime Industrial zoning districts within the M/IC.
- The specific uses identified include, but are not limited to:
  - Destination/high intensity parks and recreation,
  - Agriculture,
  - Residential uses,
  - Hospitals,
  - Airports,
  - Schools (K-12),
  - Retail,
  - Cultural institutions, and
  - Care facilities.
- Existing non-industrial uses subject to the pause would be considered allowed uses subject to limitations on expansion per TMC 13.06.630 Nonconforming uses.
- These amendments are proposed to Tacoma Municipal Code 13.06.400 Industrial Districts and includes a new section 13.06.400.G Interim Special Use Restrictions for Non-industrial Uses within the Port of Tacoma M/IC.
Category 3: Marine View Drive Residential Development Restrictions

- These amendments would pause all new residential platting and subdivision of land along Marine View Drive.
- Residential development within the S-11 Shoreline District and applicable commercial districts would be paused for the interim period.
- These amendments are proposed to TMC 13.10 Shoreline Master Program, TMC 13.04 Platting and Subdivisions, as well as TMC 13.06.200 Commercial Districts.
- Property owners in the R-1 and R-2 single family zoning districts would be allowed to build a residential unit on existing legal lots under current zoning and development standards.

Category 4: Heavy Industrial Special Use Restrictions

- These interim regulations would pause the establishment of the following heavy industrial uses:
  - Coal terminals and bulk storage facilities
  - Oil or other liquefied fossil fuel terminals, bulk storage, manufacturing, production, processing or refining
  - Bulk chemical storage, production or processing, including acid manufacture
  - Mining and quarrying
- Existing uses as noted above would be considered allowed with limited expansion of 10% storage, production, or distribution capacity during the interim period, subject to a conditional use permit.
- Unlisted uses would be prohibited and subject to TMC 13.05.030 Director Decision Making Authority.
- The changes would be made to Tacoma Municipal Code 13.06.400 and create a new Section 13.06.580 that applies to all industrial zoning districts.

C. FINDINGS OF FACT PART 1: BACKGROUND

1. Comprehensive Plan and Land Use Regulatory Code
   The One Tacoma Comprehensive Plan, updated in 2015 by Ordinance No. 28335, is Tacoma’s comprehensive plan as required by the State Growth Management Act (GMA) and consists of several plan and program elements. As the City’s official statement concerning future growth and development, the Comprehensive Plan sets forth goals, policies and strategies for the health, welfare and quality of life of Tacoma’s residents. The Land Use Regulatory Code, Title 13 of the Tacoma Municipal Code (TMC), is the key regulatory mechanism that supports the Comprehensive Plan.

2. Comprehensive Plan and Land Use Regulatory Code Amendments
   The City of Tacoma periodically accepts applications to amend the Comprehensive Plan and Land Use Regulatory Code. As part of the 2017-2018 Comprehensive Plan and Land Use Regulatory Code Amendment Application period, the City received multiple applications/requests for zoning and land use process changes in the Tideliffs Area, including the Northeast Tacoma Buffer Zone application, the implementation of the Container Port Element of the City’s Comprehensive Plan, and the Director’s Rule relating to Expanded Notification for Large Industrial Projects.

3. Consolidation of Applications
   In response to the multiple amendment applications, on May 9, 2017, the Tacoma City Council adopted Resolution No. 39723 initiating a subarea planning process for the Port Tideliffs. In addition,
the Resolution requested that the Planning Commission consolidate the various applications/requests into the scope of work for the Tideflats Subarea planning process and to hereby consider the need for interim regulations in the Tideflats subarea while the subarea planning process is under way.

4. Subarea Planning

Subarea planning allows for the establishment of a shared, long-term vision, and a more coordinated approach to development, environmental review, and strategic capital investments in a focused area. As a designated Manufacturing and Industrial Center per the Puget Sound Regional Council’s VISION 2040 the Port/Tideflats Subarea Plan must comply with VISION 2040 and the subarea planning requirements therein, which typically includes the following elements:

Plan Concept or Vision
- Preservation of industrial land base
- Economic role of the Center
- Relationship to Comprehensive Plan
- Market analysis

Environment
- Protection of sensitive areas
- Stormwater management
- Air pollution and greenhouse gas emissions

Land Use
- Employment growth targets
- Description of industrial and manufacturing uses
- Incompatible land uses
- Mitigation of aesthetic impacts

Economy
- Economic development strategies
- Key sectors and industry clusters

Public Services and Facilities
- Capital plans and investments to meet targeted growth

Transportation
- Freight movement
- Employee commuting
- Transit and mode splits

5. Interim Regulations Procedures

Tacoma Municipal Code 13.02.055 describes the procedural requirements for establishing interim regulations. The code requires the following procedural elements:
- Interim regulations must be initiated by the City Council or Planning Commission at a public meeting;
- The Council or Commission must determine, through findings of fact, that interim regulations are warranted;
- The ordinance must address the scope and duration of the interim regulations;
- The ordinance must include a work plan to develop permanent regulations;
- The Interim regulations may be effective for up to 1-year, and may be renewed every 6 months thereafter.

City Council Resolution No. 39723 initiated interim regulation review in accordance with the non-emergency procedures within 13.02.055.
D. Findings of Fact Part 2: Assessment of Need for Interim Regulations

6. VISION 2040 Manufacturing and Industrial Centers
The Puget Sound Regional Council’s VISION 2040 Multicounty Planning Policies and the City’s One Tacoma Comprehensive Plan designate the Port/Tideflats as a Manufacturing/Industrial Center (MIC). These areas are focal points for targeted regional employment growth. The designation provides regional funding priority for major transportation projects (e.g., Port of Tacoma Road, Taylor Way, SR 167, and freight projects). Regional planning policies protect MICs from encroachment of non-industrial uses.

7. Regional Industrial Employment Forecasts
Puget Sound Regional Council forecasts show industrial jobs region-wide increasing from 305,100 jobs in 2012 to 389,000 jobs in 2040, an increase in 83,900 total jobs (https://www.psrc.org/sites/default/files/industriallandsanalysisreport.pdf).

8. Regional Industrial Land Supply
PSRC forecasts employment and land supply for the Tacoma-Puyallup industrial area. Exhibit 6.18 to the Industrial Lands Analysis identifies the total land area, vacant land area, and underutilized land area for each sub-regional industrial area. The analysis indicates that the Tacoma-Puyallup industrial area includes approximately 13% of the regional vacant industrial land supply and 15% of the underutilized land supply.

9. Regional Economic Contribution of Industrial Land
According to PSRC’s Industrial Lands Analysis Report “(i) 2012, total wages paid out by industrial activities on industrial lands summed to $24.4 billion. Overall, the annual earnings from industrial jobs on industrial lands averaged $80,000 in 2012. Wages associated with industrial jobs on industrial lands equalled 23.2% of all wages paid out across the region in 2012. By comparison, the average wage across the four-county central Puget Sound region in 2012 was $59,700. Retail Trade, one of the largest segments of the regional workforce, supported an average wage of $36,300, while Finance and Insurance paid an average wage of $86,900 (page E-8).”

10. Conversion of Industrial Lands
PSRC estimates that non-industrial employment on industrial lands will grow from 36% of total jobs on industrial lands in 2012 to 45% by 2040 (page E-10, Industrial Lands Analysis Report). PSRC forecasts for the Tacoma-Puyallup subarea show “higher growth in non-industrial jobs, with such jobs representing 70% of all jobs in the subarea (page 6-16).” The employment forecasts for 2040 suggest the existing land supply is sufficient to accommodate both the industrial and non-industrial employment forecasts, but that rising land values, proximity to nearby commercial centers, and other factors, will require some shift in management strategies due these non-industrial trends.

11. Employment Allocation
VISION 2040 allocates an additional 97,000 jobs to Tacoma by 2040.

12. 2014 Pierce County Buildable Lands Analysis
The Pierce County Buildable Lands Analysis assesses the land capacity to absorb the VISION 2040 employment allocations. Appendix D to the report allocates 8% of the City’s overall employment allocation to the Tideflats MIC, an estimate of 7,555 new jobs by 2040. The report identifies a total land area of 3,912 acres within the Tideflats MIC and sufficient land capacity to absorb the allocated employment.

13. Non-industrial Uses in the Port/Tideflats
The Port Tideflats are predominantly zoned Port Maritime Industrial (PMI) and Heavy Industrial (M-2) zoning districts. Some areas to the periphery are zoned Light Industrial (M-1). Current policies support the retention and protection of manufacturing and industrial lands for manufacturing and industrial use, and to expand a diversified employment base in these areas. However, the City’s current zoning
districts allow expansive uses, including certain non-industrial uses that typically require a large land area to accommodate. These uses include:

- Golf Courses
- Schools (K-12)
- Juvenile Community Facilities
- Airports
- Agricultural uses (excluding marijuana production and processing)
- Destination Parks and Recreation (such as stadiums, arenas, museums, zoos, and aquariums).

14. Likelihood of Industrial Development in Tacoma's Port/Tideflats

In addition to the regional industrial employment growth forecasts and availability of developable land within the Port/Tideflats, two major new energy projects have recently been proposed in the Port Tideflats as well as a significant expansion of an existing facility: 1. A liquefied natural gas facility that was permitted and is now under construction. 2. A gas to methanol plant that was proposed for the Tideflats but later withdrawn, and 3. An expansion of an existing refinery to produce ethanol. Multiple oil, gas and petrochemical refineries, terminals, and bulk storage sites currently operate in the Port Tideflats. In addition, a permit application was submitted and approved for a surface mine along Marine View Drive.

15. Likelihood of Residential Development in Close Proximity

The 2014 Pierce County Buildable Lands Report documents significant development capacity along the City’s steep slopes overlooking the Port/Tideflats along Marine View Drive. In addition, the City has seen increased development pressure on these sites. Multiple plans have been submitted to develop slope properties. With continued rising demand for housing in the City of Tacoma, there is a significant likelihood that additional developments will occur on the slopes above Marine View Drive in close proximity to the Port/Tideflats and during the subarea planning process. Many of the concerns raised about Port/Tideflats industrial activities originate from residential developments along these hillsides that have less separation from the industrial waterfront. New residential development in these areas will likely introduce new interested parties and potential for nuisance complaints during the subarea planning process.


In 2015, as part of an omnibus budget bill, the U.S. Congress lifted the ban on the export of crude oil that had been in place since the 1975 Energy Policy and Conservation Act was adopted. The ban was lifted with the purpose of expanding new markets for the distribution of crude oil resulting from the increased production associated with shale fracking. This ban did not apply to other refined oil products, including gasoline. According to the Washington Post (https://www.washingtonpost.com/news/work/wp/2014/01/08/u-s-oil-exports-have-been-banned-for-40-years-is-it-time-for-that-to-change/?utm_term=.b67a1f1d5a90) gross energy exports in the U.S. have risen significantly since 2003. The result is a likelihood of an increased demand for new bulk storage facilities located on West Coast ports to tap into these growing markets.

17. Magnuson Amendment

In 1977 Congress adopted the Magnuson Amendment to the Marine Mammal Protection Act to limit oil tanker traffic in the waters of Puget Sound. According to this amendment:

(a) The Congress finds that—
(1) the navigable waters of Puget Sound in the State of Washington, and the natural resources therein, are a fragile and important national asset;

(2) Puget Sound and the shore area immediately adjacent thereto is threatened by increased domestic and international traffic of tankers carrying crude oil in bulk which increases the possibility of vessel collisions and oil spills; and
(3) it is necessary to restrict such tanker traffic in Puget Sound in order to protect the navigable waters thereof, the natural resources therein, and the shore area immediately adjacent thereto, from environmental harm.

(b) Notwithstanding any other provision of law, on and after October 18, 1977, no officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.”

18. Oceanic Resources Management Act
During the 1980s concerns over proposed oil and gas drilling off the coast of Washington resulted in adoption of the Ocean Resources Management Act (ORMA). The ORMA recognizes that “Washington’s coastal waters, seabed, and shorelines are among the most valuable and fragile of its natural resources” and that “Some uses may pose unacceptable environmental or social risks at certain times”(http://app.leg.wa.gov/rcw/default.aspx?cite=43.143&full=true).” Furthermore, “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” and “[(i)] 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.” While the City of Tacoma is not required to plan under the ORMA, the State policy intent clearly indicates that oil and liquid fossil fuels pose risks to sensitive and fragile oceanic natural resources upon which multiple other economic sectors rely.

19. Environmental Risks to Critical Areas
The Port/Tideflats is an area with multiple environmentally sensitive areas, including fish and wildlife habitat conservation areas, streams, wetlands, and aquifer recharge areas. The subarea planning process will include an environmental review that will allow the City to conduct a more scientifically rigorous, area-wide review of the potential impacts from development in the Port/Tideflats, the scale of those impacts, and potential mitigation measures.

20. Environmental Hazards to Port/Industrial Uses
The Port/Tideflats is an area with potential risks of geologic, flood, and other natural disasters. The subarea planning process will include an environmental review that will allow the City to conduct a more scientifically rigorous, area-wide review of the potential risks to new and existing uses, development, and infrastructure, as well as the compounding impacts of a natural disaster occurring in an area with potentially hazardous chemicals and other materials.

21. Public Health, Safety, and Nuisance Impacts to Surrounding Neighborhoods and Employees
Some industrial and manufacturing uses carry a higher probability of health and safety concerns, or a higher risk of nuisance impacts to adjacent uses. These risks may vary considerably depending on the type of use, the location, and the building and operational design and management. Certain types of impacts may be minimized and mitigated adequately by existing regulatory structures (such as storm water management). The City has received complaints pertaining to traffic impacts, greenhouse gas emissions, odor, noise, water consumption, and lighting. The Subarea Planning process will provide a mechanism to review these complaints and potential risks and to evaluate alternative methods of minimizing and mitigating these public health, safety and nuisance risks.

The 2015 update of the City’s Comprehensive Plan, One Tacoma, included new goals and policies pertaining to the assessment of climate risks, adaptation measures, mitigation of climate causing greenhouse gas emissions, and the promotion of community resilience strategies.
23. Climate Change Resiliency Study (2016)
This study marks the beginning of a process undertaken by the City of Tacoma’s Environmental Services and the Planning and Development Services Departments to better understand and proactively manage climate risks in order to protect local residents, make sound investments, and ensure that the City can prosper, even in a changing climate.

Three systems were considered in the study:
- Built infrastructure, with a focus on surface water, wastewater, solid waste, and transportation assets;
- Natural systems, including streams, lakes, wetlands, open spaces, and restoration sites; and
- Social systems, including general health and social services and potentially at-risk populations and neighborhoods.

The City of Tacoma is participating as a case study in the Washington Coastal Resilience Project. Washington’s Coastal Resilience Project is a three-year effort to rapidly increase the state’s capacity to prepare for natural events that threaten the coast. The project will improve risk projections, provide better guidance for land use planners and strengthen capital investment programs for coastal restoration and infrastructure. These are the tools that coastal communities need to become more resilient to disasters.

25. Transportation
Multiple Transportation studies have been conducted for the Port Tideflats that analyze growth forecasts and scenarios, existing conditions, improvement concepts, and recommended projects. However, these studies do not use the same current data or development assumptions and in some cases differ by geographic applicability. These studies include:
- Emergency Response/Intelligent Transportation System Study (2016)
- Transportation Master Plan (2015)
- Tideflats Areas Transportation Study (2011, Port of Tacoma)
- East Thea Foss Waterway Transportation Corridor Study (2008)

26. Emergency Response
The City of Tacoma and the Port of Tacoma partnered with other agencies and private companies to initiate a study of Emergency Response systems in the tideflats area. The team included representatives from Tacoma’s Planning and Development Services, Fire, and Public Works departments, as well as Tacoma Rail. In addition to active involvement from the Port of Tacoma, the Puyallup Tribe of Indians, U S Oil, Targa Sound Terminals, and Puget Sound Energy all participated in the study.

The Emergency Response/Intelligent Transportation System (ER/ITS) study addresses existing and future traffic congestion as well as infrastructure and operating deficiencies for emergency response in the tideflats.

27. Baseline
The Tideflats Subarea Plan will include an area-wide environmental review under the State Environmental Policy Act (SEPA). This review will include an inventory and assessment of the existing environmental conditions of the Port/Tideflats as well as different area-wide development scenarios. A pause on certain types of develop during this planning period (non-industrial uses in the tideflats, new residential development, as well as certain types of heavy industrial uses) helps to ensure a more consistent and stable baseline while the environmental review is being conducted.

28. Relationship to Other Emergency Ordinances
In addition to the Resolution directing the Planning Commission to evaluate the need for interim regulations for the Port/Tideflats, the City Council also recently adopted, via emergency ordinances, interim regulations relating to temporary shelters and correctional facilities. Both of these interim
regulations geographically coincide with and impact the Port/Tideflats and subarea planning discussions.

E. Findings of Fact Part 3: Planning Mandates

29. Planning Mandates and Guidelines
GMA requires that any amendments to the Comprehensive Plan and/or development regulations conform to the requirements of the Act, and that all proposed amendments, with certain limited exceptions, shall be considered concurrently so that the cumulative effect of the various changes can be ascertained. Proposed amendments to the Comprehensive Plan and/or development regulations must also be consistent with the following State, regional and local planning mandates and guidelines:

- The State Growth Management Act (GMA);
- The State Environment Policy Act (SEPA);
- The State Shoreline Management Act (SMA);
- The Puget Sound Regional Council’s VISION 2040 Multicounty Planning Policies;
- The Puget Sound Regional Council’s Transportation 2040, the action plan for transportation in the Central Puget Sound Region (adopted on May 20, 2010);
- The Puget Sound Regional Council’s Subarea Planning requirements;
- The Countywide Planning Policies for Pierce County;
- TMC 13.02 concerning the procedures and criteria for amending the Comprehensive Plan and development regulations.

F. Findings of Fact Part 4: Public Notification and Involvement

30. Public Hearing Notification Process:

(a) Public Hearing. A public hearing was set for September 13th at 6:00 pm at the Greater Tacoma Convention Center. Public comments were accepted through September 15th at 5:00 pm.

(b) Informational Meeting. An informational Session was scheduled on September 6th from 5:00 – 7:00 pm for citizens to learn more about the proposed interim regulations and the legislative process.

(c) Public Hearing Notice:

- A notice announcing the public hearing on September 13th and the informational meeting on September 6th was distributed to the City Council, Neighborhood Councils, business district associations, civic organizations, environmental groups, the development community, the Puyallup Tribal Nation, adjacent jurisdictions, major employers and institutions, City and State departments, Tideflats stakeholders and other known stakeholders and interested entities. The notice was also mailed to taxpayers of record within 2500 feet of the boundaries of the South Tacoma and Port of Tacoma Manufacturing and Industrial Districts as well as other zoning districts that allow heavy industrial uses, and within 1000’ of the boundary for the proposed residential use restrictions along Marine View Drive.

- Social Media. Facebook Event Pages were created and disseminated for both the informational meeting and the public hearing.

- News Media. An advertisement was placed on The News Tribune on August 29, 2017 and a press release was issued through the City’s Media and Communications Office on August 28, 2017.

- 60-Day Notices. A “Notice of Intent to Adopt Amendment 60 Days Prior to Adoption” was sent to the State Department of Commerce (per RCW 36.70A.106), and Joint Base Lewis- McChord (per RCW 36.70A.530(4)). Finally, the proposal was submitted to the Department of Ecology SEPA Register (per the requirements of RCW 43.21.C and WAC 197-10) on
August 29, 2017. A request for consultation was sent to the Puyallup Tribe of Indians on July
26th and again on August 29. These notices were sent more than 60 days prior to the
Council’s scheduled action in November 2017, so that their comments, if any, can be
addressed in a timely manner during the Planning Commission and City Council review
process.

- **Website.** Public review documents were posted to the City of Tacoma’s website at
  www.cityoftacoma.org/tideflatsinterim

31. Consultation with the Puyallup Tribe of Indians

- On July 26, 2017 the City of Tacoma sent a letter of request for consultation to Chairman Sterud
  of the Puyallup Tribe of Indians, inviting early involvement and comments from the Puyallup Tribe
  throughout the development of the interim regulations.
- On August 16th, staff received a comment letter from Chairman Sterud of the Puyallup Tribal
  Council in support of staff’s initial recommendations as presented to the Commission on August
  2nd and August 16th.
- On August 29th, the City of Tacoma sent an additional letter to Chairman Sterud regarding the
  Planning Commission’s public comment period and hearing, and highlighting key changes to
  staff’s recommendations within the Commission’s public review draft.

32. Public Comments:

Notification for the public hearing and comment period was sent to approximately 14,000 taxpayers of
record as well as other interested parties. Approximately 300 people attended the hearing and 81
people provided testimony to the Commission. In addition, approximately 200 written comments were
submitted prior to the close of the public comment period.

The comments received reflect broad and diverse viewpoints and interests among residents,
businesses, labor interests, property owners, environmental representatives, adjacent jurisdictions,
and Puyallup Tribal members. Staff provided the following summary of public testimony and
comments to the Planning Commission as part of the Commission’s deliberations on September 20,
2017.

**Category 1: Expanded Notification for Heavy Industrial Uses**

- Overall, comments have been supportive of expanding notification.
- Some concerns expressed that the notification does not go far enough, that certain uses are
  of a city-wide import and notification should reflect that.

**Category 2: Non-industrial Uses in the Port of Tacoma M/I/C**

- Some confusion over why these uses are included.
- Concern expressed that these uses cannot expand, but industrial uses can.
- Concern over the scope of uses identified.

**Category 3: Marine View Drive Residential Development Restrictions**

- Concerns over the immediate and long term impacts of heavy industry on nearby residential
  areas.
- Some acknowledgement that recent residential developments in this area may not have been
  appropriate.
- General recognition that a transition area is appropriate.
- Some concern was expressed that these restrictions put greater focus on residences and not
  on impacts from heavy industry.

**Category 4: Heavy Industrial Special Use Restrictions**

- The scope of uses identified (should be broader/should be more narrowly focused)
- Expansion of existing uses
• Economic impact of the restrictions
• Environment and health impacts from heavy industry (existing and new)
• Risks and vulnerability to environmental hazard and natural disaster
• Opposition to any restrictions
• General support for the restrictions

Other Themes:
• Support for the Subarea Planning Process
• Timeline for adoption
• Concern over potential impacts to Joint-Base Lewis-McChord and other communities
• Job creation and retention
• Existing regulations are adequate and effective to address community concerns
• Concerns and questions regarding consultation with the Puyallup Tribe of Indians
• Basis for interim regulations:
  o No emergency basis identified
  o Fossil fuel facilities are an emergency issue
  o Existing uses are already impacting residents and workers and causing health impacts
• Legal concerns:
  o Recent cases pertaining to fossil fuel bans and Interstate Commerce;
  o Reasonable use of residential lots along Marine View Drive
  o State Environmental Policy Act (SEPA) review
  o Port Container Element and Growth Management Act requirements
  o Correctional facilities and essential public facilities

G. Findings of Fact Part 5: Planning Commission Review

Planning Commission agendas, minutes, handouts, and presentations are available at
www.cityoftacoma.org/tidelflatsinterim and at
http://www.cityoftacoma.org/government/committees_boards_commissions/planning_commission/age
ndas_and_minutes/

30. Determination of Need.
On June 21 the Commission began its deliberation as to the need for interim regulations and staff
presented findings in support of a determination of need. The Commission preliminarily determined
that interim regulations were warranted.

31. Consideration of Options.
On August 2 the Commission discussed initial concepts for a scope of work for the interim regulations
and provided staff with guidance to develop an initial draft document.

On August 16 the Commission reviewed, modified and released a public review draft for comments
and set a public hearing.

33. Public Hearing.
On September 13 the Commission conducted a public hearing at the Greater Tacoma Convention
Center. Approximately 300 people attended and 81 people provided testimony.

34. Review of Comments.
On September 20, the Commission reviewed public testimony and comments and discussed potential
modifications to the draft proposals in response to public testimony received.
35. Recommendation.
On October 4, the Commission reviewed final modifications to the draft Interim Regulations in response to the public testimony and made a recommendation to the City Council to adopt the Planning Commission’s proposal.

At this meeting the Commission made the following modifications to the public review document:

Category 1: Expanded Notification for Heavy Industrial Uses
- The Commission made no modifications to this proposal.

Category 2: Non-industrial Uses in the Port of Tacoma MIC
- The Commission, by consensus, removed the M-1 Light Industrial District from the proposal.
- The Commission, by consensus, removed correctional facilities from the proposal.
- The Commission, by consensus, modified the proposal to allow expansion of existing uses per existing non-conforming provisions of TMC 13.06.

Category 3: Marine View Drive Residential Development Restrictions
- Without a majority supporting the proposed prohibition on all residential development, the Commission, by consensus, modified the proposal to allow one home per existing legal lot and to require a special notice as part of any new building permit disclosing the proximity of the MIC and the potential impacts resulting from living within close proximity of a heavy industrial district.

Category 4: Potential New and Expanded Heavy Industrial Uses
- The Commission maintained the following uses within the proposal:
  - Coal terminals and bulk storage facilities
  - Oil or other liquefied fossil fuel terminals, bulk storage, manufacturing, production, processing or refining
  - Bulk chemical storage, production or processing, including acid manufacture
  - Mining and quarrying
- Due to a lack of majority, smelting was removed from the list of uses subject to this proposal.
- By majority, the Commission modified the proposal to add limitations on the expansion of existing uses with approval of a conditional use permit, up to a 10% maximum.

Having completed the review of the exhibits and modifications, the Commission considered the full package of Findings and Recommendations and finalized, by a 4-2 vote, the proposed Tideflats Interim Regulations and forwarded their recommendation to the City Council.

H. Findings of Fact Part 6: SEPA Review
Interim regulations are exempt from SEPA review, per WAC 197-11-800(19) as procedural actions and WAC 197-11-880 in circumstances of emergency. Interim regulations are an available procedural step to pause significant intervening projects during development of a subarea plan including long-term policy and development regulations for the Port Tideflats area. In addition, interim regulations are responsive to an emergent situation where a temporary protective measures are necessary while planning efforts are undertaken to address an area or issue of concern.

I. Exhibits:
Exhibit A: Tideflats Interim Regulations
J. CONCLUSIONS:

1. The Commission concludes that interim regulations are warranted for the duration of the Tideflats Subarea Planning process to maintain the status quo until such time as the Subarea Plan is completed:
   - Conversion of industrial lands is a critical regional issue and current codes allow significant non-industrial uses within the Port Tideflats, as well encroachment by potentially incompatible residential land uses. Therefore, limitations on non-industrial uses both within the Port/Tideflats and along the related slopes above Marine View Drive are appropriate until such time as the subarea plan is completed;
   - Significant new heavy industrial development projects are likely to occur during the subarea planning timeframe that could pre-empt the subarea planning process. Therefore, limitations on new certain new heavy industrial uses are appropriate until such time as the subarea plan is completed;
   - A subarea planning process typically takes 2 years to complete. However, the schedule and length of the process is dependent upon the final scope of work developed through a public process, the breadth and depth of issues to be reviewed, and the legislative process. While a shorter subarea planning process would limit the overall risk of projects occurring during the planning timeframe, there is a likelihood that the permanent regulations, developed through the subarea plan, may require more than the typical timeframe to complete which would increase the risks of significant new developments occurring during the plan and code development;
   - Beyond the issues relating to incompatible land uses, pre-emption of the planning process, or risks of new development occurring during the planning timeframe, there are also multiple goals, policies, studies, programs, and emergency ordinances that pertain to the Port/Tideflats and which have been adopted in a piecemeal fashion. It is clear at this time that these issues must be addressed through a comprehensive manner through the subarea planning process. It is appropriate, therefore, to place a pause on significant new developments until such time as the City’s goals and policies and that plans and strategies are in place to invest in the necessary supportive infrastructure and mitigation measures.

2. The Commission concludes that a subarea planning process is the best course of action to comprehensively address land use issues associated with the future of the Port/Tideflats area, and given the multiple planning mandates and policy objectives for the area, the diverse stakeholder interests, and new scientific information relevant to the area, maintaining the status quo in the Port/Tideflats during the subarea planning process would serve to protect the integrity of that process until such time as these issues may be resolved through an adopted Subarea Plan.

3. The Commission concludes that the Interim Regulations have been developed consistent with the procedural requirements of the Growth Management Act and Tacoma Municipal Code 13.02.055.

4. The Commission concludes that these Interim Regulations constitute a broad pause while the Tideflats Subarea Plan is under development and that these proposed regulations do not pre-determine or constrain the outcomes or the scope of work for the Tideflats Subarea Planning process.

5. The Commission concludes that the Tideflats Subarea Plan and environmental review are the appropriate work plan to address the issues raised through the public testimony and ultimately to replace these interim regulations.
E. RECOMMENDATIONS:

1. The Planning Commission recommends that the City Council adopt the proposed interim regulations as described below:
   - Expand notification for heavy industrial uses city-wide that require a SEPA determination or discretionary permit;
   - Pause certain new non-industrial uses within the Port of Tacoma MIC and place temporary limitations on expansion of existing uses during the interim period;
   - Pause new residential platting and subdivision of land along Marine View Drive and pause new residential development in the S-11 Shoreline District and C-1 and C-2 Commercial districts along Marine View Drive during the interim period;
   - Pause certain new heavy industrial uses city-wide and place temporary limitations on expansion of existing uses during the interim period. These uses include:
     a. Coal terminals or bulk storage facilities;
     b. Oil, or other liquefied or gaseous fossil fuel terminals, bulk storage, manufacturing, production, processing or refining;
     c. Chemical production, processing, or bulk storage;
     d. Mining and quarrying.

2. The Commission recommends that the Tideflats Interim Regulations be approved for an initial 6 month period with subsequent re-authorization every 6 months until the Tideflats Subarea Plan is complete. The subarea plan is the best course of action to comprehensively address land use issues associated with the future of the Port/Tideflats, with interim regulations a necessary first step. The Commission stands ready to assist the City Council and the Planning and Development Services Department in this project that has the potential to significantly reshape Tacoma’s economic and environmental destiny.

3. Furthermore, the Commission recommends that staff provide a tracking, mapping and reporting mechanism for permit applications subject to these proposed interim regulations to inform the public, the Commission, and the City Council as to the costs and impacts associated with these regulations such that modifications may be evaluated and considered during the re-authorization process.

4. Finally, the Commission recommends that the City Council prioritize the resources (both budget and staffing) to conduct the subarea planning process in the most effective and expeditious way possible, commensurate with the degree of concern expressed over the future of the Port Tideflats by this community as evidenced by the volume and breadth of comment provided to the Commission.
Appendix 14:
Cascadia Law Group
and attorneys responsible for this report
6.14 Appendix 14: Cascadia Law Group and attorneys responsible for this report

OUR FIRM

Cascadia Law Group PLLC provides clients with the most effective environmental representation available in our region. We represent clients in litigation and regulatory matters that include complex, sometimes controversial environmental, land use, and natural resource issues. Our partners come from some of the largest international firms in the country, senior policy positions within government, and regulatory agencies.

Chambers USA, Best Lawyers in America, and other leading research firms and publications recognize us as a top regional firm. Our clients cover the spectrum of players in the environmental arena: Fortune 100 companies, small businesses, government agencies, and environmental groups.

Our clients come to us because we solve problems. We set out first to understand each client’s objectives. We then apply our knowledge of the law, persuasive skills, political acumen, and creative thinking to attain those goals. We have successfully helped our clients resolve many of our region's most difficult environmental issues.
**EXPERTISE: REGULATORY COMPLIANCE**

Defend against administrative fines and notices of violations.

Obtain wastewater and stormwater discharge permits, and help clients comply with permit requirements (Clean Water Act).

Advise clients about compliance with air emission regulations, state implementation plans, and air operating permits (Clean Air Act).

Interpret hazardous waste management and toxic material handling regulations that apply to a client's business practices (RCRA and TSCA).

Assist clients with Endangered Species Act consultations and help avoid or mitigate project impacts (ESA).

Obtain state and local permits for solid waste handling and disposal facilities (RCRA).

Advise clients about how to obtain water rights and how to comply with water quality regulations (CWA and Water Resources Act).

Work with technical consultants to analyze environmental impacts of projects and prepare environmental impact statements (SEPA and NEPA).

Obtain development permits required under state and local environmental and land use regulations (GMA and local ordinances).
EXPERTISE: SUPERFUND CLEANUPS

Negotiate administrative orders and judicial consent decrees to conduct cleanups and settle liabilities under both federal and state Superfund laws.

Work with technical consultants to prepare the critical portions of remedial investigation and feasibility study reports and remedial design reports.

Respond to actual or threatened administrative orders by defending or by negotiating favorable settlements.

Defend against government and private cost-recovery actions.

Help clients recover their cleanup costs.

Defend natural resource damages claims.

Coordinate independent remedial actions in a way that allows cost recovery.

Participate in the drafting of MTCA, amendments to MTCA and CERCLA, and regulations under MTCA and CERCLA.

EXPERTISE: BROWNFIELD REDEVELOPMENT

Negotiate prospective purchaser agreements with environmental agencies to allow “the acquisition and development of contaminated “brownfield” properties. Representative projects have included Oki Development's Newcastle Golf Course, the Port of Tacoma's Multi-Modal Terminal, and the Union Station redevelopment in downtown Seattle.

Negotiate environmental and land use permits to construct and operate industrial and commercial facilities, and defend those permits in administrative and court appeals.

Advise industrial clients about compliance with pollution control and waste management regulations, including negotiating enforcement and corrective action with governmental agencies.
EXPERTISE: PROPERTY SALES & DEVELOPMENT

Advise purchasers, sellers, and lenders about possible environmental liabilities associated with contaminated properties and find creative ways to minimize those liabilities.

Analyze and evaluate potential environmental liabilities associated with corporate mergers and acquisitions.

Obtain federal, state, and local environmental and land use permits and project approvals to allow redevelopment of commercial and industrial facilities.

Defend legal challenges to development permits on an expedited basis to allow construction to proceed.

EXPERTISE: ENVIRONMENTAL LITIGATION

Pursue and defend Superfund cost-recovery and contribution litigation, to help clients recover cleanup costs or defend against improper claims.

Defend environmental agency enforcement lawsuits.

Obtain insurance coverage for environmental liabilities.

Defend toxic tort lawsuits filed by neighbors of industrial clients.

Defend class action lawsuits arising out of environmental issues.

Prosecute and defend common law environmental claims (nuisance, trespass, negligence, etc.).

Defend environmental criminal investigations.

Defend natural resource damages claims.

Resolve citizen suit challenges to government actions and permits.

Represent parties in timber sale litigation and in reviewing forest plans.

Defend environmental permits and challenges to permit denials.
EXPERTISE: WATER QUALITY & QUANTITY

Prepare and argue challenges to environmental permit decisions.

Defend clients in enforcement actions by federal and state environmental regulatory agencies and the U.S. Department of Justice.

Advocate the use of ADR procedures, when appropriate, and offer preventative consultative strategies and approaches to avoid litigation.

Advance client projects through the water permitting process and evaluate, modify and challenge permitting efforts of others.

Assist clients in obtaining permits from jurisdictional agencies and governmental entities on behalf of utilities, other government entities and the private sector. Also assist in transferring existing permits from acquired entities.

Participate in and influence legislation and rulemaking matters at the state and federal levels.

Perform investigations on the historic use and ownership of existing water rights, calling on extensive experience in real estate law, brownfields redevelopment and environmental regulations to assist in the effort.
OUR LAWYERS

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RODNEY L. BROWN JR.

PROFESSIONAL:

Partner with CASCADIA LAW GROUP PLLC (Seattle, Washington). Practice focusing on environmental and land use law, including natural resource, project permitting, hazardous waste, and pollution control issues. Federal and state administrative and court representation.

Represent potentially responsible parties at federal and state Superfund hazardous waste sites. Clients have included owners and operators of sites and generators and transporters of waste from a broad range of industries. Representation includes negotiation of cleanups, cost allocation, and natural resource damages.

Advise industrial and governmental clients about compliance with pollution control and waste management regulations, including negotiation of enforcement and corrective action with governmental agencies.

Negotiate prospective purchaser agreements and no further action letters with environmental agencies to allow the acquisition and development of contaminated “brownfield” properties.

Advise manufacturers, developers and landowners about compliance with and challenges to Endangered Species Act requirements.

Represent parties in preparing and defending environmental impact statements and environmental permits.

Advise purchasers and sellers about environmental liabilities in real estate and corporate transactions.

Legal counsel to the Spokane River TMDL Collaboration, which developed an innovative approach to protect water quality and provide a predictable 20-year investment plan for local governments and businesses.

Principal author of Washington’s Superfund law, the Model Toxics Control Act. Member of the Washington Department of Ecology work group that drafted the implementing regulations; and member of the MTCA Policy Advisory Committee, which reviewed MTCA for the Washington Legislature and the Department of Ecology.

Appointed by Governor Jay Inslee to Co-Chair his Carbon Emissions Reduction Taskforce, charged with determining the best approach to putting a price on carbon emissions in Washington.
Appointed by Governor Christine Gregoire to the Connect Washington Task Force, to formulate a ten-year sustainable investment strategy for the state’s transportation system, tying system needs and priorities to new revenue.

Appointed by Governor Gregoire to the Governor’s Committee on Transforming Washington's Budget, to serve as a sounding and advisory board questioning assumptions underlying the state budget.

Appointed by Governor Gregoire to the Climate Action Team, directed to reduce the state’s contribution to the pollution that leads to climate change, grow Washington’s clean energy economy, and move toward energy independence.

Served a term as an Advisory Committee Director to the Climate Change Registry.

Selected to serve on the Washington State Department of Transportation Expert Review Panels charged with evaluating the finance and implementation plans for the Columbia River Crossing, Alaskan Way Viaduct, SR 520 Bridge and I-90 Bridge tolling projects. Also served on Expert Review Panels for the new design of the SR 520 Bridge and the environmental permitting of the SR 520 Bridge.

Member of the Board of Directors of Oregon’s largest utility, Portland General Electric, a national leader in clean energy practices.

Member of the Director of the Department of Ecology’s Regulatory Performance Advisory Group.

Appointed by the Washington State legislature to the Regional Transportation Leadership Group, tasked with preparing recommendations for a new transportation plan for the three-county Seattle metropolitan area.

Fellow, American College of Environmental Lawyers.

Recognized by Best Lawyers as the Best Environmental Lawyer in Seattle for 2010.

One of the Lawdragon 500 Leading Lawyers in America. In its initial ten years, Lawdragon researchers have named fewer than fifty environmental practitioners to the 500.

Chambers USA reports that Rod's peers have called him “the premier environmental lawyer in the state”; their researchers continue to rank Rod as the West Coast's only “Star Individual” among environmental lawyers, one of just five in the nation to earn that ranking. Chambers has described Rod as a “superb, highly talented practitioner” whom its sources called “head and shoulders over everyone else” in the region. Their researchers found his clients particularly appreciate Rod's "smart, fair and straightforward" style, and recognize him as a “wonderful top-tier lawyer” who is “effective with both state and federal regulators.”

One of the few attorneys to be listed in Best Lawyers in America for ten years or more; one of six Washington attorneys listed in Who’s Who Legal: USA Environment 2006; featured among the top 100 in each annual...
Washington Law and Politics magazine list of regional “Super Lawyers”; named one of the “Best Lawyers” in the Puget Sound region by Seattle magazine; listed among the three best environmental/land use lawyers in the region by Seattle Business Monthly.


Law Clerk to the Honorable Homer Thornberry, US Court of Appeals for the Fifth Circuit (1981 to 1982).

EDUCATION:

Juris Doctor, University of Texas School of Law (1978 to 1981).
   Graduated with honors.
   Articles Editor, Texas Law Review.
   Austin Lacrosse Club, Southwest Conference All-Star (Honorable Mention).

Bachelor of Arts, Baylor University (1974 to 1978).
   Graduated magna cum laude.
   Major: Political Science.
   Minor: Environmental Studies.
   Dean’s Distinguished List and Dean’s List.

CIVIC ACTIVITIES:

Member, Board of Directors, Portland General Electric (2007 to present).

Member, Board of Directors, Plan Washington (formerly Washington Business Alliance) (2013).

Member, Connecting Washington Task Force (appointed by Governor Gregoire) (2011 to present).

Member, Governor’s Committee on Transforming Washington’s Budget (2010 to present).

Member, Climate Action Team (appointed by Governor Gregoire) (2007 to present).

Fellow, American College of Environmental Lawyers (2009 to present).

Fellow, American Bar Foundation (2014 to present).

Board Chair, Washington Conservation Voters (2012 to present).

Board Member, Bullitt Foundation (2011 to present; Chair, 2017 to present).

Instructor, University of Washington School of Law, “Climate Change Law” (Spring 2016)
Member, Cascade Agenda Leadership Team, Forterra (formerly Cascade Land Conservancy) (2008 to present).

Board of Directors, Washington Environmental Council (1986 to 1997 and 2002 to present, including two terms as President from 2008 to 2012).

Advisory Committee Director, Climate Change Registry (2007 to 2008).


Member, Blue Ribbon Commission on Transportation (appointed by Governor Locke) (1999 to 2001).


Board of Directors, Northwest Pollution Prevention Resource Center (1990 to present, including two terms as President from 1993 to 1999).


Trustee, Northwest Fund for the Environment (2000 to 2006, including a term as President from 2004 to 2006).

Board of Directors, 1000 Friends of Washington (1992 to 1997).

Attorney Volunteer, Southeast Seattle Legal Clinic (1983 to 1993, including a term as Clinic Coordinator from 1986 to 1987).

PUBLICATIONS & SPEECHES:

Publications include:

“Can’t We All Just Get Along? Genuine Bipartisan Support Mustered for Climate Change Legislation”, American College of Environmental Lawyers Blog (April 18, 2013)


“Should We Go Nuclear - Again?”, American College of Environmental Lawyers Blog (November 2010)

“EPA Tries to Silence Employees Who (Weakly) Criticize Cap and Trade”, American College of Environmental Lawyers Blog (November 2009)


Speaker at numerous environmental and legal seminars, including the following:


Annual Model Toxics Control Act Workshop, Co-chair and Presenter, Seattle, WA (2006 to present).

Annual Advanced SEPA and NEPA Workshop, Co-chair and Presenter, Seattle, WA (2005 to present).


“Environmental and Land Use Update,” 15th Annual WSBA Fall Real Estate Conference: Real Estate in Turbulent Times, Seattle, WA (December 5, 2008).


“The Evolution of SEPA and NEPA,” Latest Word on Compliance With SEPA 
and NEPA: From Developing Proposals Through Judicial Review, Seattle, WA 
(January 28, 2004).

“Brownfields: New Developments in Hazardous Waste Cleanup,” Annual 
Advanced Conference on Real Estate Purchases and Sales, Seattle, WA 
(March 5-6, 2007).

“Emerging Issues In Environmental Law,” Annual Commercial Real Estate 
Leases Conference, Seattle, WA (December 14, 2006).

“Environmental Caselaw Update,” Washington State Bar Association 
Environmental & Land Use Law Section Midyear Conference, Ocean Shores, 
WA (May 4-6, 2006).

Conference on Real Estate Purchases and Sales, Seattle, WA (March 6-7, 
2006).

“Emerging Issues In Environmental Law: New Cases on Cleanup Liability, 
Revised Policy on DOE ‘No Further Action’ Letters; Indoor Air Toxics; 
Stormwater Management,” Annual Commercial Real Estate Leases 
Conference, Seattle, WA (December 13, 2005).

“Environmental and Economic Balance,” Association of Pacific Ports, Seattle, 
WA (August 23, 2005).

and Paper Association Annual Meeting, Stevenson, WA (June 17, 2005). 
Presenter, EPA Environmental Insurance & Risk Management Tool Workshop, 
Seattle, WA (June 14, 2005).

“Environmental Caselaw Update,” Washington State Bar Association 
Environmental & Land Use Law Section Midyear Conference, Chelan, WA 
(May 5-7, 2005).

“Brownfields: Developments in Hazardous Waste,” Advanced Real Estate 
Purchases & Sales, Seattle, WA (March 8, 2005).

“The US Approach To Groundwater Regulation,” International Bar Association 
Annual Convention, San Francisco, CA (June 16-18, 1992).

“Regulatory Reform—The Next Generation,” Permitting Strategies Conference, 
Seattle, WA (March 31, 2005).

“Emerging Issues in Environmental Law,” Annual Advanced Conference on 

“The Newest Hazardous Waste Considerations,” Annual Advanced Conference 
on Real Estate Purchases and Sales, Seattle, WA (March 1-2, 2004)

“Environmental Considerations,” Annual Advanced Conference on Real Estate 

“EPA’s Proposed Revision to RCRA Solid Waste Deregulation,” New Issues in 
Solid Waste and E-waste, Seattle, WA (July 21, 2004).


“Hot Topics in Environmental Law,” Seventh Annual WSBA Fall Real Estate Conference, Seattle, WA (November 17, 2000).

“Current Developments In Environmental Legislation,” Washington State Bar Association Environmental & Land Use Law Section, Ocean Shores, WA (June 4-6, 1996).


“Public & Private Rights In Land & Resources: Is There A Compromise?,” Institute for Environmental Studies: University of Washington, Seattle, WA (June 3-4, 1994).


“Reconciling The Growth Management Act And The State Environmental Protection Act,” Washington Roundtable: Economic Climate Committee, Seattle, WA (September 12, 1994).
“Cost-Effective Environmental Litigation — Complying With Cleanup Regulations: Crossing The T’s And Dotting The I’s To Ensure Cost Recovery,” University of Washington School of Law, Seattle, WA (March 25, 1994).


“Responding to Administrative Orders Requiring Site Remediation,” CLE International: Hazardous Waste Cleanup, Seattle, WA (August 11-12, 1994).


DENNIS MCLERRAN

PROFESSIONAL:

Attorney with Cascadia Law Group PLLC (Seattle, Washington). Practice focusing on environmental, climate change, land use, treaty rights and regional regulatory issues.

On June 1, Dennis McLerran returned to the practice of law and dispute resolution, becoming Of Counsel at Cascadia Law Group PLLC after serving seven years as the Regional Administrator for EPA Region 10 and as Executive Director of the Puget Sound Clean Air Agency.

President Barack Obama appointed Dennis in 2010 to the post of EPA Region 10 Administrator for the states of Washington, Oregon, Idaho, and Alaska, where he served until the end of the Obama Administration in January 2017. That role put Dennis at the forefront of a wide range of environmental policy issues in the Pacific Northwest and Alaska, including development of cleanup plans for the Seattle and Portland harbors.

At the Puget Sound Clean Air Agency Dennis served as Executive Director, appointed by the elected officials of King, Pierce, Snohomish, and Kitsap counties, as well as the Mayors of the cities of Seattle, Tacoma, Everett, and Bremerton. Dennis led our region to attain national air quality standards, developed state climate legislation, and created several innovative, collaborative approaches to solving air quality issues. These included founding the award-winning international Northwest Ports Clean Air Strategy and the regional Diesel Solutions program.

Before that, Dennis focused his law practice on land use, real estate and environmental law, serving as the City Attorney of Port Townsend, in the Land Use Division of the Seattle City Attorney's Office, and in private practice.

Governor Jay Inslee recently appointed Dennis to the Leadership Council of the Puget Sound Partnership. He also serves as a Board Member of the US arm of the Stockholm Environment Institute. Dennis has previously served as President and longtime Board Member of the National Association of Clean Air Agencies, as a member of US EPA's Clean Air Act Advisory Committee, and on several additional federal advisory committees to EPA. Throughout his term at EPA Dennis regularly hosted and led US Delegations to China and other Asia Pacific nations to work collaboratively on addressing air pollution issues, with a particular focus on ports and marine goods movement. Dennis also has been extensively involved in climate change stakeholder processes and issues in Washington State and along the West Coast. He is a past Chair of the Land Use and Environmental Law Section of the Washington State Bar.
After growing up in Eastern Washington Dennis attended the University of Washington, receiving a B.A. in Urban Planning. Dennis earned his law degree at Seattle University School of Law, where he was a leader of the public interest law foundation.

EDUCATION:

J.D., Seattle University School of Law
B.A., University of Washington (Urban Planning)

BAR & CIVIC ACTIVITIES:

Admitted in Washington
Washington State Bar Association Environment and Land Use Law Section, Past Chair
JEFFREY D. GOLTZ

PROFESSIONAL:

Attorney with Cascadia Law Group PLLC (Olympia, Washington). Practice focusing on energy, telecommunications, and state and regional regulatory matters.

Governor Christine Gregoire appointed Jeff to the Washington Utilities and Trade Commission in 2009, where he served as chairman until 2013.

Before his appointment, Jeff practiced law for 34 years, 30 of which were in the Washington Attorney General’s Office (AGO), where from 2001 to 2009 he served as one of four supervising deputy attorneys general under both Attorneys General Chris Gregoire and Rob McKenna. Prior to that, Jeff headed the AGO’s Utilities and Transportation Division, serving as chief counsel to the Commission; as head of the Ecology Division; and as an assistant attorney general both in the Ecology and Revenue Divisions. He also was in private practice and worked on environmental and energy issues as a legislative assistant in Washington, D.C.

While at the UTC Jeff served as President of the Western Conference of Public Service Commissioners, on the Electricity and Consumer Affairs Committees of the National Association of Regulatory Utility Commissioners, and as the Commission’s representative on the State-Provincial Steering Committee, an advisory committee to the Western Electricity Coordinating Council on regional transmission issues.

After growing up in Bellingham, Jeff attended Macalester College in St. Paul, Minnesota, receiving his B.A. cum laude, then earned his law degree from the University of Oregon School of Law, where he was Executive Editor of the Oregon Law Review.

EDUCATION:

J.D., University of Oregon School of Law, 1974 (Executive Editor, Oregon Law Review).

Bachelor of Arts, Macalester College, 1971 (cum laude).