



OREGON

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I. INTRODUCTION

Oregon is not a major hydrocarbon producer. According to the most recent information available from the U.S. Energy Information Administration, Oregon ranks 26th in natural gas production in the United States.¹ All natural gas production in Oregon occurs in the Mist Field, which is also used for underground natural gas storage. Crude oil is neither produced nor refined in Oregon. Accordingly, most of the focus in 2017 on the oil and gas industry in Oregon involved transportation and distribution.²

II. LAND USE BOARD OF APPEALS

A. *Portland's Ban on Fossil Fuel Terminals Overturned*

In July 2017, the Oregon Land Use Board of Appeals (“LUBA”) overturned the City of Portland’s (“the City”) zoning code amendments that prohibited the development and expansion of petroleum and natural gas terminals within the City.³ The City has appealed

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1. U.S. Dep’t of Energy, *Oregon: State Profile and Energy Estimates*, EIA.gov, <https://www.eia.gov/state/?sid> [<https://perma.cc/JNF5-8BL6>] (last updated Nov. 16, 2017).

2. For a broader look at oil and gas law in Oregon, see Eric Martin & Jerry Fish, *Mineral Rights*, OR. REAL EST. DESKBOOK (2015).

3. *Columbia Pac. Bldg. Trades Council v. City of Portland*, 289 Or. App. 739, 742 (2018); see also *Columbia Pac. Bldg. Trades Council v. City of Portland*, — Or. LUBA — (LUBA No. 17-001, July 19, 2017).

LUBA's decision, and a decision from the Oregon Court of Appeals is expected in early 2018.⁴

In late 2015, with a propane export terminal being proposed in the City, the City Council unanimously passed Resolution No. 37168 creating a policy of "actively oppos[ing] expansion of infrastructure whose primary purpose is transporting or storing fossil fuels in or through Portland or adjacent waterways." Among other things, Resolution No. 37168 directed City staff to develop amendments to the City's zoning code to implement this new policy. Approximately one year later, the City Council unanimously approved Ordinance No. 188142 amending the City's zoning code to prohibit the development of new "bulk fossil fuel terminals" (*i.e.*, facilities primarily engaged in the transportation and bulk storage of fossil fuels, including crude oil, petroleum products, and natural gas, and having either (i) the ability to transfer fuels between marine, railroad, or pipeline transportation modes or (ii) a storage capacity of more than two million gallons). In addition, Ordinance No. 188142 precluded every existing bulk fossil fuel terminal in the City from increasing its storage capacity and from storing coal.

Various industry groups appealed the zoning code amendments to LUBA, which has jurisdiction to review government land use decisions. In its lengthy *Columbia Pacific Building Trades Council* decision, LUBA concluded that the City's adoption of Ordinance No. 188142 violated a variety of Oregon land use requirements and the Dormant Commerce Clause of the U.S. Constitution:⁵

The "dormant" aspect of the Commerce Clause protects Congress's latent ability to regulate interstate commerce, even in areas where Congress has not spoken, by prohibiting states (including the municipal arms of a state) from adopting legislation that, by design or effect, regulates or burdens interstate commerce in certain impermissible ways.⁶

First, LUBA considered whether the City's zoning code amendments facially discriminated against interstate commerce or had that purpose or practical effect.⁷ Although Ordinance No. 188142 did not

4. Editor's note: In January 2018, the Oregon Court of Appeals reversed LUBA's decision with respect to the Dormant Commerce Clause but affirmed LUBA's decision as to a particular Oregon land use requirement. *Columbia Pacific Building Trades Council v. City of Portland*, 289 Or. App. 739 (2018).

5. Only one of LUBA's three members participated in this appeal. The other two members recused themselves due to family members having taken positions before the City Council on Ordinance No. 188142.

6. *Columbia Pac. Bldg. Trades Council v. City of Portland*, 2017 Ore. Land Use Bd. App. LEXIS 63, at 75 (citing *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 361 (1992)).

7. *Id.* (citing *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)).

facially discriminate against interstate commerce, LUBA found that it was intended and had the practical effect of “effectively eliminat[ing] any city role in the export of fossil fuels, while continuing to provide for existing and projected local consumption of fossil fuels.”⁸ Accordingly, LUBA considered whether the zoning code amendments were “supported by a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁹ LUBA concluded that the City’s asserted “legitimate local purposes”—reducing both vulnerability to seismic damage and the City’s contribution to climate change—were not furthered by Ordinance No. 188142 because, for example, the amendments did not address seismic vulnerability of existing terminals, nor did they contain provisions designed to reduce local or regional demand for fossil fuels.¹⁰ In addition, LUBA noted the City made no attempt to show that its local purposes could not be adequately served by reasonable nondiscriminatory alternatives.¹¹

Second, assuming Ordinance No. 188142 was actually nondiscriminatory, LUBA applied the *Pike* balancing test of whether “the burden on interstate commerce is ‘clearly excessive’ in relation to the local benefits.”¹² LUBA determined that the burdens the zoning code amendments placed on interstate commerce by prohibiting new terminals were “clearly excessive” in relation to the asserted local benefits of potentially reducing emissions from other countries.¹³ Consequently, LUBA found that Ordinance No. 188142 failed to pass constitutional muster.

B. *Jordan Cove LNG Terminal Conditional Use Permit Remanded*

LUBA remanded Coos County’s approval of a conditional use permit for the Jordan Cove LNG terminal, which would liquefy approximately one Bcf of natural gas per day for export.¹⁴ Among other things, LUBA concluded that Coos County had improperly relied on a Federal Energy Regulatory Commission (“FERC”) certificate for the facility to find that local land use standards were satisfied when (1) FERC had denied the certificate application and (2) Coos County had not addressed whether obtaining a FERC certificate was precluded as a matter of law.¹⁵

8. *Id.* at 93.

9. *Id.* at 63 (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 353 (1977)).

10. *Id.* at 102–05.

11. *Id.* at 102.

12. *Id.* at 77 (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

13. *Id.* at 117.

14. *Or. Shores Conservation Coal. v. Coos Cty.*, No. 2016-095, 2017 WL 6032695 (Ore. Land Use Board App. Nov. 27, 2017).

15. *Id.* at 10.

III. COLUMBIA RIVER GORGE COMMISSION

The Columbia River Gorge Commission (“the Commission”) affirmed Wasco County’s denial of Union Pacific’s application to build a second mainline track through Mosier, Oregon, due to concerns about derailments and spills from trains transporting crude oil.¹⁶ Union Pacific has appealed the Commission’s decision, and a decision from the Oregon Court of Appeals is anticipated in 2018.

Mosier is located in Wasco County within the Columbia River Gorge, which provides an excellent railroad route through the Cascade Mountains. The Columbia River Gorge National Scenic Area Act (“Scenic Act”), 16 U.S.C. §§ 544–544p, created the nearly 300,000-acre Columbia River Gorge National Scenic Area (“Scenic Area”) covering parts of six counties in Oregon and Washington, including Wasco County. The Scenic Act authorized the two states to create the Commission, and zoning within the Scenic Area must be consistent with the Commission’s management plan.¹⁷

In early 2015, Union Pacific applied for land use approval from Wasco County for a second mainline track within the Scenic Area. While the application was pending, sixteen cars of a unit train transporting crude oil derailed in Mosier spilling approximately 1,000 barrels, sparking a fire, and causing nearby residents to evacuate. Wasco County subsequently denied Union Pacific’s application, finding that it violated Wasco County’s Scenic Area zoning code by adversely affecting the treaty fishing rights, including habitat protection, of the Yakima Nation, Umatilla Tribe, and Warm Springs Tribe. Supporting evidence included the effects of the derailment earlier that year.

Union Pacific appealed Wasco County’s denial to the Commission, arguing that the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501, preempts Wasco County’s Scenic Area zoning code.¹⁸ The Commission rejected this argument, finding that the Scenic Area zoning code is not a local or state law subject to preemption by the ICCTA.¹⁹ Instead, the Commission found that the Scenic Area zoning code should be treated as federal law, because it is

16. *Union Pac. R.R. Co. v. Wasco Cty. Bd. of Comm’rs*, No. COA-16-01 (CRGC Sept. 8, 2017).

17. 16 U.S.C. §§ 544c(a)(1)(A), 544d(a)(1)(B) (2012).

18. Union Pacific also sought a declaratory judgement in federal district court that the ICCTA preempts Wasco County’s Scenic Area zoning code and prohibiting the expansion violated the Commerce Clause of the U.S. Constitution. That federal case was dismissed with prejudice in March 2017 because the Yakima Nation, Umatilla Tribe and Warm Springs Tribe were necessary and indispensable parties under Federal Rule of Civil Procedure 19, but their sovereign immunity precludes joinder. *Union Pac. R.R. Co. v. Runyon*, 320 F.R.D. 245, 253–57 (D. Or. 2017). Union Pacific has appealed to the Ninth Circuit Court of Appeals.

19. *Union Pac. R.R. Co. v. Wasco Cty. Bd. of Comm’rs*, No. COA-16-01, at 10–11 (CRGC Sept. 8, 2017).

required by and implements federal law, namely the Scenic Act.²⁰ Consequently, the ICCTA preempts the Scenic Area zoning code only if the zoning code unduly restricts Union Pacific from conducting its operations, unreasonably burdens interstate commerce, or was applied in a discriminatory manner or as a pretext for frustrating or preventing Union Pacific's operations.²¹ The Commission concluded that none of those standards had been satisfied. Furthermore, the Commission found that substantial evidence supported Wasco County's conclusion that a second mainline track would affect treaty fishing rights. The record included "substantial evidence that a derailment and spill into or adjacent to the Columbia River would damage or destroy habitat in" an exclusive treaty commercial fishing area.²² The Commission concluded that "[w]hile no party can say for sure whether or when a train will derail and affect treaty protected habitat, the record before Wasco County supports Wasco County's conclusion that this project significantly increases the likelihood that it will happen."²³

IV. ENERGY FACILITY SITING COUNCIL

Oregon's Energy Facility Siting Council ("EFSC") regulates the siting for large energy facilities, including certain crude oil, petroleum products, and natural gas pipelines, and the surface facilities of underground natural gas storage projects designed to receive or deliver more than 50 mmcf/day, or that require compression exceeding 4,000 horsepower.²⁴ In September 2017, EFSC approved an amendment to the site certificate for the Mist Underground Natural Gas Storage Facility. This amendment facilitates the construction of an approximately twelve-mile transmission pipeline being built in conjunction with a new compressor station that will increase the facility's allowed throughput from 515 mmcf/day to 635 mmcf/day, and the use of another depleted reservoir for underground gas storage.

In 2017, EFSC also amended its administrative rules (1) to effectively incorporate the Oregon Department of Fish and Wildlife's rules concerning sage-grouse, (2) to address structural, geologic, and seismic-related issues, (3) to increase the monetary offset rate for carbon dioxide emissions from \$1.27 to \$1.90 per ton, and (4) to enhance the opportunity for public participation in EFSC's site certificate amendment process while minimizing increases in review time.

20. *Id.* at 11.

21. *Id.* at 20.

22. *Id.* at 42.

23. *Id.* at 44.

24. OR. REV. STAT. ANN. §§ 469.300(11)(I), 469.470(2) (2015).

V. 2017 LEGISLATIVE SESSION

A. *Clean Fuels Program*

The Clean Fuels Program (“CFP”) administered by the Oregon Department of Environmental Quality (“DEQ”) was modified by HB 2017, an omnibus transportation bill passed at the tail end of the 2017 legislative session. The CFP’s goal is to reduce the average carbon intensity of transportation fuels used in Oregon by 10% by 2025.²⁵ Clean fuels standards (a.k.a. low carbon fuel standards) are established for each year.²⁶ When the carbon intensity of a fuel exceeds the standard, deficits are generated.²⁷ Conversely, when a fuel’s carbon intensity is less than the clean fuel standard, credits are generated.²⁸ Anyone that produces in Oregon, or imports into Oregon, a transportation fuel, such as gasoline, must demonstrate compliance with the CFP by possessing and retiring sufficient credits to match its deficits.²⁹ Credits can be purchased from those that generate them.³⁰

HB 2017 specifies that the maximum price for credits in 2018 will be \$200 with such cap to increase annually thereafter based on a specified consumer price index. (The average price ranged from \$44/credit to \$51.56/credit for the three months for which price information is publicly available.³¹) In addition, HB 2017 provides that if (1) “the volume-weighted moving average price of credits for a consecutive three-month period increased by 100 percent or more over the volume-weighted moving average price of credits for the previous consecutive three-month period,” or (2) DEQ determines that “abnormal [credit] market behavior exists,” then DEQ can implement emergency remedies to stabilize the credit market. The Department of Administrative Services and DEQ are also to prepare an annual fuel supply forecast that estimates whether sufficient credits will be available. If insufficient credits are forecast to be available, then DEQ is to adjust the CFP compliance obligation (*e.g.*, by suspending deficit accrual or temporarily adjusting the low carbon fuel standard to better reflect the forecast availability of credits).

In addition to these changes to the CFP, the Oregon Public Utility Commission ordered the two largest electric utilities in Oregon to reg-

25. See OR. REV. STAT. ANN. § 468A.275(2)(b)(A) (2012); OR. ADMIN. R. 340-253-0000(2) (2017).

26. OR. ADMIN. R. 340-253-8010, 340-253-8020.

27. OR. ADMIN. R. 340-253-0040(31); 340-253-1000(5)(b).

28. OR. ADMIN. R. 340-253-0040(27); 340-253-1000(5)(a).

29. OR. ADMIN. R. 340-253-0100(1); 340-253-0200(1)–(2)(a); 340-253-1030(1).

30. OR. ADMIN. R. 340-253-1050.

31. State of Oregon Dep’t of Env’tl. Quality, *Oregon Clean Fuels Program: Monthly Credit Transfer Report*, OREGON.GOV (Dec. 2017), <http://www.oregon.gov/deq/FilterDocs/cfp-creditrep.pdf> [<https://perma.cc/SR53-EBTD>].

ister as CRP credit generators, as they provide power for electric vehicles.³²

B. *Self-Service Gas Stations*

Oregon is one of just two states that effectively mandates full service gas stations. Prior to January 1, 2018, only gas stations in Oregon counties with less than 40,000 residents could allow customers to pump their own gas after 6 p.m. and before 6 a.m.³³ HB 2482, which the House of Representatives approved 56-0 and the Senate approved 26-1, eases this restriction by allowing customers to pump their own gas at any time in eastern Oregon counties with less than 40,000 residents. However, if such a gas station includes retail space, then an attendant must be available after 6 a.m. and before 6 p.m. to pump gas for customers should they so desire.

C. *Hydraulic Fracturing*

The Oregon Legislature considered a moratorium on hydraulic fracturing in the 2017 Session. HB 2711 would have prohibited, subject to certain exceptions, hydraulic fracturing in the state until the end of 2027. This bill passed the House of Representatives by a vote of 32-26 before dying in the Senate Committee on Environment and Natural Resources. One of the bill's chief sponsors, Representative Helm, testified that regulations can effectively address environmental concerns associated with hydraulic fracturing.³⁴

32. *In re Pub. Util. Comm'n of Or.*, Order No. 17-250, at 1 (OPUC July 1, 2017), available at <http://apps.puc.state.or.us/orders/2017ords/17-250.pdf> [<https://perma.cc/EE7B-AGTD>].

33. OR. REV. STAT. ANN. § 480.341(1)–(2)(a).

34. Oregon State Legislature, *Senate Committee on Environment and Natural Resources*, (May 22, 2017), http://oregon.granicus.com/MediaPlayer.php?clip_id=23724 [<https://perma.cc/Q3HP-U6WK>].

