



## **PRESENTATIONS and HANDOUTS**

### **Meeting on October 4, 2017**

- 1. Tidel flats Interim Regulations**  
(PowerPoint Slides, for Discussion Item D-2)
  
- 2. Tidel flats Interim Regulations – Additional Public Comments Received**  
(Handouts, for Discussion Item D-2)





# TIDEFLATS INTERIM REGULATIONS

Planning Commission  
10.4.17

# AGENDA

- Findings
- Review and vote on individual elements
- Review Recommendations
- Request to approve full packet and forward to the City Council
- Letter of Recommendation
- Next Steps

# FINDINGS

- New Findings documented in packet
  - ORMA: State policy on liquid fossil fuels
  - Ban on crude exports and growing market
  - Documenting public notification
  - Documenting Planning Commission deliberations
  - Documenting Public Comments
  - Tentative recommendations
  
- Still to do:
  - Finalize summary of recommendations
  - Response to comments
  
- Other additions?

# 1. EXPANDED NOTIFICATION

- Apply to:
  - Heavy Industrial Uses
  - Where a discretionary permit application or SEPA determination is required
  - Citywide
- What it would do:
  - Expand permit notification to 2500' from Manufacturing and Industrial Center boundary, where applicable, or from individual tax parcel
  - Includes a public meeting

<b>The Most Common* SEPA Triggers</b>
Work occurring within critical areas and/or on lands wholly or partly covered by water
Construction of residential structures – more than 20 dwelling units
Construction or demolition of a building – greater than 12,000 square feet
Construction of a parking lot – more than 40 vehicles
Fill or excavation – more than 500 cubic yards
Installation or removal of impervious tanks – capacity of more than 10,000 gallons
Stormwater, water, & sewer utilities – 12 inches or more in diameter
Installation of wireless facilities – on a residence or school or within a residentially zoned area
Construction of a wireless tower – 60 feet or taller or within a residential zone
Certain land use decisions – Rezone, Plats greater than 9 lots

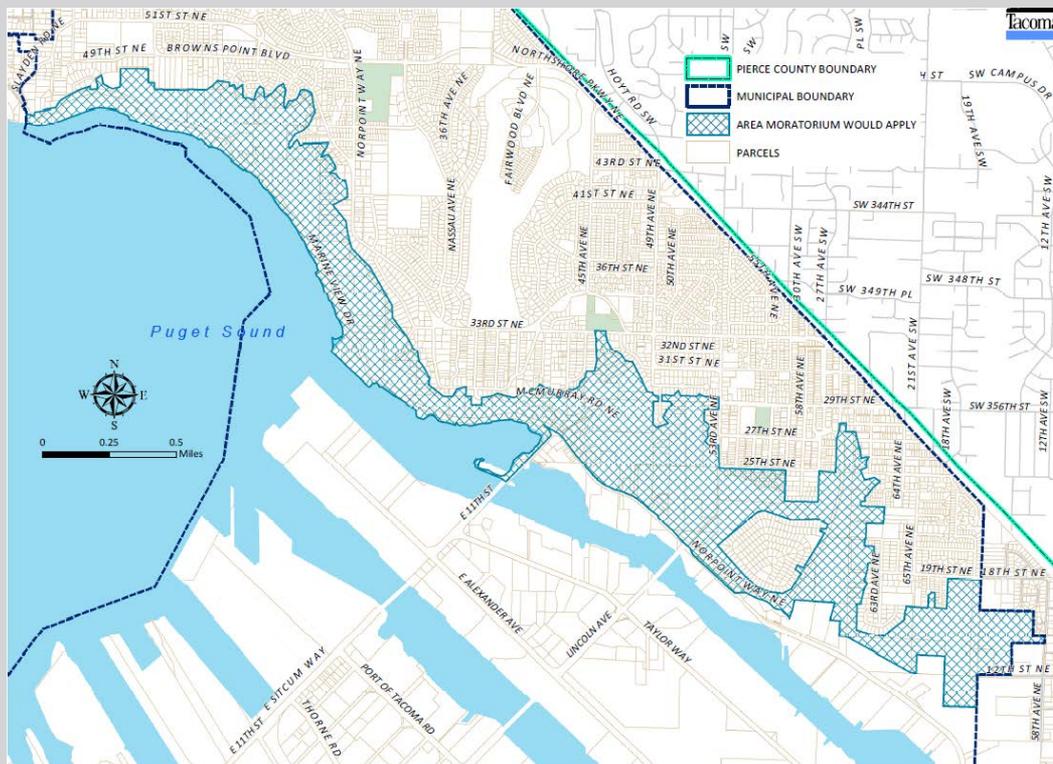
\*For a comprehensive list, see WAC 197-11-800.

## 2. NON-INDUSTRIAL USES IN PORT MIC

- Apply to:
  - Certain Non-industrial uses in TMC 13.06.400
  - Within the Port of Tacoma MIC
- What it would do:
  - Prohibit new, specified non-industrial uses
  - Allow expansion through the Nonconforming use provisions
- What uses?
  - All residential uses (group homes, adult family homes, retirement homes, work release, etc.)
  - Care facilities
  - Destination/High intensity parks and recreation
  - Cultural Institutions
  - Agriculture
  - Airports
  - Hospitals
  - Schools (K-12)
  - ~~Correctional Facilities~~
  - Limited impact to M-1

# 3. RESIDENTIAL DEVELOPMENT ALONG MARINE VIEW DRIVE

- Pause all new plats and subdivision
- Pause new residential construction in commercial and shoreline zoning districts
- Allow reasonable use of existing lots in the interim



# 4. HEAVY INDUSTRIAL USE RESTRICTIONS

- Applicability:
  - Citywide where heavy industry is allowed
- What it would do:
  - Prohibit the establishment of new uses.
  - Limit the expansion of existing uses – no more than 10% increase in storage, production or distribution capacity, subject to CUP
- What uses would be subject to the restrictions?
  - Coal terminals and bulk storage;
  - Oil, or other liquid or gaseous fossil fuel terminals, bulk storage, manufacturing, production, processing or refining;
  - Chemical production, processing, and bulk storage
  - Smelting;
  - Mining and quarrying.

# OTHER RECOMMENDATIONS

- Duration: 12 months with re-authorization every 6 months for duration of the subarea plan
- Final work plan:
  - Tideflats subarea plan
- Tracking and reporting
- Prioritize resources for the Tideflats Subarea Plan process

# REQUEST FOR RECOMMENDATION

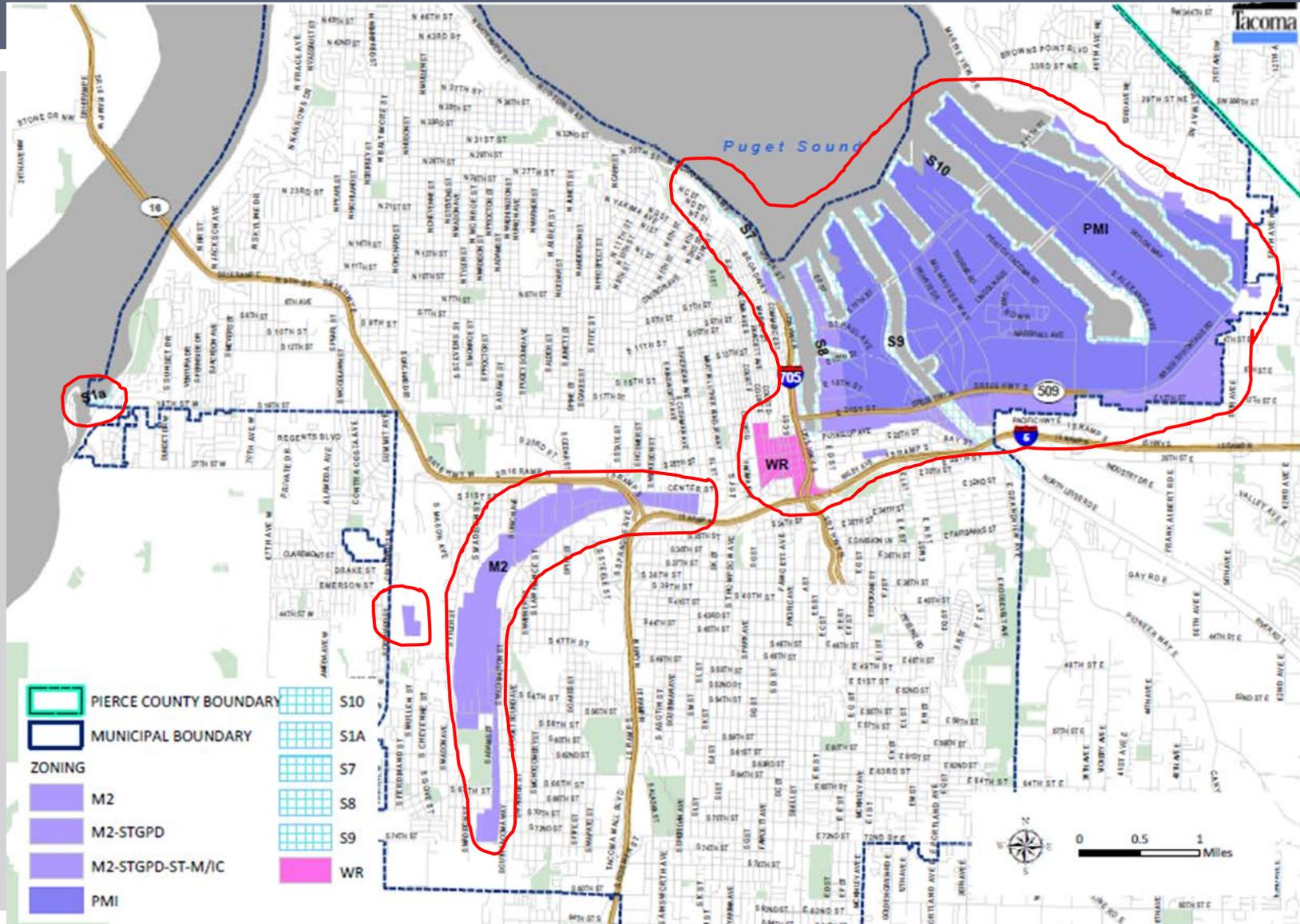
1. Expanded Notification
2. Non-industrial uses in the MIC
3. Residential Development along Marine View Drive
4. Heavy Industrial Uses
5. Other recommendations

# NEXT STEPS

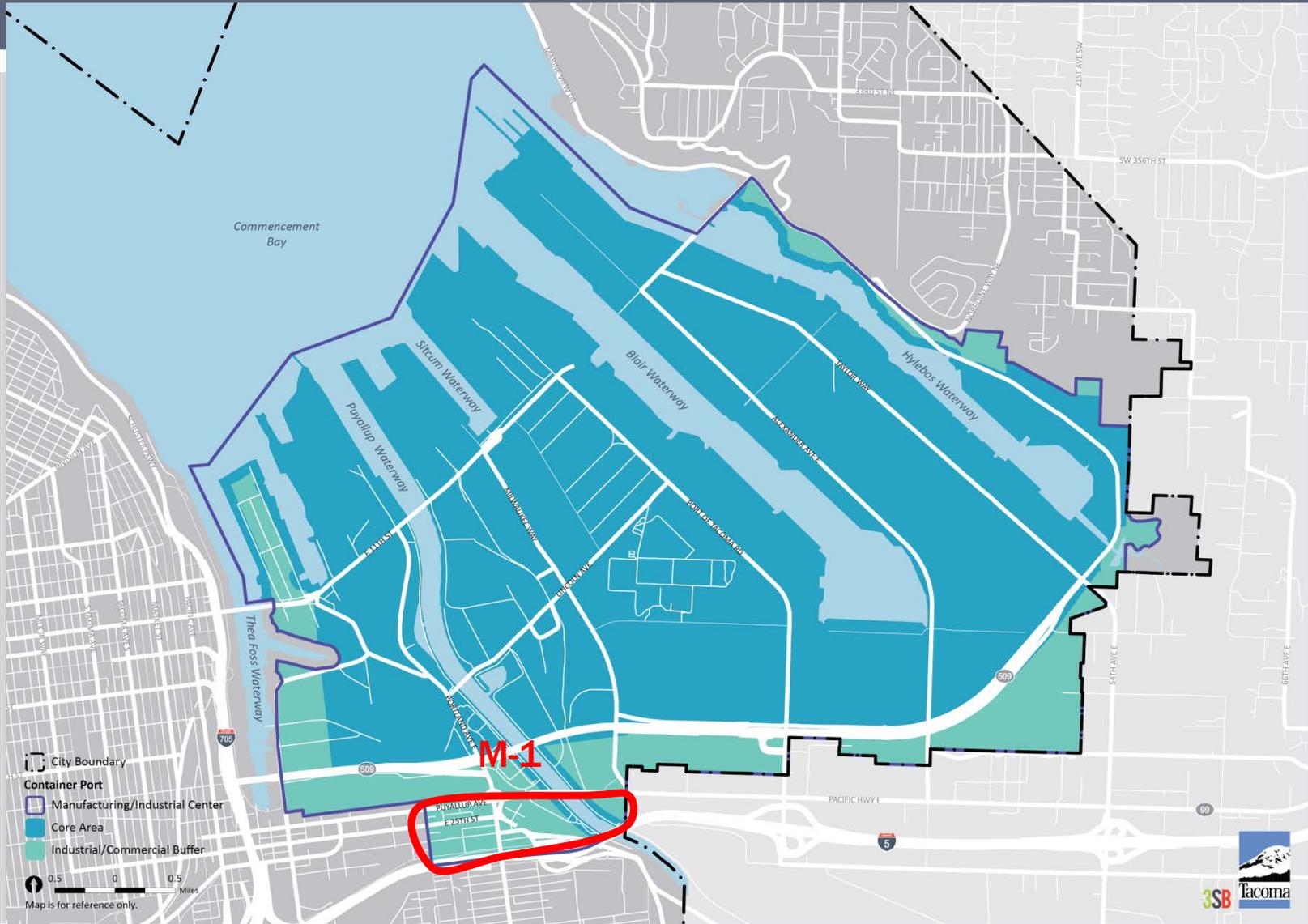
- **Tentative Council Schedule:**
  - **Study Session – October 17**
  - **Public Hearing – October 17 5:30 @ Pantages Theater**
  - **Study Session – November 7**
  - **1<sup>st</sup> Reading of Ordinance – November 14**
  - **Final Reading of Ordinance – November 21**

# EXTRA SLIDES FOR REFERENCE

# 4. HEAVY INDUSTRIAL USE RESTRICTIONS



# 2. NON-INDUSTRIAL USES IN PORT MIC



## 2. NON-INDUSTRIAL USES IN PORT MIC

	<b>M-1</b>	<b>M-2</b>	<b>PMI</b>
<b>Adult family home</b>	P/N*	N	N
<b>Confidential shelter</b>	P/N*	N	N
<b>Continuing care retirement community</b>	P/N*	N	N
<b>Day care, family</b>	P/N*	N	N
<b>Emergency and transitional housing</b>	P/N*	N	N
<b>Extended care facility</b>	P/N*	N	N
<b>Foster home</b>	P/N*	N	N
<b>Group housing</b>	P/N*	N	N
<b>Hotel/motel</b>	P/N*	N	N
<b>Intermediate care facility</b>	P/N*	N	N
<b>Live/Work</b>	P	N	N
<b>Residential care facility for youth</b>	P/N*	N	N
<b>Residential chemical dependency treatment facility</b>	P/N*	N	N
<b>Retirement home</b>	P/N*	N	N
<b>Staffed residential home</b>	P/N*	N	N
<b>Student housing</b>	P/N*	N	N
<b>Theater</b>	P/N*	N	N
<b>Work/Live</b>	P	N	N

## Wung, Lihuang

---

**From:** Dale N Bickenbach <dbick@wamail.net>  
**Sent:** Thursday, September 28, 2017 9:18 PM  
**To:** Wung, Lihuang  
**Subject:** Natural Gas Tideflats, Planning Commission Special Meeting - October 4, 2017

I support the natural gas plant with the condition Tacoma does not use that to delay more renewable development. The natural gas plant should be limited to supplying ships using natural gas, or those items that cannot run on other power sources. I understand the purpose of the natural gas plant is to position Tacoma Port to be able to maintain ships of the future using natural gas,  
thanks.

dnb

Dale N Bickenbach  
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98409-1817

Only Phone 253 475 5242 (Please e-mail 1<sup>st</sup>)  
SKYPE: dale.n.bickenbach



SOUTHWEST WASHINGTON CHAPTER

# NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION



September 11, 2017

*Received  
9/28/17  
JW*

Chris Beale, Chair  
Stephen Wamback, Vice-Chair  
Members of the Planning Commission  
Tacoma Municipal Building  
747 Market Street, Room 345  
Tacoma WA 98402

**RE: Tideflats Interim Regulations**

Dear Mr. Beale and members of the Planning Commission:

I am writing to you on behalf of my local NECA Member Firms that depend on the Industry and Economic Development in Tacoma-Pierce County. We employ thousands of workers across Southwest Washington with a significant portion directly involved with the Tacoma Tideflats.

The proposed interim regulations that would have the City of Tacoma group existing and potential businesses into a category called "high risk/high impact industrial uses," will undermine the balanced approach to the creation and retention of jobs in Tacoma. We must find better ways to keep and grow working family jobs, not halt our industries that employ them.

Washington State voters and elected leaders have adopted state laws that reflect the environmental values of Washingtonians. Our regulations are among the strictest in the country, and as a result our state is ranked #4 for most eco-friendly. Legal and appropriate business activities operate within these strict parameters. The City of Tacoma has sufficient regulations and ordinances in place to allow for enhanced review of new projects. It is incumbent upon the City to ensure that the existing laws have been applied fully and equally before putting in place any new regulations, interim or not.

We will make more progress as a region when we work together to balance our shared interested in our economic, social, and environmental wellbeing. Choosing one issue above all others would be irresponsible and shortsighted.

The proposed interim regulations are unnecessary and could have lasting effects on our local economy. We respectfully urge the Planning Commission to reject these recommendations and to ensure that the Tideflats Subarea Plan is supported by quality research, public involvement, and economic realities.

Sincerely,



Nicole Hite  
Executive Director  
Southwest Washington NECA

Cc: Mayor Marilyn Strickland and City Councilmembers  
Elizabeth Pauli, City Manager  
Steve Atkinson, Planning Services Division, and Planning Commission members



SOUTHWEST WASHINGTON CHAPTER

**NATIONAL  
ELECTRICAL  
CONTRACTORS  
ASSOCIATION**

TACOMA WA 98603  
OLYMPIA WA  
27 SEP 2017 PM 3 L

Chris Beale  
Tacoma Municipal Building  
747 Market Street, Room 345  
Tacoma, WA 98402

98402-376147

**From:** [Melissa Malott](#)  
**To:** [Planning](#); [steveintacoma@gmail.com](mailto:steveintacoma@gmail.com); [arl1@humboldt.edu](mailto:arl1@humboldt.edu); [jmcinnis@huitt-zollars.com](mailto:jmcinnis@huitt-zollars.com); [wallerdorian@gmail.com](mailto:wallerdorian@gmail.com); [bsanthuff@harboret.com](mailto:bsanthuff@harboret.com); [jeremyw@tacomaparks.com](mailto:jeremyw@tacomaparks.com); [Andrew Strobel](#)  
**Cc:** [Rebecca Ponzio](#); [Strickland, Marilyn](#); [Ibsen, Anders](#); [Thoms, Robert](#); [Blocker, Keith](#); [Campbell, Marty](#); [Mello, Ryan](#); [McCarthy, Conor](#); [Loneragan, Joe](#); [Walker Lee, Lauren](#); [Fosbre, Bill \(Legal\)](#); [william.fosbre@cityoftacoma.org](mailto:william.fosbre@cityoftacoma.org); [Sherrie Duncan](#); ["Sheri Tonn"](#)  
**Subject:** Interim Regulations on the tideflats  
**Date:** Monday, October 02, 2017 5:59:26 PM  
**Attachments:** [Planning Commission Letter 10.2.17.pdf](#)  
[Brief - Amicus Curiae-2.pdf](#)

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Dear members of the City of Tacoma Planning Commission,  
Attached, please find two items. The first is a letter from a coalition of environmental groups supporting the narrowing of the interim regulations of the tideflats to prohibit new and expanded fossil fuel facilities, and only fossil fuel facilities. We believe the Planning Commission must make a determination of need of the interim regulations moratorium, and that the available facts overwhelmingly demonstrate the urgent threat fossil fuels pose to our community. We also believe there are strong legal grounds to support a moratorium on new and expanded fossil fuel facilities. We have written this letter because we believe there is the need and legal foundation to support an interim moratorium on new and expanded fossil fuel facilities, and not other types of facilities currently listed in the draft before the Planning Commission.

Accordingly, we encourage the Commission to narrow the focus of the moratorium to new and expanded fossil fuel facilities alone.

The second attachment is an amicus curiae brief from the Portland fossil fuel ordinance case, which we believe succinctly and properly explains the applicable constitutional law.

Thank you for your time and consideration.

Sincerely,

**Melissa Malott**

**Executive Director**

**Citizens for a Healthy Bay**

*Citizens for a Healthy Bay is where people engage in the many ways to protect Commencement Bay and our surrounding waters. [Click here](#) to support our valuable work.*

535 Dock Street, Suite 213

Tacoma, WA 98402

T 253-383-2429 | W [healthybay.org](http://healthybay.org)

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October 2, 2017

City of Tacoma Planning Commission

Chair Wamback, Vice-Chair Petersen and Commissioners Waller, Santhuff, McInnis, Edmonds, Woolley, and Strobel

747 Market Street

Tacoma, WA 98402

Dear City of Tacoma Planning Commissioners Wamback, Peterson, Waller, Santhuff, McInnis, Edmonds, Strobel, and Woolley:

In anticipation of the Commission making a final recommendation on the interim tidelflat regulation, we wanted to ensure that there are findings of fact around why we believe the regulations should focus on the imminent and urgent threat of fossil fuels.

2017 City of Tacoma Resolution 39723 made three requests of the Planning Commission pertaining to land use, asking that the processes for the three actions be consolidated into one process. We are interested in the process under Section 2 of the Resolution, related to the Container Port Element (CPE) of the City's Comprehensive Plan. In the resolution, the Planning Commission is

*“requested to immediately begin discussion regarding, and consideration of the need for interim regulations related to the Container Port Element of the Tideflats Subarea while the Subarea planning process is underway, and prior to the Subarea Plan's finalization.”*

This is a two-part request for the Planning Commission: first, an identification or determination of the need for interim regulations in the container port areas of the Tacoma tideflats during the Subarea planning process, and second, a considered discussion of how to address the need for interim regulations, or recommendations.

#### **Determination of Need for Interim Regulations**

To identify whether there is a need for interim regulations, the Planning Commission should determine whether there are urgent threats to the success of the tideflats. A threat would be a potential land use project that would jeopardize the success of the container port and port related industrial areas. Generally, the success of our community or the port and port related industries can be summarized as the ability of our community to thrive and of the port and related industries to generate economic development, create jobs, and reduce environmental contamination. Presumably, expected or anticipated threats to the success of our community and port would be identified and addressed through the Subarea plan process. In contrast, a known and urgent threat would be if those jeopardizing projects are likely to arise prior to the Subarea plan being complete. If an urgent threat is not addressed, the threatening project may be proposed before the Subarea plan is complete, locking Tacoma into a future with a harmful project it doesn't want.

#### **The Need for Interim Regulations on Fossil Fuel Industry**

The Planning Commission has already received compelling information about the urgent threat fossil fuels pose to the tideflats.

- **Health:** The health impacts of fossil fuels range from direct exposure to coal, oil and gas to air pollution associated with its combustion and off-gassing.
  - Fossil fuel terminals and transport add to the air pollution burden already experienced in Puget Sound. Air pollution, “accounts for the majority of air-toxic cancer risks in the Puget Sound area.” That air pollution is associated with increased cancer rates, lower infant birth weight and increased risk of infant respiratory death, impaired pulmonary development in children and adolescents, increased risk of neurodevelopmental disorders in children, increased risk of asthma diagnosis and hospitalizations, and increased overall risk of disease and mortality.”<sup>1</sup>
  - Leaks at natural gas storage facilities have been linked to headaches, nausea and nosebleeds among nearby residents (reports from 2016 methane leak in CA).<sup>2</sup>
  - “Coal pollutants affect all major body organ systems and contribute to four of the five leading causes of mortality in the U.S.: heart disease, cancer, stroke, and chronic lower respiratory diseases.”<sup>3</sup>
- **Safety:** The threat of oil spills, derailments, gas explosions, and coal dust are real. We only need to look to the 15<sup>4</sup> major oil trains that have derailed across North America since July 6, 2013 when a train killed 47 people in Lac Megantic, Quebec.<sup>5</sup> We can also look, today, to the effects of Hurricane Harvey in Houston where the fossil fuel infrastructure has failed and has created a dangerous mix of pollution across the region.
- **Economy:** Oil and coal facilities hurt job growth in Tacoma; because oil trains preempt the railways, the trains our other industries rely on are slowed down,<sup>6</sup> which means Longshoremen and grain elevator staff lose days of work. According to local longshore workers, they lose 3-4 days of work per month due to oil trains. Additionally, according to a new study released, the impacts of fossil fuel pollution and weather extremes is costing the US \$240 billion in health and safety impacts.<sup>7</sup>
- **Urgency:** The fossil fuel industry is aggressively looking to expand its infrastructure and bring more petrochemicals through Washington. The City of Tacoma is a particularly vulnerable area given the deep water port, rail line, pipeline infrastructure, and vacant land.<sup>8</sup> Already, we see an

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<sup>1</sup> WA and OR PSR, [Position Statement on Crude Oil Transport and Storage](https://www.wpsr.org/oil-position-statement): <https://www.wpsr.org/oil-position-statement>

<sup>2</sup> Physicians for Social Responsibility report, “Too dirty, too dangerous: Why health professionals reject natural gas.

<http://www.psr.org/assets/pdfs/too-dirty-too-dangerous.pdf>

<sup>3</sup> Physicians for Social Responsibility report: Coal’s assault on human health. <http://www.psr.org/assets/pdfs/psr-coal-fullreport.pdf>

<sup>4</sup> June 3, 2016 Mosier, Oregon, November 8, 2015 Watertown, WI, July 16, 2015 Culbertson, Montana, May 6, 2015 Heimdal, North Dakota, March 7, 2015: Gogama, Ontario, March 5, 2015 Galena, Illinois, February 17, 2015 Mount Carbon W. Virginia, February 13, 2015 Vandergrift, PA, February 14, 2015 Timmons, Ontario Canada

June 16, 2014 Buhl, Alabama, April 30, 2014 Lynchburg, Virginia, January 7, 2014 Plaster Rock, New Brunswick, December 30, 2013 Casselton, North Dakota, November 8, 2013 Aliceville, Alabama, October 16, 2013 Edmonton, Canada, July 6, 2013 Lac Megantic, Quebec

<sup>5</sup> Article on status of rebuilding in Lac Megantic: <https://globalnews.ca/news/2094045/two-years-later-rebuilding-after-the-lac-megantic-train-derailment/>

<sup>6</sup> <https://www.seattletimes.com/business/oil-trains-crowd-out-grain-shipments-to-nw-ports/>

<sup>7</sup> Sir Robert Watson, Dr. James J McCarthy, and Liliانا Hisas. The Economic Case for Climate Action in the United States. September 2017. Universal Ecological Fund (FEU-US). *Article about the report*: <http://www.reuters.com/article/us-climatechange-usa/weather-extremes-fossil-fuel-pollution-cost-us-240-billion-study-idUSKCN1C22AM>

<sup>8</sup> <http://www.sightline.org/2017/06/20/northwest-targets-communities-threatened-by-fossil-fuels/>

existing facility (US Oil) proposing to expand its facility.<sup>9</sup> For all of these reasons, the Planning Commission should focus the interim regulation on putting an interim ban on new and the expansion of existing fossil fuel facilities. These are the facilities that pose an imminent and urgent threat to the health, safety and welfare of our city.

- **Climate:** Climate change is a legitimate and existential threat to our city and region. The combustion of fossil fuels is exacerbating the impacts on our climate and we must transition away from these damaging sources. By adopting the Environmental Action Plan in 2016, the City of Tacoma recognized this imminent threat and the need to take action. Indeed, through the adoption of the EAP, there was an acknowledgement that, “climate change poses serious threats for life in Tacoma and demands a strong and thorough response.”<sup>10</sup> Allowing an increase in fossil fuel development and expansion of fossil fuel infrastructure within the City is counter to the intent of the EAP and the stated emission goals.

### **Surviving Constitutional Challenge**

The threat of a lawsuit should the City move forward with interim regulations focused on fossil fuels is misguided. While the dormant Commerce Clause of the US Constitution does disallow certain local regulations on economic activity, it is fundamentally about preventing economic protectionism, or favoring local economic interests at the cost of out of state interests. When evaluating a regulation challenged on dormant Commerce Clause grounds, the court evaluates whether the regulation is a protectionist measure or whether it is designed to address legitimate local concerns with only incidental impacts on interstate commerce.

The proposed interim regulations, in so far as they would put a pause on new or expanded fossil fuel facilities, is not about favoring local interests at the expense of out of state interests. New and expanded infrastructure for fossil fuels is an urgent threat and legitimate local concern for the City to regulate, and is absolutely what the City should focus on. Doing so is the best way to proceed on legal grounds. We have included as attachments the recently filed briefs in the Portland case that deal directly with the dormant Commerce Clause as reference, and would direct you to the amicus brief, pages 11-17 for a relevant, concise discussion of this topic.

In conclusion, we urge the City of focus on putting in place, immediately, an interim regulation that bans new fossil fuel infrastructure and the expansion of existing fossil fuel infrastructure in the Tacoma tideflats. There are reasonable and justifiable findings of fact that support this action. By so taking this action, the City will then enable a more thorough and comprehensive Sub-Area Planning process to take place.

Thank you for your time and consideration.

Sincerely,

Center for Sustainable Economy

Citizens for Healthy Bay

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<sup>9</sup><https://aca.accela.com/tacoma/Cap/CapDetail.aspx?Module=Permits&TabName=Permits&capID1=DUB17&capID2=00000&capID3=00BTM&agencyCode=TACOMA&IsToShowInspection>

<sup>10</sup> City of Tacoma Environmental Action Plan. [http://cms.cityoftacoma.org/Sustainability/Tacoma\\_EAP.pdf](http://cms.cityoftacoma.org/Sustainability/Tacoma_EAP.pdf)

Earth Ministry

Fuse

Oregon Physicians for Social Responsibility

Our Wild America

RE Sources for Sustainable Community

Stand.earth

Surfider Foundation, Washington Chapter

Tatoosh Group, Washington State Chapter of the Sierra Club

Washington Environmental Council

Washington Conservation Voters

Washington Physicians for Social Responsibility

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Cc: Mayor Marilyn Strickland

Tacoma City Councilmembers Ibsen, Thoms, Blocker, Campbell, Lonergan, Walker Lee, McCarthy and Mello

Tacoma City Attorney Frosbre

Tacoma Planning Staff

**IN THE COURT OF APPEALS OF THE STATE OF OREGON**

COLUMBIA PACIFIC BUILDING  
TRADES COUNCIL, PORTLAND  
BUSINESS ALLIANCE, WESTERN  
STATES PETROLEUM  
ASSOCIATION, and WORKING  
WATERFRONT COALITION,  
Respondents,

v.

CITY OF PORTLAND,  
Respondent-below,

and

COLUMBIA RIVERKEEPER,  
OREGON PHYSICIANS FOR  
SOCIAL RESPONSIBILITY,  
PORTLAND AUDUBON SOCIETY,  
and CENTER FOR SUSTAINABLE  
ECONOMY,  
Petitioners.

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COLUMBIA PACIFIC BUILDING  
TRADES COUNCIL, PORTLAND  
BUSINESS ALLIANCE, WESTERN  
STATES PETROLEUM  
ASSOCIATION, Respondents,

and

WORKING WATERFRONT  
COALITION,  
Intervenor-Petitioner below,

v.

CITY OF PORTLAND,  
Petitioner,

and

COLUMBIA RIVERKEEPER,  
OREGON PHYSICIANS FOR  
SOCIAL RESPONSIBILITY,  
PORTLAND AUDUBON SOCIETY,

LUBA No. 2017-001

CA A165618

EXPEDITED PROCEEDING UNDER  
ORS 197.855

and CENTER FOR SUSTAINABLE  
ECONOMY,  
Intervenors-Respondents below.

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**BRIEF OF *AMICUS CURIAE* LEAGUE OF OREGON CITIES**

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On Judicial Review of a Decision of the Land Use Board of Appeals  
Dated July 19, 2017

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<i>General Motors Corp. v. Tracy</i> , 519 US 278, 117 S Ct 811, 136 L Ed 2d 761 (1997) .....	5, 15
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<i>Hess v. Port Authority Trans–Hudson Corp.</i> , 513 US 30, 115 S Ct 394, 130 L Ed 2d 245 (1994) .....	6
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<i>New Energy Co. of Indiana v. Limbach</i> , 486 US 269, 188 S Ct 1803, 100 L Ed 2d 302 (1988) .....	13
<i>Philadelphia v. New Jersey</i> , 437 US 617, 98 S Ct 2531, 57 L Ed 2d 475 (1978) .....	13, 14
<i>Pike v. Bruce Church, Inc.</i> , 397 US 137, 90 S Ct 844, 25 L Ed 2d 174 (1970) .....	5, 15
<i>Schad v. Borough of Mt. Ephraim</i> , 452 US 61, 101 S Ct 2176, 68 L Ed 2d 671 (1981) .....	6, 7
<i>Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Engineers</i> , 531 US 159, 174, 121 S Ct 675, 148 L Ed 2d 576 (2001) .....	6

#### State

<i>King v. City of Portland</i> , 2 Or 146 (1865) .....	10
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<i>Shaffner v. City of Salem</i> , 201 Or 45, 268 P2d 599 (1960) .....	7, 11
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### **Constitutional Provisions**

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### **Other Authorities**

8A McQuillin, <i>Municipal Corporations</i> (3d ed. 2007-2017) .....	7
Bernard Bailyn, <i>The Ideological Origins of the American Revolution</i> (2d ed. 1992) .....	8
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Montesquieu, <i>The Spirit of the Laws</i> (Cohler et al. trans. 1989) .....	8
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## I. INTEREST OF *AMICUS CURIAE*

This case involves the question whether a local land use regulation, limiting the size of new fossil fuel terminals, violates the “dormant” or “negative” Commerce Clause of the United States Constitution, Article I, section 8, clause 3.

By leave of the Court, the League of Oregon Cities (“League”) appears as *amicus curiae* to support petitioner on review, the City of Portland. Founded in 1925, the League is a voluntary statewide association representing all of Oregon’s 241 incorporated cities. The League advocates for improved quality of municipal services through technical assistance, research, and education. The League’s interest in this case, and therefore the interest of its 241 members, arises because this Court’s decision will affect the ability of all cities in Oregon, as well as the State and all other local governments, to regulate in their traditional spheres of competence on matters that may incidentally touch on interstate commerce.

When the Framers proposed to grant the Congress of the United States the power to regulate interstate and foreign commerce, they did not intend to supplant the traditional authority of the States and of local governments to regulate for the public health, welfare, and safety. This case presents issues of statewide concern, particularly impacting Oregon’s finely balanced land use

system, regarding the appropriate delineation of authority between federal and state/local governments.

The League has an interest in assisting the Court make a decision consistent with the text, context, and historical understanding of the principles underlying the Constitution, giving due regard to the federal nature of our Union which retains, with limited exceptions set out in the Constitution, the sovereignty of the States and their political subdivisions to enact laws to meet the particular needs and circumstances of their residents.

## II. STATEMENT OF THE CASE

The League accepts and adopts the Statement of the Case in Petitioner City of Portland's Opening Brief.

## III. SUMMARY OF THE ARGUMENT

In our political system, State and local governments are primarily responsible for regulating "the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 319 (James Madison) (Tudor ed., 1947). The United States Constitution, however, grants to the Congress of the United States the power to regulate interstate and foreign commerce.

The United States Supreme Court has inferred the existence of a negative command in the Commerce Clause, through the "dormant" Commerce Clause,

which precludes the States—and through them, local governments—from enacting local laws that discriminate against interstate commerce, even where Congress has not chosen to exercise its power.

Because, increasingly, almost anything can be viewed as having some connection with interstate commerce, reading the negative command of the “dormant” Commerce Clause too broadly will destroy the primary sovereignty of the States and, through them, the ability of local governments to regulate in their traditional spheres of competence. Since the Constitution was adopted, the nation has filled in its continental land mass, and States (Alaska and Hawaii) have joined the Union which are not contiguous to the rest of the States. The United States has territories and possessions around the world. The national and world economies have become globalized. Almost every transaction may, in some sense, be related to or touch on interstate or foreign commerce. Courts must be extremely wary of extending the reach of the “dormant” Commerce Clause, lest all of the traditional functions of State and local government are subsumed into its prohibitions, and the people of the United States are left powerless to regulate for their own, local health, welfare, and safety.

In enacting its land use regulation limiting the size of new or expanded bulk fossil fuel terminals, the City of Portland was performing a traditional local function—regulating the use of land for the public health, welfare, and safety. Under the federal constitution, considerations of federalism require the

Court to extend a strong presumption of validity to the City's Ordinance. That same level of deference is required under Oregon's constitutional provisions requiring the separation of judicial from legislative power, and extending to the legal voters of every city the right to adopt and amend their own charters, and through them, their own local ordinances. LUBA erred in failing to give the Ordinance the presumption of constitutionality to which it was entitled. The opponents of the Ordinance failed to meet their burden to establish facts that overcome this strong presumption of constitutionality.

The "dormant" Commerce Clause never was intended to supplant the authority of State and local governments to regulate "the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 319. Rather, it limits economic regulations that favor in-State economic interests at the expense of out-of-state economic interests. Neither the opponents of the Ordinance nor LUBA identified any similarly situated in-State and out-of-State actors, nor how the Ordinance benefits the former at the expense of the latter. In the absence of this showing, the Ordinance is not subject to review under the Commerce Clause.

Even if the Ordinance were subject to "dormant" Commerce Clause review, it must be sustained. For the reasons the City explains in its brief, LUBA erred in finding that the Ordinance has a discriminatory effect, because

neither the opponents of the regulation nor LUBA could identify any “substantially similar” in-state and out-of-state economic actors, nor any “actual or prospective competition between the supposedly favored and disfavored entities in a single market [without whom] there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.” *General Motors Corp. v. Tracy*, 519 US 278, 298, 300, 117 S Ct 811, 136 L Ed 2d 761 (1997).

Finally, the Ordinance easily withstands scrutiny under the deferential balancing test of *Pike v. Bruce Church, Inc.*, 397 US 137, 142, 90 S Ct 844, 25 L Ed 2d 174 (1970), because the record is devoid of substantial evidence of any actual burden on interstate commerce, much less one that is “clearly excessive,” when compared to the City’s legitimate interests in the health, welfare, and safety of its residents.

The opponents of the Ordinance failed to meet their heavy burden to overcome the strong presumption of constitutionality to which the Ordinance is entitled, and LUBA’s decision must be reversed.

#### IV. ARGUMENT

##### A. *The Ordinance is Presumed to be Constitutional*

This case requires the Court to resolve a tension between two fundamental principles of our Republic: (1) that the States—and through them,

local governments—are the primary sovereign arms of the body politic of the United States; and (2) that the Constitution has delegated to the United States Congress the power to regulate interstate and foreign commerce. Specifically, this Court must decide whether a local land use regulation, enacted to promote the health, welfare, and safety of the residents of the City of Portland, is repugnant to the “dormant” or “negative” Commerce Clause of the United States Constitution, Article I, section 8. That inquiry turns on whether, in the absence of any affirmative Act of Congress limiting the City’s authority to regulate the size of bulk fossil fuel terminals, the City’s regulation nonetheless impermissibly intrudes on the unexercised power of Congress to regulate interstate or foreign commerce.

Regulation of land use is a function traditionally performed by local governments. *See Solid Waste Agency of Northern Cook Cnty. v. United States Army Corps of Engineers*, 531 US 159, 174, 121 S Ct 675, 148 L Ed 2d 576 (2001) (noting “the States’ traditional and primary power over land and water use”); *Hess v. Port Authority Trans–Hudson Corp.*, 513 US 30, 44, 115 S Ct 394, 130 L Ed 2d 245 (1994) (“land use [is] a function traditionally performed by local governments”). Local zoning ordinances are presumed to be constitutional, and the opponent of such an ordinance bears the burden of establishing its unconstitutionality. *See Schad v. Borough of Mt. Ephraim*, 452 US 61, 77, 101 S Ct 2176, 68 L Ed 2d 671 (1981) (Blackmun, J., concurring)

(so noting); *id.* at 79-80 (Stevens, J., concurring) (same); *Shaffner v. City of Salem*, 201 Or 45, 52-53, 268 P2d 599 (1960) (“A presumption of validity and reasonableness attends zoning ordinances and amendments thereto.”). “The burden of proof weighs against one seeking to have a zoning ordinance declared unconstitutional to the extent that the evidence must overcome the presumption of validity which favors the ordinance.” 8A McQuillin, *Municipal Corporations* § 25:330 (3rd ed. 2007-2017).

1. *Federalism requires a presumption of validity.*

This deference is owed for two separate reasons, both central to the basic principles of our government. First, the United States Constitution was not intended to supplant the sovereignty of State and local governments. In framing the Constitution, the architects of the republic attempted to blend classical republican values drawn from Greco-Roman philosophers, from Plato to Cicero—who notably revered government by small communities<sup>1</sup>—with those of natural rights, most notably articulated by writers such as John Locke.

One of the more influential sources of the political philosophy underlying the Constitution was Montesquieu’s *The Spirit of the Laws* [*De l’esprit des lois*], first published in 1748.<sup>2</sup> Advocating for the adoption of the Constitution,

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<sup>1</sup> See Plato, *Republic* 58-62 (Waterfield trans., 2008).

<sup>2</sup> Although Montesquieu was influential, his ideas also were controversial. See, e.g., Bernard Bailyn, *The Ideological Origins of the*

Alexander Hamilton attempted to meet head on the criticism that creation of a federal government contradicted the “observations of Montesquieu on the necessity of a contracted territory for a republican government.” The Federalist No. 9, at 58 (Alexander Hamilton) (Tudor ed., 1947). Hamilton responded by citing extended quotations from *The Spirit of the Laws*, to demonstrate that the Constitution actualized Montesquieu’s promotion of a confederate republic made up of smaller, largely independent republics. *See id.* at 59-60. “As this government is composed of small republics, it enjoys the internal happiness of each; and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.” *Id.* at 60 (quoting Charles de Secondat, Baron de Montesquieu, *De l’esprit des lois*, Book 9, ch 1 (1748)).<sup>3</sup> Hamilton argued: “The proposed Constitution, so far from implying an abolition of the State governments \* \* \* leaves in their possession certain exclusive and very important portions of sovereign power.” *Id.* at 61.

James Madison echoed Hamilton’s conclusion:

“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which

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*American Revolution 372-75* (1992 ed.); Herbert J. Storing, *What the Anti-Federalists Were For* 73 (1981).

<sup>3</sup> A more modern translation renders this passage: “Composed of small republics, it enjoys the goodness of the internal government of each one; and, with regard to the exterior, it has, by the force of the association, all the advantages of large monarchies.” Montesquieu, *The Spirit of the Laws* 132 (Cohler et al. trans., 1989).

are to remain in the State governments are numerous and indefinite \* \* \*. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”

The Federalist No. 45, at 319. Under the Constitution, federal power is the exception, State power is the rule. A State or local regulation—in particular, one such as Portland’s Ordinance, which “concern[s] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State”—that does not on its face clearly and directly contravene an express federal power must be given a presumption of validity.

2. *The Oregon Constitution requires a presumption of validity.*

The second reason that the City’s ordinance is entitled to a strong presumption of validity is because the Oregon Constitution, through Article III, section 1, and Article XI, section 2, requires it. Article III, section 1 provides: “The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

This provision reflects the fundamental principle that the people of this State are sovereign. As the Oregon Supreme Court explained over a century and a half ago:

“It is not the province or duty of courts to declare the acts passed by the legislative assembly to be unconstitutional upon grounds seemingly reasonable; the case must be one in which the court can have no rational doubt, and the Constitution of our State is to be liberally construed in upholding the constitutionality of statutes. Otherwise the court usurps the place of legislators and assumes to enact laws.”

*King v. City of Portland*, 2 Or 146, 152 (1865) (citations omitted).

“In this connection, it must also be kept in mind that the constitution of a state, unlike that of our national organic law, is one of limitation, and not a grant, of powers, and that any act adopted by the legislative department of the State, not prohibited by its fundamental laws, must be held valid; *and this inhibition must expressly or impliedly be made to appear beyond a reasonable doubt.*”

*State v. Cochran*, 55 Or 157, 179, 104 P 884 (1909) (emphasis added).

In 1906, the people of this State, exercising their sovereignty, adopted an amendment to Article XI, section 2, of the Oregon Constitution, under which “[t]he legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon.” When the Portland City Council adopted the Ordinance that is challenged in this case, it was exercising the legislative power of the State, that the Constitution had delegated to the “legal voters” of Portland under Article XI, section 2. *Amicus* does not question that the United States

Constitution is the law of Oregon, and is as much a brake on local legislation as is the Oregon Constitution. Nonetheless, this Court must presume the constitutionality of the ordinance, both to avoid intruding on the legislative power,<sup>4</sup> in contravention of Article III, section 1, and to respect the constitutional authority of the City to adopt its own local laws, as required by Article XI, section 2.

Our federal and state constitutional systems, thus, are predicated upon this fundamental principle: that government governs best which governs closest to home. The City's ordinance must be presumed to be constitutional, and its opponents bear the burden of establishing its unconstitutionality. *Shaffner*, 201 Or at 52-53.

B. *The Ordinance Does Not Violate the Dormant Commerce Clause*

1. *The "Dormant" Commerce Clause.*

Article I, section 8, of the United States Constitution provides, in pertinent part: "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

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<sup>4</sup> Justice Thomas has argued that the tests the United States Supreme Court has adopted for measuring the constitutionality of state and local laws against Dormant Commerce Clause challenges, such as the one in this case, are inappropriate specifically because they "invit[e] us, if not compe[l] us, to function more as legislators than as judges." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 US 564, 619, 117 S Ct 1590, 137 L Ed 2d 852 (1997) (Thomas, J., dissenting). The presumption of constitutionality is particularly required here, to guard against unwarranted judicial interference with the legitimate exercise of the legislative power.

There is nothing in the text of Article I, section 8, nor elsewhere in the Constitution, that expressly prohibits the States from regulating commerce in the absence of an act of Congress. The only limitations on the power of the States are contained in Article I, section 10:

“No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

“No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net proceeds of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duties of tonnage, keep troops, or ships of war, in time of peace, enter any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”

US Const, Art I, § 10.

Notwithstanding the absence in the Constitution of any express text prohibiting the States from regulating commerce where Congress has not acted, and not without persistent and substantial dissent, the United States Supreme Court has inferred the doctrine known as the “dormant” or “negative” Commerce Clause, “prohibiting States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval.”

*Comptroller of the Treasury of Maryland v. Wynne*, \_\_\_ US \_\_\_, 135 S Ct 1787, 1794, 191 L Ed 2d 813 (2015); *see id.* at 1807-09 (Scalia, J., dissenting); *id.* at 1811-13 (Thomas, J., dissenting).

This doctrine “is driven by a concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” *McBurney v. Young*, 569 US 221, 133 S Ct 1709, 1719, 185 L Ed 2d 758 (2013) (quoting *New Energy Co. of Indiana v. Limbach*, 486 US 269, 273-74, 188 S Ct 1803, 100 L Ed 2d 302 (1988)); *see also Philadelphia v. New Jersey*, 437 US 617, 624, 98 S Ct 2531, 57 L Ed 2d 475 (1978) (“The crucial inquiry \* \* \* must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”).

2. *The ordinance does not regulate interstate commerce.*

What “out-of-state competitors” does Portland’s ordinance burden, and for the benefit of what “in-state economic interests”? As petitioner, the City of Portland, has demonstrated, the record discloses none. Without substantial evidence that the Ordinance discriminates against interstate commercial interests and in favor of Oregon economic interests, the Ordinance cannot be “protectionist,” but, rather is, on its face, “a law directed to legitimate local

concerns, with effects upon interstate commerce that are only incidental.”

*Philadelphia*, 437 US at 624.

The Ordinance imposes limitations on the development of property within the City of Portland, irrespective whether the owner is local or out-of-state, and irrespective of whether the economic use made of the property is conducted by or for the benefit of local interests or by or for out-of-state economic interests. The Ordinance simply does not “regulate commerce with foreign nations, [or] among the several States,” and it does not intrude upon the powers reserved to Congress under Article I, section 8 of the United States Constitution. Rather, it regulates “objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State[,]” the regulation of which the Constitution intended to reserve to the States, and, through them, to local governments. *The Federalist No. 45*, at 319.

3. *The ordinance does not discriminate against interstate commerce.*

“Even shoehorned into [the] dormant Commerce Clause framework, however, [this] claim would fail.” *McBurney*, 133 S Ct at 1720. Petitioner’s Opening Brief correctly states the two tests the United States Supreme Court has developed under its dormant Commerce Clause jurisprudence. For the reasons the City explains in its brief, LUBA erred in finding that the Ordinance has a discriminatory effect, because neither the opponents of the regulation nor

LUBA could identify any “substantially similar” in-state and out-of-state economic actors, nor any “actual or prospective competition between the supposedly favored and disfavored entities in a single market [without whom] there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.” *General Motors Corp.*, 519 US at 298, 300.

4. *The ordinance withstands Pike balancing.*

Neither may the Ordinance be invalidated under the balancing test of *Pike v. Bruce Church, Inc.*, 397 US 137, 90 S Ct 844, 25 L Ed 2d 174 (1970). To prevail under *Pike*, the opponents of the regulation must demonstrate a “burden imposed on [interstate] commerce [that] is clearly excessive in relation to the putative local benefits.” *Id.* at 142. *Amicus* adopts and support’s the City’s argument demonstrating why LUBA erred in invalidating the City’s ordinance under *Pike*’s generous standard. In sum, the record is devoid of any evidence of any substantial burden on interstate commerce, much less one that is “clearly excessive,” when compared to the City’s legitimate interests in the health, welfare, and safety of its residents.

## V. CONCLUSION

This case starkly illustrates the nefarious creep of the judicially-created “dormant” Commerce Clause. The Commerce Clause was intended primarily, if not exclusively, to prohibit oppressive taxes, duties and imposts. It “negatives

the exercise of that power to the States, as to the only two objects which could ever tempt them to assume the exercise of that power, to wit, the collection of a revenue from imposts and duties on imports and exports; or from a tonnage duty.” *Gibbons v. Ogden*, 22 US (9 Wheat) 1, 236 (1824) (Johnson, J., concurring). Courts should be loath to extend the reach of the “dormant” Commerce Clause to invalidate regulations that are not designed to impose discriminatory *financial* treatment of interstate commerce.

City councils exist for the sole and exclusive purpose of providing for the health, welfare, and safety of the residents of their cities. To hold that the Constitution prohibits them from adopting non-discriminatory, non-revenue-generating regulations “concern[ing] the lives, liberties, and properties of the people” they serve, based only on speculation regarding theoretical impacts on some future economic activity, would upset the balance of power between the national and local governments in a way that would shock and appall those who wrote and adopted that Constitution.

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Respectfully Submitted,

*s/ Harry Auerbach*

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*s/ Philip Thoennes*

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND  
TYPE SIZE REQUIREMENTS**

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b), and (2) the word count of this brief (as described in ORAP 5.05(1)(a)) is 3,785 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(ii).

*s/ Philip Thoennes*  
\_\_\_\_\_  
Philip Thoennes, OSB 154355  
*Of Attorneys for Amicus Curiae*  
*League of Oregon Cities*

## CERTIFICATE OF FILING

I certify that on September 1, 2017, I electronically filed the foregoing **Brief of Amicus Curiae League of Oregon Cities** with the Appellate Court Administrator, Appellate Court Records Section, by using the Oregon Appellate eFiling System.

## CERTIFICATE OF SERVICE

I further certify that on September 1, 2017, I served the foregoing **Brief of Amicus Curiae League of Oregon Cities** on the following parties by using the electronic service function of the eFiling system:

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*s/ Philip Thoennes*  
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League of Oregon Cities*

**From:** [Jimmy McMichael](#)  
**To:** [Atkinson, Stephen](#)  
**Cc:** [Thoms, Robert](#); [Blocker, Keith](#); [Campbell, Marty](#); [Loneragan, Joe](#); [Walker Lee, Lauren](#); [McCarthy, Conor](#); [Mello, Ryan](#); [Ibsen, Anders](#)  
**Subject:** Re: Tacoma Tide Flats  
**Date:** Friday, September 15, 2017 4:46:38 PM

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I am writing to ask you to pass interim regulations that place a pause on all new and expanded fossil fuels in the Tacoma tide flats. We need to stand for stronger environmental regulations, clean air and water and building living wage jobs, not expanding a fossil fuel based system that exploits our city and residents while benefiting corporations. Thank you for your time and for working towards a balanced approach to protecting the Tacoma tide flats.

Thank you,

James McMichael  
Tacoma Resident

## Wung, Lihuang

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**From:** Mary Paynter <payntermary@comcast.net>  
**Sent:** Saturday, September 16, 2017 4:39 PM  
**To:** Ibsen, Anders; Thoms, Robert; Blocker, Keith; Campbell, Marty; Lonergan, Joe; Walker Lee, Lauren; McCarthy, Conor; Mello, Ryan; Atkinson, Stephen  
**Subject:** FW: Interim regulations for Tideflats

Dear officials of City of Tacoma,

**I am forwarding the letter I sent Friday to the Planning Commission. Thanks for your interest—Mary Paynter**

**Subject:** Interim regulations for Tideflats

Dear Planning Commission:

Thank you for your volunteer service, and thank you for providing opportunities for citizens to voice their concerns about the Interim Regulations for the Tideflats. I am a resident of Des Moines, and live about 14 miles from the Tacoma Tideflats.

The proposed interim regulations should focus on fossil fuels only. This is the immediate threat. The regulations should include a moratorium on building new fossil fuel infrastructure, but equally importantly, the regulations must include a pause in the expansion of existing fossil fuel facilities.

If Tacoma allows the building of this huge LNG facility, there will be some benefits:

- Substituting LNG for diesel fuel in marine vessels probably provides some reduction in GHG emissions and Diesel Particulate Matter, although an extremely fine-grained and yet wide-ranging analysis is necessary to reach this conclusion.
- Some good union jobs will result--250 jobs over two years and 18 permanent jobs
- PSE, a foreign-owned corporation, will be able to extract a lot of fracked gas, transport it through pipelines, and potentially export it to lucrative markets in Asia. It's not clear that PSE will use very much of the capacity of this plant to ensure that peak demands of PSE customers will be met, but to the extent that that happens, I guess we can count it as a benefit to the region.

But in my view the benefits are far outweighed by the costs:

- This LNG plant will be supplied with fracked gas, which is largely methane. Methane burns cleanly, but when methane escapes into the atmosphere unburned, it is an extremely potent GHG, about 86 times more potent over 20 years than carbon dioxide. Methane leaks happen during fracking, during transportation by pipelines, and during processing at natural gas facilities. These leaks mean that fracked gas is far from an innocuous "bridge fuel" to a clean energy future—it is arguably worse than coal as a contributor to climate change.
- The safety issues of this plant's location are not adequately addressed. Transferring LNG from the storage tank to vessels is a dangerous process. It should not be undertaken in a busy port. PSE is not experienced at this sort of thing. Does Tacoma want to be the guinea pig while PSE experiments to find the best way to get LNG to a truck and from there to a vessel?

- Other environmental issues are raised by the Puyallup Tribe and by recreational and fisheries interests, all of whom stand to be impacted by leaks, spills, and increased marine traffic.
- We know that if we are to avoid catastrophic climate change, about two-thirds of known reserves of fossil fuels need to stay in the ground. If known reserves cannot get to markets, they will stay in the ground. Unfortunately, an LNG plant of this size will act like a gigantic siphon, sucking fracked gas from upstream sources for a long time to come, whether the PSE rate payers need it or not. And if they don't need it, because of transitioning to renewables, conserving energy, and finding ways to increase efficiency of buildings and industries, that LNG will find a market elsewhere, likely in Asia, to the benefit of the Australian stockholders who own PSE and to the detriment of the planet.

We should not be building ANY new fossil fuel infrastructure, nor should we expand existing facilities. We must direct all of our efforts toward the transition to solar and wind power, energy efficiency, and conservation if we are to avoid catastrophic climate change.

Mary Paynter  
27220 10<sup>th</sup> Avenue South  
Des Moines WA 98198



975 Carpenter Rd NE, Suite 301  
Lacey, WA 98516

City of Tacoma  
Planning Commission

August 28, 2017

RE: Tidelands Interim Regulations

Dear Commissioners,

I am writing on behalf of the more than 47,000 member families of the Washington Farm Bureau, to share our concern about the draft Tidelands Interim Regulations currently under consideration by the Planning Commission.

This issue is important to our members because we represent 12 percent of Washington's economy and employ 164,400 workers annually. Each year 15 billion dollars in food and agricultural products are exported through Washington ports. We rely on an efficient farm to market network to move our food products to market in a timely fashion. Washington ports are an integral part of the delivery chain. As such, we need to maintain a world class transportation system and continually seek to upgrade and enhance the system now in use.

The draft Tidelands Interim Regulations are troubling for a number of reasons, but chief among our concern is the prohibition on new bulk grain terminals. It would be short sighted to preclude such facilities from potential development. All options need to be on the table to ensure Washington products can be shipped in a timely fashion from Washington ports. The regulatory process already considers the suitability and safety of potential projects, so we would ask that you give thoughtful consideration to any regulation that might needlessly impact commerce.

It is essential that maritime terminals make adequate investments to compete on a level playing field. That's why we urge you to carefully consider these draft regulations and not take action that would tie the hands of the port and in turn harm the economic viability of our farms, rural economy, and the general economic health of the state.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Stuhlmiller', with a long horizontal flourish extending to the right.

John Stuhlmiller  
Chief Executive Officer  
Washington Farm Bureau

**From:** [Sunny Thompson](#)  
**To:** [Atkinson, Stephen](#)  
**Subject:** Tacoma Tideflats  
**Date:** Friday, September 15, 2017 8:10:45 PM

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I may be too late to have you read this..thank you if you are ! I attended the hearings Wednesday night and was so impressed by the patience and attentiveness of the 6 of you..so polite and respectful, no matter how many times you heard the very same comments, or how you might have disagreed with the speaker.

I want to comment that the entire issue is representative of what we as a human community are facing all around the world. The conflict between jobs and protecting the atmosphere so that people have meaningful living wage work to do, and, that everyone has a healthy, safe, planet to live on.

It is , in the words of VP Al Gore, truly an Inconvenient Truth. My heart went out to the young men in hard hats. i too want them to have jobs here where they live. Unfortunately, it is my opinion , that we have to make a big change in the jobs we have in order to move us quickly to a sustainable energy future. Depressingly inconvenient, but nonetheless true.

Thank you for your part in this process. I hope you realize the opportunity you have to play an important role in this difficult transition time. Your children and your grandchildren will be very proud of you !

sincerely,

Sunny Thompson

## Wung, Lihuang

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**From:** Leigh Ann Zehnder <leighannsweeney@hotmail.com>  
**Sent:** Friday, September 15, 2017 6:57 PM  
**To:** Planning  
**Subject:** Tideflats protection

Hello planners!

I apologize, I'm submitting these comments in the 11th hour. My name is Leigh Ann Zehnder, I live with my husband and three young children (one of whom is 3 months old, hence the delayed email). We love our community and are so excited about a bright future for Tacoma.

I am on the board of directors for the Tacoma farmers markets and also a member of the junior league. We are deeply invested in our community and thank you for taking the time to gather input.

The following is generic, but captures my sentiments.

Thank you Planning Commission for working on a balanced approach to putting in place protections for the Tideflats.

*Scope:*

- Interim regulations should focus on pausing new AND existing fossil fuels.
  - The imminent threat is around new and expanded fossil fuel facilities.
  - This should be a 'fossil fuel' only regulation.
- Include in the pause the expansion of existing fossil fuel facilities in the Tideflats.
  - Right now, the draft regulations do not address existing fossil fuel infrastructure. With the lifting of the national ban on exports and our current federal administration's focus on increasing oil and gas production, there is a very real concern around the existing facilities expanding and turning into export terminals.

*Definitions:*

- The definition of "terminal" should include rail.

*Timing:*

- Urge the Commission to move this more quickly to the City Council.
  - The longer this takes, the more likely we are to see more proposals, which in turn cost the citizens and City more money and interfere with a strong sub-area planning process.

Thank you, Again!  
Leigh Ann Zehnder and family

Apologies for typos, sent from my mobile device

Sent from my iPhone