

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
for the  
DEPARTMENT OF STATE LANDS**

IN THE MATTER OF:	)	<b>RULINGS ON MOTIONS FOR SUMMARY DETERMINATION</b>
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<b>COYOTE ISLAND TERMINAL, LLC</b>	)	OAH Case Nos.: 1403883 and 1403884
	)	Agency Case No.: APP0049123-RF
<b>PORT OF MORROW</b>	)	

**HISTORY OF THE CASE**

On August 18, 2014, the Department of State Lands (Department) issued a determination labeled Findings and Order on Application No. 49123-RF, denying the application of Coyote Island Terminal, LLC for a removal-fill permit to construct a new loading dock, walkway, conveyor and associated facilities at the Port of Morrow near Boardman, Oregon. On September 8, 2014, Coyote Island Terminal requested a hearing on the Department’s denial of Removal Fill Application No. 49123-RF. That same date, the Port of Morrow also requested a hearing on the Department’s denial of Removal Fill Application No. 49123-RF.

The Department issued rulings granting Coyote Island Terminal, LLC’s and the Port of Morrow’s hearing requests. On or about October 3, 2014, the Department referred the hearing requests to the Office of Administrative Hearings for a consolidated hearing. The OAH assigned Senior Administrative Law Judge Alison Greene Webster to preside at the hearing.

Subsequent to the referral, the Department issued rulings granting the following entities the authority to participate as limited parties: the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe, Columbia Riverkeeper, Friends of the Columbia Gorge, and the Sierra Club.

The Department also issued rulings granting the State of Montana and the State of Wyoming the authority to participate in the contested case proceeding as limited parties.

Pursuant to a prehearing motion briefing schedule established by the parties during prehearing scheduling conferences, the parties filed the following pleadings, along with affidavits and supporting documents:

On May 6, 2016, Coyote Island Terminal, LLC and the Port of Morrow (collectively CIT) filed a Joint Motion for Summary Determination; the Department filed a Motion for Partial Summary Determination; Columbia Riverkeeper, Sierra Club and Friends of the Columbia (collectively Columbia Riverkeeper) filed a Motion for Summary Determination on Commerce Clause Claims; the State of Montana filed a Motion for Summary Determination; and the State of Wyoming filed a Motion for Summary Determination.

On June 3, 2016, CIT filed a Joint Response to the Department's Motion for Partial Summary Determination; the Department filed a Cross-Motion for Partial Summary Determination and Responses to Motions for Summary Determination;<sup>1</sup> Columbia Riverkeeper filed an Opposition to Motions for Summary Determination filed by Montana, Wyoming, Coyote Island Terminal and Port of Morrow; the State of Montana and the State of Wyoming filed a Joint Response to Columbia Riverkeeper's Motion for Summary Determination on Commerce Clause Claims; and the Confederate Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe (collectively the Tribes) filed a Consolidated Response to the Motions for Summary Determination filed on behalf of the State of Wyoming, the State of Montana, the Port of Morrow and Coyote Island Terminal.

On July 1, 2016, Columbia Riverkeeper filed a Reply in Support of Motion for Summary Determination; CIT filed a Joint Reply in Support of Joint Motion for Summary Determination; and the Department filed its Reply in Support of Motion and Cross Motion for Partial Summary Determination.

On July 5, 2016, ALJ Webster closed the record for purposes of ruling on the parties' motions, and took the matters under advisement.

On August 2, 2016, the State of Montana filed motions for leave to file a memorandum of additional authority and relief from prior conferring rule. On August 9, 2016, the Department filed an opposition to the State of Montana's motions. The ALJ denied the State of Montana's motions as untimely and in disregard of the stipulated scheduling order, but nevertheless reviewed the case law cited in considering the State's Motion for Summary Determination.

## ISSUES

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<sup>1</sup> Although titled a "Cross-Motion," this pleading by the Department is responsive in nature and does not raise additional issues for summary determination.

1. Whether the Department’s decision to deny the removal-fill permit application No. 49123-RF violates the dormant Commerce Clause, Article I, § 8 of the United States Constitution.<sup>2</sup>

2. Whether the Department may consider impacts to fishing or fisheries at or near the proposed project site in its determination whether a proposed project is “consistent with the protection, conservation and best use of the water resources in this state” under ORS 196.825(1)(a).<sup>3</sup>

3. Whether the Department may consider impacts to fishing or fisheries in its determination whether the proposed fill conforms to sound policies of conservation under ORS 196.825(3)(e).<sup>4</sup>

4. Whether the Department is prohibited from considering impacts of the “project” as opposed to impacts of the “proposed fill or removal,” except for purposes of the alternatives analysis under ORS 196.825(3)(c).<sup>5</sup>

5. Whether the Department erred in relying on ORS 196.825(1)(b) as an alternative basis for denying the removal-fill permit.<sup>6</sup>

6. Whether, under ORS 196.825(3)(c), the Department may require a permit applicant to address the availability of alternatives to the project that do not involve any impacts to waters of the state.<sup>7</sup>

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<sup>2</sup> Coyote and the Port of Morrow raised a Commerce Clause challenge in their Requests for Hearing. The States of Wyoming and Montana join Coyote and the Port in this claim, and have moved for summary determination on the issue. The Department and Columbia Riverkeeper, on the other hand, seek a determination that the permit does not violate the Commerce Clause and seek dismissal of the States’ Commerce Clause claims.

<sup>3</sup> This issue is raised in the Department’s Motion for Partial Summary Determination and, indirectly, by CIT’s Joint Motion.

<sup>4</sup> This issue is raised in the Department’s Motion for Partial Summary Determination and, indirectly, by CIT’s Joint Motion.

<sup>5</sup> This issue is raised in CIT’s Joint Motion and addressed in Columbia Riverkeeper’s Response.

<sup>6</sup> This issue is raised in CIT’s Joint Motion and addressed in the Department’s Cross-Motion for Partial Summary Determination.

<sup>7</sup> This issue is raised in the Department’s Motion for Partial Summary Determination.

7. Whether, as matter of law, the Department erred in finding that Coyote did not provide all practicable mitigation to reduce the adverse effects of the proposed fill or removal for purposes of ORS 196.825(3)(i).<sup>8</sup>

### FINDINGS OF FACT

1. On or about February 1, 2012, Coyote Island Terminal, LLC (CIT or Coyote) submitted an application (Application No. 49123-RF) to the Department for a removal-fill permit to construct an industrial dock (industrial dock no. 7) at the Port of Morrow near Boardman, Oregon. Coyote proposed to place pilings in the Lake Umatilla section of the Columbia River to construct the dock. The fill project would involve 256 cubic yards of temporary fill and 572 cubic yards of permanent fill. The dock, if built, would be used to load coal into barges for shipment overseas.

2. The proposed industrial dock no. 7, if built, would join six other active docks at the Port of Morrow.

3. In 2013, Coyote submitted a Compensatory Non-Wetland Mitigation Functions and Values Assessment and Mitigation Plan for enhancing streamside vegetation in connection with its permit application. The Department reviewed the plan, which described some of the mitigation necessary for the proposed fill. The Department accepted this plan as adequate for its limited purposes. (Affidavit of Kirk Jarvie dated June 3, 2016.)

4. During the permitting process, the Department received information from the applicant and proponents of the project supporting social, economic and other benefits to the public of the proposed fill, and the project it facilitates. The Department also received information from opponents of the project as to negative social and economic impacts of the proposed fill and the project it facilitates. During public comment periods and through affidavits, the Department received information from the Confederate Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Warm Springs, the Nez Perce and the Columbia River Intertribal Fish Commission regarding adverse impacts to tribal fishing and fisheries from the proposed fill. (Finding and Order at 3.)

5. On or about August 1, 2014, as part of the final completed version of its application, Coyote submitted a Fishing Mitigation Plan. The Executive Summary of the Fishing Mitigation Plan stated, in pertinent part, as follows:

During the permitting process, several tribes have expressed concerns with the impact the dock may have on fishing in the area. While CIT does not agree that the dock has the potential to impact fishing, CIT has developed a range of potential mitigation measures to alleviate Tribal concerns and be a good neighbor to the tribes. CIT does not propose implementing all of the identified options. The list is intended to suggest a range of alternatives that could be considered by DSL if it is determined the project results in impacts to fishing. If such a finding

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<sup>8</sup> This issue is raised in CIT's Joint Motion.

were made, CIT would expect to work with DSL and the affected Tribes to determine the most appropriate mitigation conditions in relation to the identified impact.

CIT has proposed on-site and off-site mitigation to address Tribal fishing concerns. At the site, CIT proposes up to 15 days of dock closure during the spring, summer and fall fishing seasons. CIT will provide shoreline access and the placement of Tribal fishing nets behind the dock, and will facilitate construction of a Tribal selective fish trap at the dock to help improve fishing.

\* \* \* \* \*

This fisheries mitigation plan is in addition to the streambank mitigation plan submitted by CIT in the updated joint permit application, Appendix 4.

(Ex. A1 to Department's Motion at 5543.)

6. On August 18, 2014, the Department issued its Findings and Order regarding Application 49123-RF denying a removal-fill permit to Coyote Island Terminal, LLC for the proposed removal-fill activities. In the Findings and Order, the Department discussed each of the considerations enumerated in ORS 196.825(3). As pertinent here, the Department found, among other things, as follows:

**(a): The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal:**

The proposed fill consists of pilings to support a walkway and conveyor structure and to create associated mooring dolphins and breasting dolphins to facilitate loading of Columbia River barges. The permit applicant is a private company proposing this as part of a commercial enterprise; therefore the fill will not directly meet a public need.

\* \* \* \* \*

The low public need for the proposed fill does not support issuance of the permit. The evidence regarding social, economic, and other benefits (except for fisheries) is conflicting. The Department finds that the evidence (except for fisheries) is inconclusive.

Regarding fisheries, the Department finds that the preponderance of the evidence demonstrates that there is a small but important long-standing fishery at the project site, which is itself a social, economic and other benefit to the public. The fishery is more significant than the public benefits that may be derived from the proposed fill. Therefore, the social, economic or other public benefits likely to result from the proposed fill or removal does not support issuance of the permit.

**(b) The economic cost to the public if the proposed fill or removal is not accomplished:**

\* \* \* \* \*

The Department finds there is little, if any, economic costs to the public if the proposed fill or removal is not accomplished.

**(c) The availability of alternatives to the project for which the fill or removal is proposed:**

\* \* \* \* \*

Although the recent submittal [an alternatives analysis revised in July 2014] is far more informative than previous ones, the Department finds that the alternatives analysis does not support that the proposed fill is the practicable alternative with the least impact to waters of this state.

**(d) The availability of alternative sites for the proposed fill or removal.**

\* \* \* \* \*

Because the applicant did not demonstrate that the Port of Morrow was the site of the practicable alternative with the least impact to waters of this state, the Department has not made a specific finding on this consideration.

**(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety.**

\* \* \* \* \*

The Department finds that the proposed fill does not conform to sound policies of conservation. For example, the proposed fill would obstruct the small but important long-standing fishery in the project area. Therefore, sound policies of conservation do not support issuance of the permit. In considering the public health and safety issues the Department finds the record inconclusive.

**(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations.**

\* \* \* \* \*

The Department finds that the proposed fill is not in conformance with existing public uses of the waters. The lack of conformance with existing public uses of the waters does not support issuance of the permit.

The Department finds that the proposed fill is in conformance with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations. This consideration supports issuance of the permit.

**(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion.**

\* \* \* \* \*

The Department finds that the proposed fill is in conformance with acknowledged comprehensive plan and land use regulations for the area where the proposed fill is to take place. This consideration supports issuance of the permit.

**(h) Whether the proposed fill or removal is for streambank protection.**

The proposed fill or removal is not for stream-bank protection.

**(i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800.**

\* \* \* \* \*

The Department finds that the applicant has not provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800. Its proposal for Waterway Impact Mitigation is missing the financial assurance and long-term protection documents necessary for approval by the Department. In addition, the applicant has not actually proposed any Fishery Impact Mitigation. Instead, it has listed some possible options for further discussions with the Department. Therefore, the applicant's mitigation measures do not support issuance of a permit.

**DEPARTMENT DETERMINATIONS:**

The Department will issue a permit only if the Department makes all of the following three determinations: The project described in the application: (1) has independent utility; (2) is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and (3) would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation. The permit applicant has the burden of proof for all three determinations. For this proposed project, the Department has determined that the project has independent utility, however the Department has also determined that the project is not consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905, and it would unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation. Each of the determinations is summarized below.

**Independent utility**

The Oregon Department of State Lands has made the required considerations based on the application, public comment and our own investigations and the Department has determined that Application 49123-RF **has independent utility.**

\* \* \* \* \*

**Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905.**

The Oregon Department of State Lands has made the required considerations based on the application, public comment and our own investigations and the Department has determined that Application 49123-RF **is not consistent** with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905. As stated previously in this document, the entire Columbia River that is within the State of Oregon is a “waters of this state” for purposes of the Oregon Removal-Fill Law. “Water resources” include not only the water itself but also aquatic life and habitats therein and all other natural resources in and under the waters of this state. Therefore, this determination is completely independent of the ownership of the land underlying the waters of this state. It is also an independent basis for denial of the permit.

As noted previously, the Department finds that a number of the considerations support that the Department not issue the permit. Here, we discuss two of those considerations further, and discuss the protection, conservation and best use of the water resources of the project site.

\* \* \* \* \*

The applicant did not compare the practicability of Rail directly to Port Westward against the practicability of the proposed development and operation at Port of Morrow. There was no acknowledgement that this Rail to Panamax alternative might entirely eliminate impacts to Waters of the State.

2) Protection, Conservation and Best Use; Fishing Use: The Department received extensive, robust and persuasive input from the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of Warm Springs, and the Nez Perce, as well as from the Columbia River Intertribal Fish Commission. \* \* \* The Department finds and concludes that the evidence supporting that there is a small but important long-standing fishery at the project site is more persuasive than the evidence submitted by the applicant regarding fishing at the project site.

Although the applicant presented a range of potential actions that might mitigate the project effects on the fishing at the project site, the applicant did not commit to any specific action or set of actions.

The Department determines that the applicant did not clearly demonstrate that the development of a new barge loading facility is the best use over a small but important long-standing fishing use.

**Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.**

The Department has made the required considerations based on the application, public comment and our own investigations and the Department has determined that Application 49123-RF, **would unreasonably interfere** with the paramount policy of this state to preserve the use of its waters for navigation, fishing and

public recreation. The agency record demonstrates that the project would unreasonably interfere with a small but important and long-standing fishery in the state's waters at the project site. The determination is made as an alternative basis for denial of the permit.

(Findings and Order at 2-16).

### **CONCLUSIONS OF LAW**

1. The Department's decision to deny the removal-fill permit application does not violate the dormant Commerce Clause of the United States Constitution.
2. The Department may consider impacts to fishing and fisheries at or near the proposed project site in its determination whether a proposed project is consistent with the protection, conservation and best use of the water resources in this state.
3. The Department may consider impacts to fishing and fisheries in its determination whether the proposed fill conforms to sound policies of conservation under ORS 196.825(3)(e).
4. The Department is not prohibited from considering impacts of a proposed project in determining whether to issue a permit under ORS 196.825.
5. The Department may rely on ORS 196.825(1)(b) as an alternative basis for denying the permit.
6. The Department may require an applicant to address the availability of alternatives to the project that do not involve any impacts to waters of the state.
7. Material questions of fact remain in dispute as to whether the Department erred in finding that Coyote did not provide all practicable mitigation to reduce the adverse effects of the proposed fill or removal for purposes of ORS 196.825(3)(i).

### **OPINION**

#### **A. *Summary Determination Standard***

Motions for Summary Determination are governed by OAR 137-003-0580, which provides, in pertinent part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

- (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
- (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.
- (9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.
- (10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any. When a motion for summary determination is made and supported as provided in this rule, the administrative law judge or the agency must explain the requirements for filing a response to any unrepresented party or parties.
- (11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.
- (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with OAR 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

**B. *Applicable Law: Criteria for Issuance of Removal-Fill Permit***

ORS 196.825 establishes the criteria for issuing a removal-fill permit. As pertinent here, the statute provides as follows:

- (1) The Director of the Department of State Lands shall issue a permit applied for under ORS 196.815 if the director determines that the project described in the application:
- (a) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and
  - (b) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

\* \* \* \* \*

(3) In determining whether to issue a permit, the director shall consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the director may accept and rely upon the public body's findings as to local public need and local public benefit.

(b) The economic cost to the public if the proposed fill or removal is not accomplished.

(c) The availability of alternatives to the project for which the fill or removal is proposed.

(d) The availability of alternative sites for the proposed fill or removal.

(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety.

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations.

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion.

(h) Whether the proposed fill or removal is for streambank protection.

(i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800. In determining whether the applicant has provided all practicable mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.

OAR 141-085-0565 sets out the procedures for the Department's determinations and considerations in evaluating an application for a removal-fill permit. As pertinent here, the rule provides:

(1) Departmental Final Review. The Department will evaluate the information provided in the application, conduct its own investigation, and consider the comments submitted during the public review process to determine whether or not to issue an individual removal-fill permit.

(2) Effective Date of Review Standards. The Department may consider only standards and criteria in effect on the date the Department receives the complete application or renewal request.

(3) Department Determinations. The Department will issue a permit if it determines the project described in the application:

(a) Has independent utility;

(b) Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.990; and

(c) Would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation, when the project is on state-owned lands.

(4) Department Considerations. In determining whether to issue a permit, the Department will consider all of the following:

(a) The public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the proposed fill or removal. When the applicant for a permit is a public body, the Department may accept and rely upon the public body's findings as to local public need and local public benefit;

(b) The economic cost to the public if the proposed fill or removal is not accomplished;

(c) The availability of alternatives to the project for which the fill or removal is proposed;

(d) The availability of alternative sites for the proposed fill or removal;

(e) Whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety;

(f) Whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations;

(g) Whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion;

(h) Whether the proposed fill or removal is for stream bank protection; and

(i) Whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800.

**C. *Substantive Issues Raised by the Parties' Motions***

**1. *Dormant Commerce Clause***

As set out above, the State of Montana and the State of Wyoming seek a determination that the Department's August 18, 2014 denial of Coyote's application for a removal-fill permit (Application No. 49123-RF) unduly burdens interstate commerce in violation of Article I, § 8 of the United States Constitution (the Commerce Clause). Specifically, the States assert that the Department's Order impermissibly discriminates against interstate commerce (the transport of Wyoming and Montana coal) and, alternatively, even if not discriminatory, the Department's action imposes excessive burdens on commerce in relation to the putative benefits.

The Department and Columbia Riverkeeper, on the other hand, seek a determination that the Department's denial of the permit does not run afoul of the dormant Commerce Clause. The Department argues that its determination was made in accordance with statutory requirements, that the permit denial does not discriminate against out-of-state commerce, and does not impose an undue burden on interstate commerce. Columbia Riverkeeper similarly asserts that the Department's permit denial is neither a discriminatory nor unduly burdensome action under the Commerce Clause.

For the reasons that follow, I find that the Department's denial of Coyote's permit application does not violate the dormant Commerce Clause. The States of Montana and Wyoming are not, therefore, entitled to a ruling in their favor. The Department and Columbia Riverkeeper are, however, entitled to a favorable ruling as a matter of law on the dismissal of the States' Commerce Clause claims.

The Commerce Clause of Article I, § 8 of the United States Constitution empowers Congress to "regulate Commerce \* \* \* among the several States." Although phrased as a grant of regulatory power to Congress, the Commerce Clause has long been understood to have a negative aspect that denies the States the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Oregon*, 511 US 93 (1994). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors.” *Dep’t of Revenue of Ky. v. Davis*, 553 US 328, 337 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 US 269, 273–74 (1988)).

The first inquiry under the dormant Commerce Clause is whether the challenged action treats in-state and out-of-state economic interests differently, in which case “it is virtually *per se* invalid.” *Oregon Waste Systems, Inc.*, 511 US at 99. A state action that effectively favors in-state economic interests over out-of-state interests is subject to heightened scrutiny. It will be deemed “unconstitutional unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 US 353, 359 (1992). The burden to show discrimination rests on the party challenging the validity of the state action. Once discrimination is established, the burden falls upon the state to demonstrate both that the regulation serves a legitimate local purpose and that the purpose could not be served as well by available nondiscriminatory means. *Hughes v. Oklahoma*, 441 US 322, 336 (1979).

By contrast, regulations that are nondiscriminatory 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 v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will 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.*

(a) *Discriminatory State Action: Heightened Scrutiny Standard*

As noted above, Montana and Wyoming argue that the Department’s denial of the removal-fill permit application discriminates against interstate and international commerce, both in purpose and in practical effect, and should be subject to strict scrutiny. Specifically, the States argue that the Port of Morrow Project represents “CIT’s only practicable option for getting intermountain coal from Montana and Wyoming to the nation’s trade partners in Asia without first going through Canada”<sup>9</sup> and that the Department’s denial of the permit has the practical effect of completely obstructing coal exports through Oregon.<sup>10</sup> The States further contend that the Department’s denial of the permit cannot withstand strict scrutiny because, under ORS 196.825(5), the Department has less restrictive means to protect the state interest at issue, *i.e.*, it can impose conditions on a permit to mitigate any expected adverse effects of project development.

The Department and Columbia Riverkeeper, on the other hand, contend that the Department’s decision to deny the permit is not subject to the heightened scrutiny standard because the action is not discriminatory. The Department asserts that its determination to deny CIT’s permit application did not have the purpose or effect of blocking trains, trucks, barges, or other commercial vehicles from crossing the state’s border or moving across the state. Columbia

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<sup>9</sup> State of Montana’s Motion for Summary Determination at 13.

<sup>10</sup> States’ Joint Response to Columbia Riverkeeper at 13.

Riverkeeper similarly argues that the Department’s decision does not limit the movement of coal in interstate commerce, or block anyone from constructing an export terminal. The Department and Columbia Riverkeeper contend that the Department simply found that Coyote’s preferred site did not meet the permit criteria set out in ORS 196.825.

In a case somewhat analogous to the matter at hand, the Third Circuit rejected a dormant Commerce Clause challenge to the Delaware Coastal Zone Act (CZA), a law enacted in 1971 that prohibited offshore gas, liquid, or solid bulk product transfer facilities in the Delaware Bay which were not in operation as of June 1971. In *Norfolk Southern Corp v. Oberly*, 822 F2d 388, 400 (3d Cir. 1987), a group proposing a coal lightering service (a facility used to fully load ships for transport overseas) filed suit claiming that the CZA, as applied to its proposed project, violated the dormant Commerce Clause. The court rejected the appellants’ contention that the CZA’s ban on vessel-to-vessel bulk product transfers discriminated against interstate commerce and was therefore subject to strict scrutiny. In short, the court found that the law did not prohibit the export, import, or transshipment of coal, and did not have the effect of blocking the flow of coal at Delaware’s borders.<sup>11</sup> 822 F2d at 401. The court also rejected the appellants’ contention that the law was protectionist and subject to heightened scrutiny because it favored certain uses, such as tourism and fishing, which produce economic benefits for Delaware over “competing” uses of the Bay, such as lightering, which allegedly add little or nothing to the Delaware economy. *Id.*

Noting that the Supreme Court has found facially evenhanded legislation to have discriminatory effects only where the state law advantages in-state businesses in relation to out-of-state businesses in the same market, the *Norfolk Southern* court explained:

A state’s choice between competing land uses or between alternative environmental protection policies does not implicate the Commerce Clause simply because the alternative chosen may be in the best economic interests of the state so long as the state’s choice does not discriminate between in-state and out-of-state competitors.

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<sup>11</sup> The court also noted that even if the law did have that effect, it would not trigger heightened review because the law also prohibited in-state business from the activity. The court explained:

It is the discrimination against interstate versus intrastate movements of goods, rather than the “blockage” of the interstate flow per se, that triggers heightened scrutiny review in such cases. \* \* \* Rather than discriminatorily prohibiting interstate commerce in a certain good, the CZA regulates an in-state activity—vessel-to-vessel coal transfers—in a wholly nondiscriminatory manner.

822 F2d at 401.

822 F2d at 402. Citing to *Exxon Corp. v. Maryland*, 437 US 117 (1978),<sup>12</sup> the court also rejected the notion that the CZA was discriminatory and subject to heightened scrutiny because out-of-state firms were the only ones interested in engaging in the activity foreclosed by the regulation. *Id.*

In addition, the *Norfolk Southern* court rejected the appellants' contention that heightened scrutiny should apply because the CZA burdened foreign commerce. The court held that for purposes of a foreign Commerce Clause analysis, the relevant burden on commerce is "the degree to which the state law impinges on the need for federal uniformity in the area of foreign trade policy." 822 F2d at 405. The court then found that because the CZA did not impose embargos, quotas or tariffs, and did not prevent the nation from speaking with one voice in regulating foreign commerce, the law did not impose any cognizable burden on foreign commerce. *Id.*

*Norfolk Southern* is instructive even though, in this instance, Montana and Wyoming are challenging the denial of a removal-fill permit to construct a loading dock at a specific site rather than a law banning bulk transfer facilities in a coastal zone. As in *Norfolk Southern*, the Department's permit denial is facially nondiscriminatory – it does not favor any in-state economic interests over out-of-state interests. Indeed, there is no indication that the Department's decision was designed to protect any local economic or commercial interests. Instead, the Department's decision is founded on environmental concerns and protection of natural resources.

Like the law prohibiting new bulk transfer facilities at issue in *Norfolk Southern*, the Department's denial of the permit does not impair the free flow of goods across state borders. As the Department and Columbia Riverkeeper note, the permit denial does not prohibit trains, trucks, barges, or other commercial vehicles from crossing into Oregon or moving across the state. The permit denial does not prohibit the movement of coal in interstate commerce, it just prevents the construction of an industrial loading dock at the Port of Morrow. In addition, the fact that Oregon does not have a coal industry does not trigger heightened scrutiny. *See Exxon Corp v. Maryland*, 437 US 117.

In summary, Montana and Wyoming have not shown that the Department's denial of the removal-fill permit discriminates against interstate commerce on its face, in its purpose or in its

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<sup>12</sup> In *Exxon Corp. v. Maryland*, the State of Maryland enacted a statute that barred petroleum producers and refiners from operating retail gas stations in the state. Because there were no petroleum producers or refiners based in Maryland at the time, only out-of-state firms were initially impacted by the law. The Court noted, however, that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." 437 US at 125.

effect.<sup>13</sup> Because the heightened scrutiny standard does not apply, the next inquiry is whether the States have shown that the permit denial imposes an excessive burden on interstate commerce under the *Pike* balancing test.

(b) *Balancing Test: Burden on Interstate Commerce*

In *National Ass'n of Optometrists & Opticians v. Harris*, 682 F3d 1144 (9<sup>th</sup> Cir. 2012), the Ninth Circuit addressed the standard for evaluating the validity of regulations that impose incidental burdens on interstate commerce:

Given the purposes of the dormant Commerce Clause, it is not surprising that a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce. \* \* \* A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden on interstate commerce*. \* \* \* These other significant burdens on interstate commerce generally result from inconsistent regulation of activities that are inherently national or require a uniform system of regulation. \* \* \* A classic example of this type of regulation is one that imposes significant burdens on interstate transportation. \* \* \*

Although dormant Commerce Clause jurisprudence protects against burdens on interstate commerce, it also respects federalism by protecting local autonomy. \* \* \* Thus, the Supreme Court has recognized that “under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern such as public health” and has held that “not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.” \* \* \*

*Id.* at 1148 (citations omitted, emphasis in original).

The *Harris* court explained that under *Pike*, the controlling question is whether the challenged law imposes a burden on interstate commerce that is clearly excessive in relationship to the putative local interests. After analyzing Supreme Court precedent, including *Exxon Corp. v. Maryland*, 437 US 117, and *Minnesota v. Clover Leaf Creamery, Co.*, 449 US 456 (1981), the Ninth Circuit held:

There is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating in a retail market. Where such a regulation does not regulate activities that inherently require

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<sup>13</sup> To the extent Montana and Wyoming also contend that Department’s denial of the permit violates the Foreign Commerce Clause, they have similarly failed to make such a showing. The Foreign Commerce Clause “restrains protectionist policies, but it also restrains the states from excessive interference in foreign affairs.” *National Foreign Trade Counsel v. Natsios*, 181 F3d 38, 66 (1<sup>st</sup> Cir. 1999). Here, for the same reasons that the permit denial does not discriminate against interstate commerce, it also does not discriminate against foreign commerce. The fact that the States’ coal is to be exported to Asia does not, in and of itself, trigger heightened scrutiny of the permit denial. As in *Norfolk Southern*, the Department’s action imposes no legally cognizable burden on foreign commerce because it does not impose embargos, quotas or tariffs, or prevent the nation from speaking with one voice in regulating foreign commerce.

a uniform system of regulation and does not otherwise impair the free flow of materials and products across state borders, there is not a significant burden on interstate commerce.

682 F3d at 1154-55. In addition, the *Harris* court found that if a regulation merely has an effect on interstate commerce but does not impose a significant burden on interstate commerce, then there is no need to examine the actual or putative benefits of the challenged regulation. The court explained:

This is the explicit lesson of *Exxon*. Once the *Exxon* Court determined that there was no discrimination and no significant burden on interstate commerce, it ended its dormant commerce clause analysis without assessing the value of the statute's purported benefits or actual benefits.

*Id.* at 1156 (citations omitted).

In a similar vein, in *Norfolk Southern*, the court confirmed that the incidental burden on interstate commerce is “the degree to which the state action incidentally discriminates against interstate commerce relative to intrastate commerce. It is a comparative measure.” 822 F2d at 406. The court explained that where the burden on out-of-state interests is no different from that placed on competing state interests, “it is simply a burden on commerce, rather than a burden on interstate commerce.” *Id.* The court added:

[T]he case law makes clear that the Commerce Clause is concerned with protectionism and the need for uniformity and the holdings of the cases demonstrate that legislation will not be invalidated under the *Pike* test in the absence of discriminatory burdens on interstate commerce.

*Id.* at 406. In finding that the CZA did not discriminate against out-of-state interests or in favor of in-state interests, the *Norfolk Southern* court concluded:

The necessity of a discriminatory burden is dispositive of this case. The burden identified by *Norfolk Southern* “is the total prevention of a new mode of export that may achieve undeniable commercial significance and that furthers national objectives.” *Norfolk Southern Br.* at 46. This alleged burden, at base, is that CZA precludes coal exporters from lowering their average transportation costs. This kind of burden is not, however, a legally relevant incidental burden. It is a nondiscriminatory burden that must be shouldered by any coal transporter, regardless of state affiliation. Our observation in *American Trucking Associations, Inc. v. Larson* is equally pertinent here: If as is likely, the principal function of the Commerce Clause is to prevent discrimination against interstate commerce, then once it is conceded that there is no such discrimination, either facially or in application, the inquiry as to the burden on interstate commerce should end. \* \* \*

*Id.* at 407.

In this case, relying on *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F3d 1230 (11<sup>th</sup> Cir. 2012), the States argue that the Department's decision to deny the permit

imposes an onerous burden on interstate commerce that is not outweighed by the Department's stated interest in the protection of a small but important fishery in the Port of Morrow.<sup>14</sup> Both Montana and Wyoming assert that the Department's decision significantly burdens interstate commerce because the practical effect of denying the permit is to force Coyote to build, at great expense, new rail facilities at Port Westward or abandon its plans for coal export entirely.<sup>15</sup>

*Florida Transportation Services* involved a Commerce Clause challenge to a county ordinance for the permitting of stevedores at the Port of Miami in Miami-Dade County. Florida Transportation Services (FTS) filed suit alleging that the County's Port Director did not follow the ordinance's requirements and instead protected incumbent stevedores and denied permits to new entrants and competition. Port of Miami stevedore permits expire annually and automatically on the same date each year, thereby requiring existing permit holders and new applicants alike to apply for a permit each year. The County's ordinance authorized the Port Director to renew an expiring permit only if the renewal application met the criteria for the issuance of a new permit. For three years, the Port Director had denied a permit to FTS, a Broward County stevedore business seeking to expand its services to the Port of Miami.

In analyzing FTS's Commerce Clause claims, the court noted that "the Port Director's permitting practices were not even-handed and were designed to prevent competition." 703 F3d at 1257. The court found that instead of determining whether a permit applicant met the criteria for issuance of a new permit, the Port Director automatically granted new permits to the stevedore companies that held permits in the previous year and automatically denied permits to all companies that did not hold a permit in the previous year. The court concluded that the Port Director's permitting practices plainly burdened interstate commerce by making entry into the Port's stevedore market impossible. *Id.* 1258-59. Upon finding that the Port Director's permitting practices imposed a substantial burden on interstate commerce, the court balanced that burden against the local benefits the County attributed to the Port Director's practices, i.e., maximizing Port space and operational efficiencies and ensuring a skilled, experienced and safe pool of permitted stevedores. The court concluded that the discriminatory permitting practices did not further, but if anything rather disserved, the County's purported purposes and benefits. Ultimately, the court held that the record showed no local benefit rationally furthered by how the Port Director actually applied the stevedore permit ordinance. The court concluded as follows:

The burden on interstate commerce—effectively removing the Port of Miami stevedore market from the local, state, and national markets and preserving it for a select few privileged permit holders—is significant, whereas the actual permitting practices did not further any local benefits. Thus, the burden necessarily

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<sup>14</sup> Wyoming argues: "The Department's decision to deny the Company's application to preserve fishing at a specific location that is designated as a commercial dock site at the Port of Morrow goes well beyond protection of a legitimate local interest and excessively and unduly burdens interstate commerce." State of Wyoming's Motion at 25.

<sup>15</sup> See State of Montana's Motion at 18-19; State of Wyoming's Motion at 25; States' Joint Response at 10.

exceeded them. Accordingly, the stevedore permit ordinance as applied violates the dormant Commerce Clause.

*Id.* at 1261-62.

The preceding case law discussion, while lengthy, is necessary because it demonstrates why the *Florida Transportation Services* case does not support the States' Commerce Clause claims in this matter.

Unlike the permit denials at issue in *Florida Transportation Services*, the Department's decision to deny Coyote's removal-fill permit application was not discriminatory. As discussed previously, the Department's decision has nothing to do with economic protectionism or preventing competition, and it does not favor in-state economic interests over out-of-state competitors. The Department simply determined that Coyote had not demonstrated that a loading dock was the best use of the state's waters at the proposed location. As the Department and Riverkeeper note, the Department's decision is agnostic as to the material to be loaded and the origins of the parties involved.

The States have not shown that the Department's decision to deny the permit imposes a discriminatory or excessive burden on interstate commerce. Indeed, although the Department's decision may preclude the development of a coal export facility at the Port of Morrow, the result is an incidental burden on commerce generally, rather than a burden on interstate commerce. As in *Norfolk Southern*, this is not a legally relevant burden on interstate commerce.<sup>16</sup> Because the States have not shown that the Department's action is discriminatory or that it imposes a significant burden on interstate commerce, the Commerce Clause analysis need not go any further.

**2. Considering impacts to fishing in determining whether a project is "consistent with the protection, conservation and best use of the water resources in this state" under ORS 196.825(1)(a)**

In its Motion for Partial Summary Determination, the Department asserts that it may consider impacts to fishing and fisheries in determining whether the proposed fill or removal project is consistent with the protection, conservation and best use of the water resources of this state for purposes of ORS 196.825(1)(a) and OAR 141-085-0565(3)(b).<sup>17</sup> Noting that "water resources" includes not only the water itself but also "aquatic life and habitats therein and all

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<sup>16</sup> The Oregon Court of Appeals took a similar approach in rejecting a Commerce Clause challenge to Oregon's bottle bill in *American Can Co. v. OLCC*, 15 Or App 618 (1974). There, the court noted: "The bottle bill is not discriminatory against interstate commerce and is not intended to operate to give Oregon industry a competitive advantage against outside firms. The ban on pull tops and the deposit-and-return provisions apply equally to all distributors and manufacturers whether Oregon-based or from out of state." *Id.* at 704.

<sup>17</sup> Department's Motion for Partial Summary Determination at 12-13. OAR 141-085-056(1)(b) parrots ORS 196.825(1)(a), stating that the Department will issue a permit if it determines the project "Is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.990."

other natural resources in and under” the waters of the state (ORS 196.800(14)) and that “aquatic life and habitats” means “the aquatic environment including all fish \* \* \* dependent upon environments created and supported” by the waters of the state (OAR 141-085-0510(2)), the Department contends that it may consider impacts on fishing (and fisheries) as part of its determination whether a proposed project is consistent with the best use of water resources.

CIT does not specifically assert that the Department lacks the authority to consider impacts to fishing under ORS 196.825(1)(a), but argues instead that, based on the Department’s prior practice and interpretation of the statute, the Department is limited to considering the factors listed in ORS 196.825(3)(a) through (i) in evaluating an individual permit application. CIT further asserts that nothing in subsection (3) specifically authorizes the Department to consider impacts to fishing activity at the proposed project site.

At this stage, the question is simply one of statutory interpretation: whether the Department has authority under ORS 196.825(1)(a) to consider impacts to fishing in determining whether a project<sup>18</sup> is consistent with the protection, conservation and best use of water resources. For the reasons set out below, I find the Department has such authority.

OAR 196.805 sets out the policy behind the fill and removal statutes. As pertinent here, the statute provides:

(1) The protection, conservation and best use of the water resources of this state are matters of the utmost public concern. Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people. Unregulated removal of material from the beds and banks of the waters of this state may create hazards to the health, safety and welfare of the people of this state. *Unregulated filling in the waters of this state for any purpose, may result in interfering with or injuring public navigation, fishery and recreational uses of the waters. In order to provide for the best possible use of the water resources of this state, it is desirable to centralize authority in the Director of the Department of State Lands, and implement control of the removal of material from the beds and banks or filling of the waters of this state.*

(2) *The director shall take into consideration all beneficial uses of water including streambank protection when administering fill and removal statutes.*

(Emphasis added.)

Considering the statutory directive that the director take into consideration “all beneficial uses of water” when administering the fill and removal statutes, the recognition that “habitats and spawning areas for fish” and “sites for commerce and public recreation” are matters within

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<sup>18</sup> “Project” is defined by OAR 141-085-0510(72) (2010) as follows: “‘Project’ means the primary development or use, having independent utility, proposed by one person. A project may include more than one removal-fill activity.”

the Department's concern, it is clear that fisheries and fishing fall within the use of water resources in this state. Indeed, the legislature specifically acknowledged that that unregulated filling of the waters of this state can adversely impact fisheries and recreational uses of the waters. Consequently, I find that the Department has the general authority under ORS 196.825(1) to consider impacts to fishing and/or fisheries at or near a proposed fill or removal site in determining whether to grant or deny a removal-fill application.

CIT's arguments regarding the limited scope of the Department's review under ORS 196.825(3) are addressed below. Additionally, while the Department may, as a matter of law, consider impacts to fishing and fisheries in making a permit determination, it remains a matter in dispute for hearing whether, and to what extent, the Department considered impacts to fishing activity (and CIT's Fishing Mitigation Plan) in denying the permit in this case.

**3. *Considering impacts to fishing in determining whether a proposed fill "conforms to sound policies of conservation" under ORS 196.825(3)(e)***

The Department also seeks a determination that it is authorized to consider impacts to fishing and recreation in determining whether the proposed fill "conforms to sound policies of conservation" under ORS 196.825(3)(e).<sup>19</sup> CIT, on the other hand, asserts that the statute does not authorize the Department to consider impacts to fishing as the plain language of the provision directs the Department to consider policies of "conservation," and not the act of fishing.<sup>20</sup>

As noted above, at this summary determination stage, the question is one of statutory interpretation: whether the Department has the authority to consider the impact the proposed fill will have on fishing activity at the project site. I find, as a matter of law, the Department has such authority. However, in this case, it remains a factual matter in dispute for hearing whether the Department erred in concluding that the proposed fill does not conform to sound policies of conservation because of a small but longstanding fishery in the project area.

"Conservation" is defined as, among other things, "a: planned management of a natural resource to prevent exploitation, destruction, or neglect <wildlife~> <~of the Northwest> b: the wise utilization of a natural product esp. by a manufacturer so as to prevent waste and ensure future use of resources that have been depleted \* \* \*." *Webster's Third New World Int'l Dictionary* 483 (2002 ed.) As discussed above, ORS 196.805(2) requires that the Department consider "all beneficial uses of water" when administering the removal-fill statutes. Additionally, the legislature has recognized that "unregulated filling in the waters of this state \* \* \* may result in interfering with or injuring public navigation, fishery and recreational uses of the

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<sup>19</sup> Department's Motion for Partial Summary Determination at 10-11. As found above, in determining whether the proposed fill conforms to sound policies of conservation and would not interfere with public health and safety, the Department stated, "For example, the proposed fill would obstruct the small but important long-standing fishery in the project area." (Findings and Order at 8.)

<sup>20</sup> CIT's Response at 17.

waters.” ORS 196.805(1). Given the stated policy and purpose behind Oregon’s removal-fill laws, and the meaning of the term conservation (in particular, the planned management of a natural resource and wise utilization of a natural product), it is reasonable to conclude that impacts to fishing and fisheries fall within the determination whether a proposed fill or removal “conforms to sound policies of conservation,” under ORS 196.825(3)(e).

Furthermore, the absence of any specific reference to fishing in ORS 196.825(3) does not preclude the Department from considering what, if any, impact a proposed removal fill project would have on this use of state waters. While ORS 196.825(3) identifies the criteria the Department must consider in determining whether to issue a permit, nothing in the wording of the statute suggests the list is exclusive.<sup>21</sup> As courts have recognized for years, the legislature knows how to write an exclusive list. *See, e.g., Oregonians for Sound Economic Policy v. SAIF*, 187 Or App 621, *rev. den.*, 336 Or 60 (2003) (explaining that the legislature “certainly knows how” to enact wording that communicates an intent that a statutory scheme be exclusive); *Langlotz v. Noelle*, 179 Or App 317, *rev. den.* 334 Or 260 (2002)<sup>22</sup> (“Had it wanted to write an exclusive list, the legislature could have done so with a variety of locutions.”); *Richardson v. ODOT*, 253 Or App 456 (2012) (holding that a statute, as written, did not expressly prohibit DMV from considering evidence of defenses other than the three listed.) Consequently, in determining whether to issue a permit, the Department must consider the nine criteria set out in ORS 196.825(3) and may, in its discretion, consider other impacts a proposed fill or removal will have on water resources of this state, including impacts to fishing and fishery uses.

#### **4. Considering impacts of the project versus impacts of the proposed fill or removal under ORS 196.825**

In the Joint Motion, CIT seeks a determination that the Department’s considerations conform to the plain language of ORS 196.825(3) and, for purposes of 196.825(3)(a), (b), (e), (f), (h), and (i), the considerations be limited to “the proposed fill or removal” as opposed to the project as a whole.<sup>23</sup> Citing to *Examilotis v. Dep’t of State Lands*, 229 Or App 522 (2010) and a

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<sup>21</sup> *Examilotis v. Dep’t of State Lands*, 229 Or App 522 (2010), discussed in more detail *infra*, does not suggest otherwise. The fact that the Department did not err in confining its review of a particular permit application to the specific criteria set forth in ORS 196.825(3) does not mean the Department lacks the authority to consider any other impacts a proposed fill or removal may have on the water resources of the state. Again, ORS 196.805(2) requires that the Department director consider “*all beneficial uses of water* including streambank protection when administering fill and removal statutes.”

<sup>22</sup> In *Langlotz v. Noelle*, the plaintiff challenged a county sheriff’s authority to demand certain information on an application for a concealed handgun license. The plaintiff argued that the provisions of ORS 166.291, the statute setting forth the procedures and criteria for obtaining a concealed handgun license from a county sheriff, limited the information the sheriff may require of applicants and required the sheriff to issue a license upon the applicant providing such information. The court rejected the plaintiff’s contentions based on the plain language of the statute. 179 Or App 317.

<sup>23</sup> CIT’s Motion at 16-21.

Department Appellate Brief in a case currently pending before the Oregon Court of Appeals,<sup>24</sup> CIT contends that the Department may not evaluate the impacts of the project's operation except when conducting its review of the alternative analysis under ORS 196.825(3)(c).<sup>25</sup>

The Department does not dispute that the provisions of ORS 196.825(3) direct it to consider the impacts of the proposed removal or fill as opposed to the operational impacts of the project. The Department contends, however, that whether it sufficiently distinguished between impacts of the proposed fill and impacts of the project in making its determination in this case is a factual matter to be resolved at hearing.

Columbia Riverkeeper, on the other hand, argues that CIT is not entitled to a ruling in its favor because the Department's authority to evaluate removal-fill permit applications is not as restricted as CIT asserts. Columbia Riverkeeper avers that, in light of the language of ORS 196.825(1), which was amended in 2007 and expressly requires the Department to consider impacts to the "project," the Department is not strictly limited in its consideration to the removal-fill activity or the nine factors enumerated in ORS 196.825(3).

In *Examilotis v. Dep't of State Lands*, 229 Or App 522 (2010), the court, interpreting a former version of ORS 196.825 and rules promulgated thereunder, found that the Department did not err in failing to consider certain issues in connection with granting a removal-fill permit to the Coos County Salmon Trout Enhancement Program Commission (Coos STEP) to construct a fish hatchery. There, the petitioners challenged the Department's granting of the permit asserting that the Department was required, by its own rules, to consider public health and safety impacts of the hatchery project as a whole (the proposed plan to move and reconstruct the hatchery), as opposed to impacts associated with the proposed fill. The rules in effect at the time directed the Department to consider, among other things, whether "the project would interfere with public health and safety" and "the degree to which, if at all, the project will increase erosion or flooding upstream and downstream of the project or redirect water from the project site onto adjacent nearby lands." 239 Or App at 532. In affirming a Department final order granting Coos STEP's permit, the court held that although the term "project" covers activities and uses beyond fill and removal activities, the Department had the authority not to apply rules that exceeded its

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<sup>24</sup> CIT relies on the Department's December 2013 Answering Brief in *Coos WaterKeeper v. Port of Coos Bay*, CA A154347 (OAH Case No. 1202690). There, the petitioners challenged the Department's issuance of a permit to the Oregon International Port of Coos Bay for the removal and fill necessary to construct a new multi-user slip, dock, and access channel adjacent to the Coos Bay Navigation Channel. The issues on appeal involve the scope of the Department's review of the permit under ORS 196.825(1) and, in particular, the question of whether the statute requires the Department to consider the impacts of operations that could result from developments for which removal or fill is proposed. In its brief, the Department argued that it was not required under ORS 196.825(1) to conduct a sweeping review of the operational impacts of a project for which the removal-fill is proposed, and did not err by looking only to the criteria of *former* ORS 196.825(2) (since renumbered 196.825(3)) in determining whether to issue the permit. Attachment 1 to CIT's Joint Reply.

<sup>25</sup> As set out above, ORS 196.825(3)(c) is the only subsection that refers to the project: It requires consideration of "the availability of alternatives to the project for which the fill or removal is proposed."

rulemaking authority, and it “did not err in confining the scope of its rules to the requirements for issuing a fill or removal permit under ORS 196.825.” *Id.*

*Examilotis* stands for the proposition that the Department acted within its authority in confining its analysis of Coos STEP’s permit application to the nine criteria enumerated in the statute. The case does not, however, answer the question on which CIT seeks summary determination in this case, which is whether the Department is legally barred from considering the operational impacts of a “project”<sup>26</sup> in making its determination on a removal-fill permit, except in the context of the alternatives analysis required under ORS 196.825(3)(c). After considering the text and context of ORS 196.805<sup>27</sup> and 196.825, and mindful of the fact that, in 2007 the legislature amended ORS 196.825(1) and replaced the terms “removal” and “fill” with the word “project,” I decline to find that the Department’s authority is so constrained.

By the plain language of ORS 196.825(1), the Department has the authority and discretion to consider the impact that a proposed “project” may have on the waters of this state. The fact that the Department has historically limited its permit review to the nine criteria identified in ORS 196.825(3) does not mean the Department is statutorily required to do so. Stated differently, there is nothing in the Oregon Removal-Fill law that prohibits the Department from considering other aquatic impacts, if any, associated with the operation of the project for which the fill or removal is proposed in determining whether to issue a permit. CIT is not, therefore, entitled to a favorable ruling on this issue.

Additionally, I agree with the Department that the extent (if any) to which the Department considered the adverse impacts that the operations of the proposed project (a coal export facility) would have on the water resources of this state (the Lake Umatilla section of the Columbia River) is a question of material fact that precludes summary determination.

##### **5. *Applicability of ORS 196.825(1)(b)***

In the Joint Motion, CIT contends that ORS 196.825(1)(b) does not apply to its permit application and the Department is precluded from relying on this provision as an alternative basis on which to deny the permit because the proposed dock would not be built on state-owned lands.<sup>28</sup> Specifically, citing to OAR 141-085-0565(3)(c) and OAR 141-085-550(5)(j), CIT argues that it is not appropriate for the Department to consider whether the project would unreasonably interfere with the paramount policy of the state to preserve the use of state waters

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<sup>26</sup> As noted previously, “project” means the primary development or use, having independent utility, proposed by one person. OAR 141-085-0510(72) (2010).

<sup>27</sup> As set out previously, ORS 196.805 identifies the protection, conservation and best use of water resources of this state as matters of the utmost public concern, and authorizes the Director of the Department to control the removal of material from the beds and banks and filling of the waters of this state.

<sup>28</sup> CIT’s Motion at 13-16.

for navigation, fishing and public recreation because the rules, in particular OAR 141-085-0565(3)(c), limit the application of this determination to projects on state-owned lands.

The Department, on the other hand, contends that ORS 196.825(1)(b) is applicable and, to the extent that OAR 141-085-0565(3)(c) purports to limit the requirement for a navigation, fishing and public recreation determination to state-owned lands, the rule is inconsistent with the governing statute and therefore invalid.

As set out above, ORS 196.825(1)(b) authorizes the Department to issue a permit if the director determines the project described in the application: “Would not unreasonably interfere with the paramount policy of the state to preserve the use of state waters for navigation, fishing and public recreation.” OAR 141-085-0565(3)(c) parrots the statutory language, but adds the qualifying clause “when the project is on state-owned lands.”

*Examilotis v. Dep’t of State Lands* is instructive on this issue. There, the court found that the Department exceeded its rulemaking authority when it adopted a rule that expanded the scope of review beyond the provisions of ORS 196.825. The court noted, “DSL had authority not to apply rules that exceeded its rulemaking authority.” 239 Or App at 532. Here, the Department’s rule purports to narrow the scope of review under ORS 196.825 by adding a qualifier to the navigation, fishing and recreation determination “when the project is on state-owned lands.”

It is a well-known principal of administrative law that an agency may not adopt rules inconsistent with an applicable statute. *Lane County v. Land Conservation and Development Commission*, 325 Or 569 (1997) (citing *Sunshine Dairy v. Peterson*, 183 Or 305, 326-27 (1948)). On its face, the rule is inconsistent with the statute. ORS 196.825(1) currently requires the director to make two determinations: (a) whether the project is consistent with protection, conservation and the best use of water resources and (b) whether the project would unreasonably interfere with the use of state waters for navigation, fishing and public recreation. Nothing in the language of the statute indicates that the latter determination applies only if the project is not state-owned lands.

CIT argues that the legislative history behind ORS 196.825(1)(b) demonstrates that the navigation, fishing and recreation determination arises out the Public Trust Doctrine and the state’s obligation to protect the *jus publicum* interest in tidelands and the beds and banks of state-owned waterways. CIT contends that because OAR 141-085-0565(3)(c) is consistent with the legislative history of the statute, the rule is valid. CIT further asserts that historically, the Department has only undertaken a navigation, fishing and recreation determination upon a finding that state-owned submerged/submersible lands are involved.

The validity of the rule is not the determinative issue here, however. Instead, for purposes of this ruling, the pertinent issue, as put forth by CIT, is whether the Department is legally precluded from determining whether the proposed industrial dock would unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation because the dock would not be built on state-owned lands. In short, the answer is no. The statute trumps the rule. Despite the language of OAR 141-085-0565(3)(c),

the Department is *not* legally precluded from making a navigation, fishing and public recreation determination on CIT's permit application.<sup>29</sup>

The statute is clear in its terms, and there is no language that limits the Department's authority in this regard to projects on state-owned land. It is a well-known maxim of statutory construction that one is not to insert what has been omitted, or to omit what has been inserted. ORS 174.010. It is also noteworthy that the statute requires a determination of the project's impact upon "the water resources of this state" without regard to ownership of the affected land. Indeed, had the legislature truly intended to preclude the Department from evaluating certain impacts of a removal-fill project based on the ownership of the underlying land, it could and would, have done so.

Because ORS 196.825(1)(b) expressly authorizes the Department director to determine whether the project would unreasonably interfere with navigation, fishing and public recreation, the Department did not err by making such a determination in this case. As a matter of law, CIT is not entitled to a favorable ruling on this issue.

**6. *Practical alternatives to the project that do not involve impacts to waters of the state***

In its Motion for Partial Summary Determination, the Department seeks a determination that it was entitled under ORS 196.825(3)(c) to require Coyote to provide an analysis of alternatives to the proposed project that did not involve any fill or removal. The Department also contends that Coyote failed to provide an analysis that satisfied the requirements of this section.<sup>30</sup> In response, CIT contends that Coyote provided the required alternatives analysis with its application, and whether that analysis adequately and completely addressed other project sites remains a matter in dispute for hearing.

A review of the parties' briefs on this issue reveals no true legal dispute, only factual questions. Indeed, both the Department and CIT seem to agree that the Department can require an applicant to provide an analysis of alternative projects that do not involve any fill or

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<sup>29</sup> As the *Examilotis* court noted, the Department's rulemaking authority "is limited to those rules that 'carry out the provisions' of various statutes, including ORS 196.825. Put another way, the agency's rulemaking authority is confined to policies that implement its statutory authority and does not include the authority to issue rules that expand *or neglect* those responsibilities." 239 Or App at 533 (emphasis added).

<sup>30</sup> Department's Motion for Partial Summary Determination at 8-10.

removal.<sup>31</sup> Similarly, both the Department and CIT agree that it remains a matter for hearing whether Coyote's alternatives analysis adequately examined the practicality of alternative project sites that would not involve any fill or removal. However, in light of the way the Department has framed the issue in its motion, the Department is entitled to a ruling in its favor on the statutory standard: Based on the plain language of ORS 196.825(3)(c), the Department has the authority to require an applicant to provide an analysis of alternatives to the proposed project that do not involve any fill or removal.

**7. *Practical mitigation to reduce the adverse effects of the proposed fill or removal***

Lastly, in the Joint Motion, CIT challenges the Department's finding that it did not provide all practicable mitigation to reduce adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800. Specifically, CIT seeks a determination that Coyote's 2013 Compensatory Non-Wetland Mitigation (CNWM) Functions and Values Assessment and

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<sup>31</sup> OAR 141-085-0550(5) sets out the application requirements for a fill or removal permit, including the following requirement for an alternatives analysis:

(o) An analysis of alternatives to derive the practicable alternative that has the least reasonably expected adverse impacts on waters of this state. The alternatives analysis must provide the Department all the underlying information to support its considerations enumerated in OAR 141-085-0565, such as:

(A) *A description of alternative project sites and designs that would avoid impacts to waters of this state altogether, with an explanation of why each alternative is, or is not practicable, in light of the project purpose and need for the fill or removal;*

(B) A description of alternative project sites and designs that would minimize adverse impacts to waters of this state with an explanation of why each alternative is, or is not practicable, in light of the project purpose and need;

(C) A description of methods to repair, rehabilitate or restore the impact area to rectify the adverse impacts; and

(D) A description of methods to further reduce or eliminate the impacts over time through monitoring and implementation of corrective measures.

(Emphasis added.)

Mitigation Plan satisfied the requirements of OAR 141-085-0765,<sup>32</sup> and the Department erred by not accepting this mitigation plan. Additionally, with regard to the August 2014 Fishing Mitigation Plan, CIT seeks a determination that Coyote identified all practicable mitigation measures and was not required to select a particular plan or propose specific measures until after the Department determined the extent of unavoidable impacts to waters of the state. CIT argues that the Department acted in contravention of OAR 196.825(3)(i) and OAR 141-085-0765 by

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<sup>32</sup> OAR 141-085-0765 addresses compensatory non-wetland mitigation and provides as follows:

(1) Compensatory Non-Wetland Mitigation (CNWM) for Waters Other Than Wetlands or Tidal Waters. The Department will also require CNWM for unavoidable impacts to waters of this state for waters other than wetlands or tidal waters. Such conditions may impose obligations on the permit holder beyond the expiration of the authorization.

(2) Scope of CNWM. CNWM will be commensurate with removal-fill impacts and may include, but is not limited to:

(a) Offsite or onsite enhancement, creation, restoration and preservation of water resources of this state such as rivers, intermittent and perennial streams, lakes, ponds and springs; and

(b) Offsite and onsite improvements to enhance navigation, fishing and public recreation uses of waters of this state.

(3) CNWM Functional Assessment. When no other Department-approved functional assessment method is available, best professional judgment may be used to assess waterway functions and values. A written discussion of the basis of the conclusions must be provided. The written discussion must provide a detailed rationale based upon direct measurement or observation of the indicators for the following functions and values:

(a) Hydrologic;

(b) Geomorphic;

(c) Biological; and

(d) Chemical and nutrient.

(4) CNWM Approval Standard. In order for the Department to approve compensatory mitigation for impacts to waters of this state other than wetlands or tidal waters, the applicant must demonstrate in writing, using a method approved by the Department, that the compensatory mitigation plan will replace or provide comparable substitute water resources of this state.

(5) CNWM Conditions of Approval. The Department may require that the CNWM include:

(a) Defined performance standards;

(b) Site monitoring and reporting using a method approved by the Department;

(c) Administrative protection of the CNWM site; and

(d) Financial security.

rejecting the proposed mitigation measures without first determining impacts to fishing and evaluating what commensurate mitigation would be necessary.<sup>33</sup>

The Department, in response, asserts that it reviewed and accepted Coyote's 2013 CNWM plan, which addressed enhancing streamside vegetation, as adequate for its limited purposes, although the streamside mitigation plan described only some of the mitigation that would be necessary for the proposed fill. As for Coyote's Fishing Mitigation Plan, the Department contends that it reviewed the potential mitigation options listed by Coyote, but did not accept Coyote's attempt at mitigating fishing impacts because Coyote did not propose a firm plan to perform specific measures. The Department also asserts that it is a factual, and not legal, question whether the Department adequately considered the fishery mitigation information submitted by Coyote and whether Coyote's fishing mitigation measures support issuance of a permit.

Coyote and the Port nevertheless argue that they are entitled to summary determination because, by law, the Department had an obligation to determine the extent of unavoidable impacts to fishing, and advise Coyote of the impacts and the mitigation necessary to address them before it could determine whether Coyote provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal for purposes of ORS 196.825(3)(i). For the reasons that follow, I find otherwise. CIT is not, therefore, entitled to a favorable ruling on this issue as a matter of law.

First, I agree with the Department that the extent to which the Department evaluated Coyote's Fishing Mitigation Plan and the adequacy of Coyote's proposed mitigation measures present factual questions that preclude summary determination.

Second, on the legal question, I disagree with CIT's reading of OAR 141-085-0765. CIT inserts into the law a requirement that is not there. Simply stated, nothing in the rule or the permit application review process in general<sup>34</sup> requires the Department to identify unavoidable impacts to waters of this state arising from a proposed removal fill activity, notify an applicant of those impacts, and engage in a back and forth with the applicant to develop a compensatory mitigation plan commensurate with the identified impacts before deciding whether to issue an individual removal-fill permit.

As discussed previously, an alternatives analysis is a required element of every permit application. OAR 141-085-0550(5)(o). That analysis often includes description of methods to repair or restore adverse impacts of the proposed fill or removal project. OAR 141-085-0550(5)(o)(C) and (D). In some circumstances, such as this case, a complete compensatory mitigation

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<sup>33</sup> CIT's Motion at 22-27.

<sup>34</sup> The Department's process for reviewing and determining individual permit applications is set out in OAR 141-085-0555 (Individual Removal-Fill Permit Application Review Process), OAR 141-085-0560 (Public Review Process for Individual Removal-Fill Permit Applications), and OAR 141-085-0565 (Department Determinations and Considerations in Evaluating Individual Permit Applications).

plan may be a required element. OAR 141-085-0550(p).<sup>35</sup> In addition, OAR 141-085-0565(5) makes it clear that it is the individual project applicant who bears the burden of establishing entitlement to a removal-fill permit:

The Department will issue a permit only upon the Department's determination that a fill or removal project is consistent with the protection, conservation and best use of the water resources of this state and would not unreasonably interfere with the preservation of the use of the waters of this state for navigation, fishing and public recreation. The Department will analyze a proposed project using the criteria set forth in the determinations and considerations in Sections (3) and (4) above (OAR 141-085-0565). *The applicant bears the burden of providing the Department with all information necessary to make this determination.*

(Emphasis added.)

CIT's interpretation of the Department's application review process and the Department's obligations under ORS 196.825(3)(i) (and, in particular, CIT's contention that the Department must ensure that an applicant understand the scope of the impact before the applicant is judged on whether the proffered mitigation plan is sufficient<sup>36</sup>), is at odds with the rules discussed above. It is the applicant who bears the burden of providing the Department with all information necessary for the Department to make its determination. The Department has no statutory or regulatory obligation to assist an applicant in providing all practicable mitigation. Even if the Department has a practice of working with applicants to inform the applicant's alternatives analysis and compensatory mitigation plans, that does not create a legal obligation for the Department to do so. Accordingly, CIT's contention that, as a matter of law, the Department erred in finding that Coyote did not provide all practicable mitigation is rejected.

Finally, even assuming the Department erred by summarily rejecting the Fishing Mitigation Plan that, in and of itself, is not enough to establish Coyote's entitlement to a permit as a matter of law.

## **RULINGS**

1. Columbia Riverkeeper's May 6, 2016 Motion for Partial Summary Determination on Commerce Clause Claims is GRANTED.
2. Coyote Island Terminal, LLC and the Port of Morrow's May 6, 2016 Joint Motion for Summary Determination is DENIED.

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<sup>35</sup> OAR 141-085-0550(5)(p) provides: "If applicable, a complete compensatory mitigation plan that meets the requirements listed in OAR 141-085-0680 through 141-085-0715 and 141-085-0765 to compensate for unavoidable permanent impacts to waters of this state and a complete rehabilitation plan if unavoidable temporary impacts to waters of this state are proposed."

<sup>36</sup> CIT's Joint Reply at 22.

3. The Department's May 6, 2016 Motion for Partial Summary Determination is GRANTED.

4. The State of Montana's May 6, 2016 Motion for Summary Determination is DENIED.

5. The State of Wyoming's May 6, 2016 Motion for Summary Determination is DENIED.

Alison Greene Webster

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Senior Administrative Law Judge  
Office of Administrative Hearings

**CERTIFICATE OF MAILING**

On August 11, 2016, I mailed the foregoing RULINGS ON MOTIONS FOR SUMMARY DETERMINATION in OAH Case No. 1403883 and 1403884.

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