



# Oregon

John A. Kitzhaber, MD, Governor

## Department of State Lands

775 Summer Street NE, Suite 100

Salem, OR 97301-1279

(503) 986-5200

FAX (503) 378-4844

[www.oregonstatelands.us](http://www.oregonstatelands.us)

August 18, 2014

49123-RF/KDJ600

Clark Moseley

Coyote Island Terminal, LLC

Ambre Energy North America

170 S. Main Street, Suite 700

Salt Lake City, UT 84101

### State Land Board

John A. Kitzhaber, MD

Governor

Kate Brown

Secretary of State

Ted Wheeler

State Treasurer

Subject: Removal-Fill Application 49123-RF; Coyote Island Terminal; 4N, 25E,  
Section 2, TL 100; Morrow County

Dear Mr. Moseley:

The Department of State Lands (Department) has reached a decision on the subject removal-fill permit application. After careful evaluation of the application and considering the criteria for issuance of a permit described in Oregon Revised Statutes 196.825 (1) and (3), the Department acts to deny your permit application 49123-RF. The attached Findings and Order describe the specific considerations and determinations made by the Department in support of this decision to deny. Your rights to appeal this decision are described on page 17 of the attached document.

Sincerely,

Kirk D. Jarvie

Northern Region Manager

Wetlands and Waterways Conservation Division

Enclosure

cc: Martha Pagel; Schwabe, Williamson & Wyatt

# Findings and Order

**Application No. 49123-RF**

**Name of Applicant: Coyote Island Terminal, LLC**

## INTRODUCTION

**Project Purpose and Description:** The project proposed in the application is part of the larger Morrow Pacific Project. The applicant states that its purpose for the Morrow Pacific Project is to develop and successfully operate the first environmentally responsible coal export facility in the Pacific Northwest.

The applicant proposes to construct a new loading dock, walkway, conveyor and associated upland facilities at the Port of Morrow near Boardman, OR. The fill project involves 256.5 cubic yards of temporary fill and 572 cubic yards of permanent fill in the form of pilings placed in the Lake Umatilla section of the Columbia River to support the overwater structures.

**Scope of the Department's Authority:** The Department of State Lands' (the Department or DSL) decision concerning this permit application is governed by Oregon's Removal-Fill Law (ORS 196.800 through 196.990) and the Department's administrative rules that implement those statutes for individual permits (OAR chapter 141, division 85). The Department's task under these statutes and rules is to regulate the removal and filling of material within "waters of this state." The Department's permitting authority is designed to ensure the protection, conservation and best use of Oregon's "water resources" and that the removal and fill would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.

In this application, the applicant proposes to construct a new docking structure in the Columbia River. 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.

**Expertise and Agency Record:** The Department used its expertise in evaluating the agency record and making its permit decision. The agency record includes, but is not limited to: the final compiled version of the application that was submitted by Coyote Island Terminal, LLC, on August 1, 2014; the public comments submitted to the Department during the public comment periods; and information submitted to or gathered by the Department during the Department's investigation of the application.

**Purpose of Findings and Order:** The Findings and Order document the permit decision. See OAR 141-085-0565(7). The Removal-Fill Law and the applicable rules require the Department to do the following things when processing an application for a removal-fill individual permit: consider, at a minimum, a list of nine criteria; then determine three things. The following discussions briefly summarize the Department's considerations and determinations.

### **DEPARTMENT CONSIDERATIONS.**

In determining whether to issue the requested permit, the Department considered all of the following factors using all of the information in the agency record:

- (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;**

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 applicant and project proponents have provided information in the application and comments, supporting social, economic and other benefits to the public of the proposed fill, and the project it facilitates, in the form of:

- Temporary construction jobs for the dock and associated facilities.
- Permanent jobs for the operation of the facility.
- Voluntary cash contributions to local schools based on the amount of coal transferred through the facility.
- Lease and Volume payments to the Port of Morrow.
- Tax revenues to Morrow County.
- The application materials also identify economic benefits to other areas outside the proposed removal-fill area such as where transloading is proposed in Columbia County.
- A report commissioned by the applicant's parent company (Ambre Energy North America Inc.) from ECONorthwest estimated total economic benefits from capital investment during two phases of the project (approximately 5 years) at \$391,100,264 including 2,101 job years. (ERD Appendix 0: May 2012).

Project opponents have provided comments indicating negative social and economic impacts of the proposed fill and the project it facilitates in the form of:

- Reduced livability and property values in the area due to increased train and barge traffic and potentially coal spill/releases.
- Possible impacts to downstream municipal water supplies from construction disturbance of possibly contaminated river sediments.
- Impacts to endangered species in the area from increased predation on juvenile Salmonids by piscivorous fish and birds.
- In public comment periods and through several affidavits obtained through our investigation, the Confederated 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 all stated that negative impacts would occur to tribal fishing and fisheries from: fill size and location physically interfering with fishing; operation of the dock facility causing noise, light and vibration and increased barge interference.
- Project opponents (Power Past Coal Coalition) commissioned a report by an economist from Ecotrust estimating some of the costs to the public over the 20 year life of the project if it were constructed. (Ecotrust.org March 20, 2014 report) The report projected such costs as: \$63 million in damages to salmon fisheries, \$746 million in damage to recreational values and a total of \$40.6 million in costs from 5 pollutants.

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;**

This consideration is a mirror to the second part of (a). The applicant submitted information of how the proposed fill would lead to jobs and other economic benefits, but did not submit any information relating to the costs to the public if the proposed fill or removal is not accomplished.

The Department finds that 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;**

On August 1, 2014 the applicants submitted (as discussed and agreed with the Department) a "clean copy" of the Joint Permit Application for the purpose of clarifying the many versions of documents and statements built up over the application process. This application package in Appendix 3 contains an alternatives analysis revised July 2014 which included:

- 1) The project purpose is to "Develop and successfully operate the first environmentally responsible coal export facility in the Pacific Northwest for the export of low-sulfur intermountain coal to U.S. trade allies in Asia."
- 2) Project criteria:

Logistics

- Ability to obtain permits from other agencies
- Approval by landowner
- Access to Class One Railroad
- Access to existing rail loop to accommodate coal unit trains
- Access to inland waterway system and/or deep draft port (capable of handling a fully loaded Panamax)
- Storage site for 15 days of coal (approximately +20 acres)
- Access to water, sewer and electricity
- Ability to accommodate operations up to 8 Million Metric Tons (MMT) per year

Existing Technology/Design Criteria

- Ability to utilize existing bulk handling technology
- Ability to minimize dust exposure
- Ability to meet safety standards
- Ability to accomplish the purpose with minimal upgrades to existing infrastructure not owned by the applicant (port infrastructure, highways, roads, navigation locks etc.)
- Ability to accommodate operations up to 8MMT

Cost

- Ability to accommodate operations up to 8MMT
- Ability to use a Panamax vessel for export
- Ability to ship coal from a Northwest port

Impacts to Waters of the State

- Ability to utilize existing water-related infrastructure (where practicable)
- Location in a port industrial area
- Avoid spawning/rearing or estuary habitat

3) Evaluation of alternative sites and methods against the project purpose and criteria

The applicant first eliminated shipping via a port outside of the Northwest due to the cost of increased shipping distance.

Next the applicant evaluated a range of options for shipping intermountain coal by rail directly to a deep draft (Panamax capable) port in Washington or Oregon.

The applicant eliminated the following Ports because they have passed resolutions that do not allow the handling of coal on site: The Ports of Longview, WA; Kalama, WA; Vancouver, WA; Portland, OR; Astoria, OR; Tacoma, WA.

The applicant eliminated the following Panamax capable ports on the criteria "Access to a Class One Railroad": Ports of Madison, WA; Port Angeles, WA; Grays Harbor, WA; Coos Bay, OR; St. Helens, OR; Boise Paper Solutions; US Gypsum; Georgia Pacific.

Based on the criteria "Access to an existing rail loop to accommodate coal unit trains" the applicant eliminated: The Port of Seattle; Millennium Bulk Terminal Longview (See pg. 10, footnote 3,) and Weyerhaeuser.

The applicant concluded that rail directly to an existing Panamax Port is not a practicable alternative. (pg10)

Next, the applicant considered sites for transferring coal from rail to barges which would then be transloaded to a Panamax vessel at a deep draft port. In this section the applicant used three criteria to evaluate sites: access to Class One Railroad; access to inland waterway system; and, deep draft port and storage site for 15 days of coal (approximately +20 acres). The applicant evaluated fifteen ports for rail to barge transfer and concluded that the Port of Morrow is the only site to meet all three criteria. (pg13)

The Port of Morrow was evaluated against remaining project criteria and determined to be capable of meeting the project purpose when paired with a Panamax transloading site. (pg16)

The analysis listed potential Panamax transloading sites in Oregon and Washington, eliminated those that had taken a public position against coal

and those that were inaccessible to Columbia River barges. (pgs. 16-18) Next the applicant eliminated Boise Paper Solutions, Weyerhaeuser, Millennium Bulk Terminal, Georgia Pacific and Boise Paper Solution stating they "do not have capacity to transload". Based on this the applicant concluded the only ports where transloading can practicably occur are US Gypsum and Port of St. Helens. When contacted, US Gypsum was not willing to sell or lease the space for transloading so the applicant determined the Port of St. Helens- Port Westward facility is the only practicable transloading site and that it meets all relevant project criteria without requiring new infrastructure or in water work. (pgs. 18-21)

In summary, the applicant's alternative analysis dated July 2014 concluded that: the only project alternative which meets criteria is rail to barge transfer at a newly constructed facility at the Port of Morrow with transloading from barge to ocean going vessel at the Port of St. Helens-Port Westward facility.

The Department discusses this consideration further in the "Department's Determinations" below. Although the recent submittal 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;**

In the most recent alternatives analysis (Revised July 2014) the applicant evaluated which alternative sites, methods and designs met their revised project criteria. The applicant's analysis determined no alternative sites and methods meet project criteria except for barge loading from a new dock at the Port of Morrow. (See summary in (c) above and on Pg. 7) Construction of the new dock requires permanent and temporary fill to waters of this state.

As part of their alternatives analysis, the applicant evaluated transfer facility alternatives at the Port of Morrow including:

- Using the Cemex aggregate loader;
- Using the Tidewater ethanol dock;
- Using the Grain loader;
- Constructing new barge loading dock at the lease site.

The existing docks were eliminated primarily for capacity limits and existing owner permissions. The applicant concluded the only practicable transfer facility alternative is constructing a new dock at the Port of Morrow lease site. (Pgs.21-29)

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 for 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 application proposes 572 cubic yards of permanent fill and 256.5 cubic yards of temporary fill in the form of steel pilings in order to construct a dock and conveyor system for loading coal onto barges in the Lake Umatilla section of the Columbia River within the Port of Morrow industrial area.

The August 1, 2014 application proposes several best management practices for construction and operation of the facility to minimize impacts to waters of this state.

- A DEQ 1200-C permit for upland construction including sediment fence to prevent sediment or upland constructions material from entering the river.
- Elevating the 4-foot wide walkway and 6-foot wide dock at least 9 feet above the water and covering it with grating to allow some light penetration.
- Installing anti-perching caps on pilings to limit perching and predation by piscivorous birds.
- In-water work during ODFW recommended period.
- Use of a confined or unconfined bubble curtain to attenuate noise when an impact hammer is used for pile driving.
- Locating dolphin structures in water > 28 feet deep.
- The application does not propose a sediment curtain for in-water work (based on a March 30, 2012 e-mail from Ben Meyer, of National Marine Fisheries Service at that time).

The Department received thousands of comments that the construction or operation of the facility may lead to adverse effects to aquatic habitat, fishing or public health and safety. In summary they raised concerns about:

- Coal dust being discharged from trains, and during loading of and transport with barges.
- The increase in air pollution from diesel exhaust (trains and barges) both in the immediate vicinity of the dock and elsewhere in the Columbia River basin.
- Increased predation on endangered juvenile salmonids from structural effects of the dock such as shading, increased predatory fish attracted to the piling structures and increased perching locations.



- The potential for radionuclides in the sediment to be disturbed, carried downstream with the current and then infiltrate the Ranney collector wells for the City of Boardman water intake system.
- Barge navigation interfering with navigation for tribal fishing both in the immediate vicinity of the Port of Morrow dock and elsewhere in the Columbia River system.
- Interference with tribal fishing (commercial and subsistence) both in the immediate vicinity of the dock and elsewhere in the Columbia River system due to:
  - a) Physical interference of the dock structure with set net and drift net fishing sites;
  - b) Hardware conflicts when barges and nets are in the same area, e.g. fishing nets becoming entangled with towboats;
  - c) Safety concerns for tribal fishing boats and barge towboats when they are operating in the same area, e.g. if drift nets and towboats become entangled fishing boats can be capsized or sunk endangering the fisherman and towboats can lose steerage or thrust capabilities and drift or collide; and,
  - d) Impacts of the dock structure and operations on fish and fishing through increased noise, vibration and nighttime lights as well as pilings, barge ingress/egress and staging/loading affecting fish behavior and patterns.

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;**

Existing Public Uses: The proposed fill to construct a dock, walkway and conveyor is in an area of the river currently used for navigation related to commerce, fishing and recreation. Comments from Tribal entities state that the proposed fill will destroy existing commercial, subsistence and cultural fishing uses of the waters.

During public comment periods and through several affidavits (most recently June 30, 2014) the Confederated 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 all expressed negative impacts would occur to tribal fishing and fisheries from: fill size and location physically interfering with fishing; operation of the dock facility causing noise, light and vibration and increased barge interference.

The applicant submitted several affidavits from Port of Morrow staff, fishing guides and tug/barge operators that state that the Port of Morrow or the Industrial Dock 7 site are not used for tribal or recreational fishing or that there is limited insignificant use.

Conformance with plan and regulations: The application provided a land use compatibility statement and landowner signature that the project is compatible with designated and existing land uses. (Original Application Rcvd. 2/1/2012 Blocks (7) and (9)) Existing land use adjacent to the fill site on the east, west and south is primarily port industrial/commercial activities with some commercial agriculture. To the north is open water underlain by State owned submerged lands. Current uses are navigation, fishing and recreation.

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 original application Received Feb 1, 2012 in Block (7) contains the standard land use compatibility affidavit signed by the planning director of Morrow County. It states "This project is consistent with the comprehensive plan and land use regulations".

The Department finds that the proposed fill is compatible with the 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 stream-bank protection; and**

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.**

**1) Waterway Impact Mitigation:** The August 1, 2014 Application contained a copy of the Compensatory Non-Wetland Mitigation Functions and Values Assessment and Mitigation Plan” that the Department received in October 2013 and a new, but similar “Stream Enhancement US ACE Mitigation Plan 2014”.

- a. The functional assessment states that the project fill will not impact the hydrologic, geomorphic or chemical and nutrient functions of the area. It states there will be minor biological impacts such as “potentially increased fish predation as a result of shading from overwater structures and staged barges, potentially increased avian predation as a result of increased perching locations, and habitat impacts to the riverbed, including disturbances to the benthic invertebrate community.” (pg.10)
- b. The plan states “Mitigation for predation will be included in dock design. Anti-perching devices will be installed wherever possible and surfaces will be elevated to minimize shading and aquatic predator refuge. Barge and tug staging will be managed to minimize length of time that they are stationary and therefore shading the nearshore area.” (pg.10)
- c. “Potential impacts to the riverbed and disturbance to benthic communities will be mitigated by riparian enhancement. Tree and shrub plantings will improve the riparian corridor condition and contribute leaf litter, food sources and large woody debris to the river” (pg.10)
- d. Administrative protection of mitigation site: Two proposals were submitted for long term protection of the Coyote Island Terminal Mitigation Area (CITMA) in Appendix 4A, “Stream Enhancement USACE Mitigation Plan, July 2014”. There are no page numbers in the main body of the document, however Section 8. “Site Protection Instrument” states “Once permits are received, the Applicant will implement a long-term agreement. The perpetual maintenance of the site and vegetation will be included in the lease agreement with the Port of Morrow.” An identical statement is made in the “Compensatory Non-Wetland Mitigation Functions and Values Assessment and Mitigation Plan, September 2013”, Appendix 4B. No sample language was provided for review. The second reference in the USACE plan to long term site protection is in Appendix 4A, Attachment H, Page 1, where the first paragraph

states "The CITMA area will be protected in perpetuity by a restrictive covenant". No sample covenant was provided for review.

- e. Financial Security: No proposal was offered for a financial security of the mitigation obligation.

**2) Fishing Impact Mitigation:** In the August 1, 2014 submission the applicant states on pg. 12 of the JPA "There is limited bank angler use in the area. The area is a migratory corridor for salmon and steelhead. The area may be used for limited tribal fishing activity but navigation is the primary use." "Fishing at the site is discussed in the attachments. A fishing mitigation plan is attached in the appendix."

- a. Fishing Mitigation Plan, Appendix 5 in summary says "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 to 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 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."(page 1)
- b. On Page 2, "CIT has actively engaged with the tribes on fishing concerns and mitigation for 2.5 years, until all Tribes recently ceased communication with CIT. Since that time CIT has continued to reach-out to the Tribes, but the Tribes have not been receptive to CIT's efforts. As a consequence, this mitigation proposal includes concepts discussed with the Tribes over a period of 2 years, but has not been adopted by the Tribes."
- c. Page 5 Section VI. is entitled "Mitigation for Potential Impacts to Fishing" and states "The project will not adversely impact fishing at the proposed dock site within the Port of Morrow Industrial Area. However, in an effort to be a good neighbor, CIT has agreed to provide mitigation for the concerns raised by the Tribes."
- d. On pages 5 and 6 the applicant proposes four fishing related measures as potential Mitigation for Dock Construction. 1) Operation Closure Days: CIT will agree to shut down operations at the Port of Morrow barge loading dock for 5 days each fishing season- Spring Summer and Fall- up to 15 days total....During these closure days fishers will be allowed to access the dock to tie

nets, which will be uninhibited by operations. 2) Shoreside Access: CIT will agree to facilitate boat access to shoreline areas at the Port of Morrow Industrial Dock 7 site. To avoid conflicts, shoreside access should be limited to Tribal fishers who presently fish at the dock locations or any members those fishers subsequently transfer their rights to. 3) Dock Access: CIT will allow fishers access to the entire area behind the dock via boat, approximately 110,000 SF, to anchor nets....Again to avoid conflicts, docks access should be limited to Tribal fishers who presently fish at the dock location or any members to whom those fishers subsequently transfer their rights. 4) Floating Fishing Enclosure: Subject to Tribal agreement, CIT agrees to install a floating fish enclosure at the location of the CIT proposed dock facility at the Port of Morrow, as outlined in Appendix 1.

- e. On pages 6 and 7, the applicant proposes two measures as potential Mitigation for Barge Traffic. 1) Fishing Net Replacement Program. CIT will agree to replace nets damaged by barge traffic, up to 10 nets a year at a maximum price of \$4,000 a net. 2) Barge Operator/Tribal Roundtable. CIT is willing to facilitate a round table between barge companies and the Tribes to improve interactions between the two user groups...Based on CIT discussions with Tribal fishermen and barge operators, improvements could be made to help avoid barging and Tribal fishermen interactions. Some of these improvements are as follows:
- Communication of the preferred barge travel routes from the barge companies to the Tribal fishers.
  - Better communications about when fishing seasons occur so barge operators can be aware of potential conflicts.
  - Better communication for locations where conflicts occur
  - Distribution of equipment such as transponders to Tribal fishers which would provide tug captains an electronic means of monitoring the location and trajectory of vessels along the river system.
  - Development of a centralized website where fishing seasons and barging activities can be entered into a calendar so all with access would have a clear picture of when gill nets are installed in the river as well as when barging operations occur and where docking is taking place.
- f. Fishing Mitigation Plan Conclusion (pgs. 7 and 8): The applicant states "construction of the CIT barge loading dock will have very

minimal, if any, impact on the ability to fish within Zone 6. However in an effort to be a good neighbor and work with Tribal fishers, CIT has offered a variety of mitigation options to offset impacts from the dock construction and operation as well as barging activity. The mitigation offered can fully offset any impacts, as well as improve fishing and safety throughout the zone. The list of potential mitigation options 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 were made, CIT would work with DSL to determine the most appropriate mitigation option in relation to the identified impact. We expect one or more of the proposed mitigation options could be included as permit conditions in relation to the extent of the perceived impact. We do not propose implementing all of the mitigation options included in the proposal.”

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 persuasion 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.**

This determination is based on the applicant's repeated statements to staff that no removal or fill at Port Westward is necessary for the project, and on the descriptions of the proposal that are in the agency record. For example, the August 1, 2014 Joint Permit Application describes the fill needed to conduct the project as 256.5 cubic yards of temporary fill and 572 cubic yards of permanent fill in the form of pilings placed at Port of Morrow to support the overwater structures. The Department also considered other information in the record regarding:

Strengthening the existing dock at Port Westward: The application in Appendix 3, page 20 referenced a letter, dated November 8, 2013, summarizing the findings of a Norwest Engineering study. On August 12, the Department requested and received a copy of that letter. It concludes "By following the operational measures contained herein, the Beaver Dock is currently capable of handling 60,000 DWT Panamax Class vessels and the transloading operation as proposed by Pacific Transloading." Also, on page 5 of the JPA form the applicant states "No in- or over-water work is needed at Port Westward in order for the transloading activities to occur."

Mooring of barges in the area of Port Westward: On August 6, 2014 the Department received a copy of the Option and Terminal Services Agreement between the Port of St Helens and Pacific Transloading, LLC. Section 4.3 states merely that the "Operator may install barge tie-off pilings, mooring buoys or dolphins within the designated areas to be provided pursuant to section 4.1" The Department determined that this statement indicates that the described activities are possible, rather than necessary.

**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.

- 1) Alternatives to the project; alternative sites and designs: The alternatives analysis should support a determination that the proposed project is the practicable alternative with the least impacts to waters of the state. [OAR 141-085-0550(5)(n)]. The application proposes many dock design practices that minimize impacts such as anti-perching devices on overwater structures, use of grating and elevated surfaces to minimize shading from the overwater structure. The application record is inconclusive on why some alternatives which may have less impact to Waters of the State are not "practicable". The applicants criteria state that any alternative must have "Access to a Class 1 Railroad" and "Ability to Access Existing Rail Loop to Accommodate Unit Coal Train"

a) Access to Class 1 Rail: The July 2014 alternatives analysis states the "Port of St. Helens/Port Westward site was rejected because it does not have "Access to a Class 1 Railroad". The sub section states "Of the remaining Panamax Ports the following do not have Class One Railroad service: .....Port of St. Helens, OR".

In documents supplied by the Port of St. Helens to support grant applications (1M0294 and 1M0352 for Connect Oregon V) to upgrade their existing Port Westward dock, the Port's own words on the application (1M0294, pg. 30) state it has "access to short line rail service with connections to Class I rail service; available land for the development of unit train facilities; and berth access to vessel and barge shipping." Included letters of support from several other groups (Pages 77-on) state "the Port Westward Industrial Park is a prime industrial site with access to the deep-draft navigation channel, recently upgraded rail line, and land available for development." Another part of the application says "The Port Westward site is also large enough to accommodate loop rail systems that could handle 100-car unit trains." Based on these documents, there appears to be access to Class 1 rail service at Port Westward.

b) Existing Rail Loop: The applicant never discussed the availability of rail loop service at Port Westward. In addition they never discussed why a new rail loop could not be constructed. There is no estimate or discussion of costs for constructing or completing a loop when rail access is nearby. DSL investigation provides one example: in 2005-2006 the Port Of Morrow constructed a unit train rail loop for approximately \$3 million (DSL Application 39400, Rcvd Feb 1, 2008).

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. Through public comments and the Department's requests for clarifying information, several tribal interests provided comment and affidavits containing historical information, descriptions, mapping, photographs and a video that support that there is important commercial, subsistence and cultural fishing uses by tribal fishers of Waters of the State in the project area. For examples, see: Brigham affidavit; Patrick affidavit including video at 29 minutes, between minutes 33-35, and at 39 minutes; Treloar Affidavit; Lumley affidavit; Declaration and photos of Julie A Carter; Jim affidavit w/ Ogan photos; Parker and Luke Affidavits; Traditional Use Report. 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 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, **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. This determination is made as an alternative basis for denial of the permit.

**ORDER**

Pursuant to the Oregon Removal-Fill Law and OAR chapter 141, division 85, and based on the entire agency record, the Department of State Lands hereby denies a Removal-Fill Permit to Coyote Island Terminal, LLC for the removal-fill activities proposed in application 49123-RF.

Signed  Date: August 18, 2014  
Kirk D. Jarvie  
Northern Region Manager  
Wetlands & Waterways Conservation Division

**Appeal rights:** Pursuant to ORS 196.825(7) and OAR 141-085-0575, an applicant whose application for a permit or authorization has been deemed incomplete or has been denied, or who objects to any of the conditions imposed, may request in writing a hearing from the director. The request must be in writing and submitted so that it is received by the Department within 21 days of the denial of the permit or authorization or imposition of any condition. The request must include the reasons for the request.

Pursuant to ORS 196.835 and OAR 141-085-0575, any person who is aggrieved or adversely affected by the Department's final decision concerning an individual permit or a condition therein may file a written request for a hearing from the director. The request must be in writing and submitted so that it is received by the Department within 21 days of the decision. The request must include the reasons for the request.

Any written request for hearing related to application 49123-RF must be sent by email to [kirk.jarvie@state.or.us](mailto:kirk.jarvie@state.or.us) or by regular mail to:

Department of State Lands  
Attn: Kirk Jarvie  
775 Summer St. NE Suite 100  
Salem, OR 97301-1279