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Marion County Circuit Court

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5 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
6 FOR THE COUNTY OF MARION  
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8 SIERRA CLUB, a non-profit corporation,  
9 OREGON PHYSICIANS FOR SOCIAL  
10 RESPONSIBILITY, an Oregon non-profit  
11 corporation, and PETER CORNELISON, an  
12 individual,

11 Petitioners,

12 v.

13 OREGON DEPARTMENT OF  
14 ENVIRONMENTAL QUALITY, an agency of  
15 the State of Oregon,

15 Respondents.

Case No. 14C-18402

PETITION FOR REVIEW

(Administrative Procedures Act – Petition for  
Review of Agency Order)

NOT SUBJECT TO MANDATORY  
ARBITRATION

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19  
20 Come now, Petitioners Sierra Club, Oregon Physicians for Social Responsibility, and  
21 Peter Cornelison for a claim of relief against Respondent Oregon Department of Environmental  
22 Quality (“DEQ”) pertaining to DEQ’s order issuing the Air Contaminant Discharge Permit  
23 (“ACDP”) to Ambre Energy, dba Coyote Island Terminal, LLC (“Ambre”), for the construction  
24 and operation of a coal-export terminal in Boardman, Oregon. Petitioners allege as follows:  
25

PETITION FOR REVIEW-1

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**INTRODUCTION**

1.

Petitioners bring this Petition for Review to challenge DEQ’s issuance of Air Contaminant Discharge Permit (“ACDP”) number 25-0015-ST-01 to Ambre, which allows construction and operation, and discharge of air pollution from the Coyote Island coal-export terminal in Boardman, Oregon.

2.

Petitioners request the Court’s review because the permit is inconsistent with state and federal laws, regulations, and standards designed to protect air quality and public health.

**PARTIES**

3.

Petitioner Sierra Club is a California non-profit corporation with its principal business office located in San Francisco, California.

4.

Petitioner Oregon Physicians for Social Responsibility (“Oregon PSR”) is an Oregon non-profit corporation with its principal place of business located in Multnomah County, Oregon.

5.

Petitioner Peter Cornelison is a member of the non-profit corporation Friends of the Columbia Gorge, and is an individual residing in Hood River County, Oregon.

6.

Sierra Club has over 600,000 members nationwide, including nearly 16,000 who reside in Oregon. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the

1 Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems;  
2 to educating and enlisting humanity to protect and restore the quality of the natural and human  
3 environment; and to using all lawful means to carry out these objectives. Sierra Club's concerns  
4 encompass a variety of environmental issues in Oregon and beyond, including an interest in  
5 protecting Oregon communities, air, waterways, and the broader environment.

6 7.

7 Sierra Club's members depend, at least in part, upon Sierra Club to provide them with  
8 opportunities to be involved through outings in the outdoors, communication with elected and  
9 other public officials, and regular communication about issues of concern to the membership.

10 8.

11 Many of Sierra Club's members and staff enjoy recreational, aesthetic, and scientific  
12 activities, including canoeing, kayaking, biking, hiking, sightseeing, and wildlife observation in  
13 areas that will be affected by the transport of coal, by rail, barge and ocean going vessels,  
14 through Oregon, including the Columbia River Gorge National Scenic Area (the "Gorge"), as a  
15 direct result of DEQ's action granting an ACDP for the Coyote Island Terminal.

16 9.

17 Sierra Club has been working for years in Oregon to preserve and improve air and water  
18 quality, to reduce activities that result in climate change, and to promote clean energy. This  
19 work has included actively participating in administrative decisions that impact the environment,  
20 and working closely with governments, businesses and other institutions to promote  
21 environmentally sound policies. Sierra Club staff and members have been actively involved in  
22 the public process around DEQ's action granting an ACDP for the Coyote Island Terminal,  
23 including comments to the agency, organizing its members to attend meetings and to testify  
24  
25

1 before the agency, and educating its members about the proposal.

2 10.

3 Oregon Physicians for Social Responsibility works to protect human life from the gravest  
4 threats to health and survival by striving to end nuclear threats, advance environmental health,  
5 protect the climate and promote peace. Oregon PSR is an organization of health professionals  
6 and concerned individuals working collaboratively with community partners to educate and  
7 advocate for societal and policy change that protects human health at the local, state, national  
8 and international levels. In furtherance of this purpose, Oregon PSR has been interested in  
9 preserving and improving environmental quality for many decades. Oregon PSR maintains an  
10 active and continuous presence in the state of Oregon, as it has since it was founded in or about  
11 1980.

12 11.

13 Members, staff, and the Board of Directors of Oregon PSR regularly travel throughout,  
14 and use and enjoy the areas that will be affected by the transport of coal, by rail, barge and ocean  
15 going vessel, through the Gorge and Columbia River basin as a direct result of DEQ's action  
16 granting an ACDP for the Coyote Island Terminal. Effects from DEQ's action include increased  
17 risk of travel delays, vehicle and pedestrian injuries, and increased exposure to air, water and  
18 noise pollution along transport corridors. The project will also affect Oregon PSR's members,  
19 staff and Board of Directors because increased exposure to air, water and noise pollution causes  
20 or contributes to numerous health problems. Oregon PSR and its members have been vigorously  
21 involved in the public process around DEQ's action granting an ACDP for the Coyote Island  
22 Terminal, including directly commenting to the agency, organizing its members to attend  
23 meetings and testify before the agency, and informing its members about the health risks of the  
24  
25

1 proposal.

2 12.

3 Sierra Club and Oregon PSR have been actively working to prevent the construction and  
4 operation of the Coyote Island Terminal because of the adverse impacts of the project, as  
5 described above. Sierra Club and Oregon PSR have invested significant resources to monitor the  
6 permitting process, educate and engage the public, and communicate with DEQ (and other state  
7 and federal agencies) regarding their concerns about the impacts of the project on human health  
8 and the environment. Specifically, Oregon PSR and Sierra Club have engaged and continue to  
9 engage in the following: 1) filing requests for, and reviewing responses to, state and federal  
10 public records regarding the project; 2) receiving and responding to phone calls from the public  
11 regarding the project and its impacts; 3) testifying at DEQ and other local, state and federal  
12 agency public hearings about the project; 4) hosting public presentations on air quality, climate  
13 change and the impacts of the project; 5) mobilizing the public to provide input to decision  
14 makers on the project via emails, newsletters, social media and other channels; and 6)  
15 communicating with mass media and public officials regarding the impacts of the project.  
16

17 13.

18 Petitioners Sierra Club and Oregon PSR have relied upon the influence of their  
19 organizations in seeking public participation in the Coyote Island Terminal ACDP process, and  
20 have similarly relied upon the interest of the public to influence elected and public officials to  
21 deny the ACDP.  
22

23 14.

24 The members, volunteers, and staff of Petitioners Sierra Club and Oregon PSR are  
25 adversely affected and aggrieved by DEQ's issuance of the Coyote Island Terminal ACDP

1 because the permit illegally allows the construction and operation of a coal export facility that  
2 will import over eight million tons per year of coal into and through Oregon along the Columbia  
3 River. DEQ's illegal issuance of the permit threatens to harm Petitioners' substantial interests in  
4 air and water quality, climate, transportation efficiency, recreation and aesthetics along the  
5 Columbia River affected by the construction of Coyote Island Terminal, and it threatens to waste  
6 Petitioners' resources and interfere with Petitioners' ability to influence future decisions  
7 regarding environmental issues in Oregon.

8 15.

9 Petitioners Sierra Club and Oregon PSR are adversely affected and aggrieved by DEQ's  
10 issuance of the Coyote Island Terminal ACDP because their respective organizational interests  
11 have been undermined by DEQ's actions. As organizations incorporated, in part, for the express  
12 purpose of protecting the natural environment, Petitioners have an interest in ensuring that any  
13 permitting decision affecting air quality in Oregon is made in accordance with applicable state  
14 and federal laws. These organizational interests have been injured by DEQ's issuance of the  
15 Coyote Island Terminal ACDP because the ACDP authorizes the construction and operation of a  
16 facility that will enable the transport and transfer of over eight million tons of coal per year  
17 through Oregon along the Columbia River. This transport and transfer of coal will result in new  
18 or increased emissions of air pollution, and will contribute to climate change. The issuance of an  
19 ACDP to Coyote Island Terminal may limit the ability of Petitioners to attract new members,  
20 retain current members, and to obtain financial donations, because when DEQ issues permits like  
21 the ACDP, these actions suggest to the public that the organizations are failing to achieve their  
22 missions and goals.  
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25

16.

1  
2 Petitioner Peter Cornelison is a member of and works for Friends of the Columbia Gorge.  
3 Mr. Cornelison spends time in areas directly affected by the construction and operation  
4 authorized by the Coyote Island Terminal ACDP. He frequently travels to many communities  
5 along the Columbia River Gorge, including the Port of Morrow and Boardman, for both his job  
6 and personal recreational activities. Mr. Cornelison has worked towards the protection of  
7 Oregon's environment for more than 10 years, and has participated in DEQ public sessions about  
8 Ambre's air and water permits on his own behalf and on behalf of Friends of the Columbia  
9 Gorge regarding the issues set forth in this Petition.

10  
11 17.

12 Petitioner Cornelison travels, kayaks, windsurfs, and observes wildlife in and around  
13 areas that are affected by DEQ's challenged action. His aesthetic and recreational interest in  
14 these areas will be harmed during these activities by the noise, and air and water pollution from  
15 coal trains, tugs and barges; and the unpleasant industrial appearance of the Coyote Island  
16 Terminal. Mr. Cornelison's ability to use and enjoy the areas for various activities will be  
17 significantly harmed by the construction and operation of the Coyote Island Terminal as  
18 authorized by the ACDP.

19  
20 18.

21 Individually and collectively, Petitioners' interests are and will continue to be adversely  
22 affected and aggrieved by DEQ's actions unless the requested relief is granted.

23  
24 19.

25 Respondent Oregon Department of Environmental Quality ("DEQ") is an agency of the  
State of Oregon, and has its principal place of business in Multnomah County, Oregon. DEQ is

1 responsible for issuance of permits to construct and operate sources of air pollution in Oregon.

2 **LEGAL BACKGROUND**

3 20.

4 Petitioners bring this Petition under the Oregon Administrative Procedures Act (“APA”).  
5 The APA allows that “any person adversely affected or aggrieved by an order or any party to an  
6 agency proceeding is entitled to judicial review of a final order, whether such order is affirmative  
7 or negative in form.” ORS § 183.480(1).

8 21.

9 An order “means any agency action expressed orally or in writing directed to a named  
10 person or named persons, other than employees, officers or members of an agency . . . . ‘Order’  
11 includes . . . [a]gency action under ORS 468B.050 to issue a permit.” ORS § 183.310(6)(a). A  
12 final order is “final agency action expressed in writing.” ORS § 183.310(6)(b). A final order  
13 “does not include any tentative or preliminary agency declaration or statement that: [p]recedes  
14 final agency action; or [d]oes not preclude further agency consideration of the subject matter of  
15 the statement or declaration.” *Id.*

16 22.

17 Jurisdiction “for judicial review of orders other than contested cases is conferred upon the  
18 Circuit Court for Marion County[.]” ORS § 183.484(1).

19 23.

20 This Court may set aside the agency action if “the agency has erroneously interpreted a  
21 provision of law and that a correct interpretation compels a particular action.” ORS §  
22 183.484(5)(a). The Court may also set aside the permit if the agency has exercised discretion  
23 outside of the range of discretion afforded it by law, inconsistent with the agency’s own rules or  
24  
25



1 practices without explanation, or in violation of the constitution or statutes. ORS §  
2 183.484(5)(b). Finally, this Court can set aside the permit if DEQ's action "is not supported by  
3 substantial evidence in the record. Substantial evidence exists to support a finding of fact when  
4 the record, viewed as a whole, would permit a reasonable person to make that finding." ORS §  
5 183.484(5)(c).

6 24.

7 The United States Congress passed the Clean Air Act "to protect and enhance the quality  
8 of the Nation's air resources so as to promote the public health and welfare and the productive  
9 capacity of its population[.]" 42 U.S.C. § 7401(b)(1). The Clean Air Act establishes various  
10 programs to meet its objectives. Components of the Act relevant to this case include: (1) the  
11 National Ambient Air Quality Standards ("NAAQS"); and the (3) Prevention of Significant  
12 Deterioration ("PSD") Program.

13 25.

14 NAAQS are concentrations that the United States Environmental Protection Agency  
15 ("EPA") sets for "criteria pollutants" under the Clean Air Act to protect human health and  
16 welfare. 42 U.S.C. § 7409. Criteria pollutants are pollutants that EPA has determined "cause or  
17 contribute to air pollution which may reasonably be anticipated to endanger public health or  
18 welfare[.]" 42 U.S.C. § 7408(a)(1)(A). To date, EPA has made "endangerment findings" for six  
19 pollutants: particulate matter (PM, PM10, and PM2.5), ground-level ozone (O<sub>3</sub>), sulfur dioxide  
20 (SO<sub>2</sub>), nitrogen oxides (NO<sub>x</sub>), lead (Pb), and carbon monoxide (CO). When EPA makes an  
21 endangerment finding, EPA must then develop "air quality criteria" for that pollutant. 42 U.S.C.  
22 § 7408(a)(2). The criteria are intended to accurately reflect the latest scientific knowledge about  
23 effects on public health and welfare that can be expected from various levels of that pollutant in  
24  
25

1 the ambient air. *Id.* Once the criteria are established, EPA must set NAAQS to protect human  
2 health and welfare. 42 U.S.C. § 7409. Thus, the NAAQS are upper-limit concentrations of air  
3 pollutants that EPA has deemed will protect public health and welfare. The heart of the Clean  
4 Air Act is to ensure that all areas of the United States achieve these minimal levels of air quality.

5 26.

6 The Clean Air Act also contains specific provisions to ensure that areas with relatively  
7 clean air are protected from industrial expansion that will compromise air quality. 42 U.S.C. §§  
8 7470–7492. Collectively, these provisions are known as the prevention of significant  
9 deterioration (“PSD”) program.

10 27.

11 The PSD program is designed to protect public health and welfare from actual or  
12 potential adverse effects that may reasonably be anticipated to occur from air pollution in areas  
13 that are attaining the NAAQS. 42 U.S.C. § 7470(1). Further, the PSD program is intended to  
14 ensure that economic growth will occur in a manner consistent with the preservation of existing  
15 clean air resources, to assure that emissions from any source will not interfere with any portion  
16 of a PSD implementation plan for any other state, and to assure that any decision to permit  
17 increased air pollution is made only after careful evaluation of all the consequences of such a  
18 decision and after public participation in the decision making process. 42 U.S.C. §§ 7470(3)-(5).

19 28.

20 The PSD program prohibits the construction, modification, and subsequent operation of a  
21 new source in an attainment area unless the facility has received a permit that satisfies Section  
22 165 of the Clean Air Act, 42 U.S.C. § 7475. 42 U.S.C. § 7475(a). The program applies when a  
23  
24  
25

1 proposed stationary source emits, or has the potential to emit, a specified amount of an air  
2 pollutant per year. 42 U.S.C. § 7479(1).

3 29.

4 The Clean Air Act is a “cooperative federalism” scheme. After public notice and  
5 comment, each state must adopt and submit to EPA for approval a state implementation plan (the  
6 “SIP”) that provides for the attainment and maintenance of the NAAQS promulgated by EPA.  
7 42 U.S.C. § 7410(a). The Clean Air Act and EPA’s regulations at 40 C.F.R. Part 51, set forth  
8 detailed requirements that SIPs must satisfy to obtain EPA approval. Among other requirements,  
9 SIPs must include enforceable emissions limitations and other control measures, specific  
10 schedules and timetables for compliance with NAAQS, a plan for monitoring and analyzing air  
11 quality data, and a program for regulating the construction or modification of stationary sources  
12 of air pollution. 42 U.S.C. § 7410(a)(2). Once approved by EPA, after notice and comment,  
13 state regulations comprising the SIPs are incorporated by reference at 40 C.F.R. Part 52. In  
14 Oregon, agencies are required to “attempt to adopt rules that correspond with equivalent federal  
15 laws and rules”, except under specific circumstances. ORS § 183.332. If approved by EPA,  
16 these programs become the federal law of air pollution control in that state. On May 31, 1972,  
17 EPA approved initial SIPs for 50 states, including Oregon. 37 Fed. Reg. 10,842 (May 31, 1972).  
18 Since 1972, Oregon has submitted numerous SIP revisions.

19 30.

20 The Oregon SIP declares that the Oregon Environmental Quality Commission (“EQC”)  
21 shall achieve “full compliance with ambient air standards at the earliest possible date.” OAR  
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1 340-202-0050.<sup>1</sup> Oregon also has a duty under Section 110 of the Clean Air Act to implement,  
2 maintain and enforce the NAAQS. 42 U.S.C. § 7410. This obligation includes the duty to  
3 regulate the construction of new sources to “assure that national ambient air quality standards are  
4 achieved....” 42 U.S.C. § 7410(a)(2)(C). In addition, Oregon has a duty to prohibit air pollution  
5 emissions in the state that will contribute to poor air quality in neighboring states, such as  
6 Washington. 42 U.S.C. § 7410(a)(2)(D)(i)(I)-(II).

7 31.

8 The SIP also specifies applicable ambient air quality standards in Chapter 340, Division  
9 202 of the Oregon Administrative Rules (OAR). The ambient air quality standards for  
10 particulate matter (PM), PM10, and PM2.5 are found in OAR 340-202-0060. The PM2.5  
11 standards are equivalent to the 2006 NAAQS. 71 Fed. Reg. 61144 (Oct. 17, 2006). In 2012,  
12 EPA revised the annual PM2.5 NAAQS. 78 Fed. Reg. 3086 (Jan. 15, 2013). The ambient air  
13 quality standards for NO<sub>2</sub> are found in OAR 340-202-0100. DEQ issued a Notice of Proposed  
14 Rulemaking on July 15, 2013, indicating that it is amending OAR 340-202-0100 regulations to  
15 include the 1-hour NO<sub>2</sub> NAAQS in effect since April 12, 2010. This NAAQS is attained when  
16 the 3-year average of the 98<sup>th</sup> percentile of daily maximum 1-hour NO<sub>2</sub> concentrations does not  
17 exceed 100 ppb (or 188 ug/m<sup>3</sup>). 75 Fed. Reg. 6474 (Feb. 9, 2013).

18 32.

19 The Oregon SIP also contains the state’s federally approved ACDP and PSD permitting  
20 programs. OAR 340 Division 216 (ACDP) & OAR 340 Division 224 (PSD). The applicability  
21  
22

23  
24 <sup>1</sup> All references to Oregon Administrative Rules (OAR) in Chapter 340 are references to the currently promulgated  
25 and codified Oregon Administrative Rules, which may differ from the federally-approved SIP version of the Oregon  
Administrative Rules, available at:  
<http://yosemite.epa.gov/r10/AIRPAGE.NSF/0/190c1fe31b30951588256cdb0070ed48?OpenDocument>. Petitioners  
will note parallel citations where discrepancies exist between the two OAR versions.

1 of the permitting and PSD programs is determined by the potential to emit of a “major source” of  
2 air pollution. OAR 340-200-0020(55).<sup>2</sup> Potential to emit is defined, in relevant part, as follows:

3 ... the lesser of:

4 (a) The capacity of a stationary source; or

5 (b) The maximum allowable emissions taking into consideration any physical or  
6 operational limitation, including air pollution control equipment and restrictions  
7 on hours of operation or on the type or amount of material combusted, stored, or  
8 processed, if the limitation is enforceable by the Administrator.

9 OAR 340-200-0020(100).<sup>3</sup> Meanwhile, “[s]tationary source means any building, structure,  
10 facility, or installation at a source that emits or may emit any regulated air pollutant.” OAR 340-  
11 200-0020(141).<sup>4</sup>

12 33.

13 In Oregon, “fugitive emissions” are included in a source’s potential to emit. OAR 340-  
14 224-0100. Fugitive emissions are defined as “emissions of any air contaminant which escape to  
15 the atmosphere from any point or area that is not identifiable as a stack, vent, duct, or equivalent  
16 opening.” OAR 340-200-0020(58).<sup>5</sup>

17 34.

18 In Oregon, “secondary emissions” are excluded when determining a source’s potential to  
19 emit. OAR 340-200-0020(100)(c).<sup>6</sup> “Secondary emissions” are included in PSD emission  
20

21  
22  
23 <sup>2</sup> SIP-approved OAR 340-200-0020(67).

24 <sup>3</sup> SIP-approved OAR 340-200-0020(91).

25 <sup>4</sup> SIP-approved OAR 340-200-0020(131).

<sup>5</sup> SIP-approved OAR 340-200-0020(54).

<sup>6</sup> SIP-approved OAR 340-200-0020(91)(c).

1 calculations only once the “major source” threshold has been met by primary emissions. OAR  
2 340-224-0100. “Secondary emissions” are defined as “emissions that are a result of the  
3 construction and/or operation of a source or modification, but that do not come from the source  
4 itself.” OAR 340-200-0020(109).<sup>7</sup> “Secondary emissions may include, but are not limited to: []  
5 emissions from ships and trains coming to or from the facility[.]” OAR 340-200-0020(109)(a).<sup>8</sup>

6 35.

7 The Oregon SIP provides that if proposed new sources may interfere with attainment and  
8 maintenance of air quality standards, DEQ has grounds to prohibit the construction of such  
9 sources. OAR 340-202-0050(2).

## 10 **FACTUAL BACKGROUND**

11 36.

12 The Coyote Island Terminal ACDP authorizes the construction and operation of a coal  
13 transfer and storage facility that will emit pollutants including nitrogen oxides (NO<sub>x</sub>), sulfur  
14 dioxide (SO<sub>2</sub>), and fine particulates (PM<sub>2.5</sub> and PM<sub>10</sub>).

15 37.

16 NO<sub>x</sub> are highly reactive gasses that can cause respiratory problems such as asthma  
17 attacks, respiratory tract syndrome, bronchitis, and decreased lung function. In addition to public  
18 health concerns, NO<sub>x</sub> emissions cause nitrogen deposition, which may cause soil acidification,  
19 water acidification, and eutrophication. These problems, in turn, reduce water quality and may  
20 render water unfit for aquatic life or human consumption. NO<sub>x</sub> also contributes to visibility  
21 impairment, global warming, acid rain, formation of ground-level ozone and formation of toxic  
22 chemicals. NO<sub>x</sub> is also a precursor chemical to fine particulate matter. The Columbia River  
23  
24

25 <sup>7</sup> SIP-approved OAR 340-200-0020(100).

<sup>8</sup> SIP-approved OAR 340-200-0020(100)(a).

1 Gorge National Scenic Area is particularly impaired by NO<sub>x</sub> pollution. The Columbia River  
2 Gorge National Scenic Area ranked 6th in the country for poorest visibility of Scenic Areas.  
3 Over the past 17 years, the Forest Service has documented that visibility impairment occurs on at  
4 least 95% of the days that have been monitored. The impacts of NO<sub>x</sub> on Oregon's protected  
5 parks and wilderness areas, including the Columbia River Gorge, have been well documented.  
6 Metals, sulfur and nitrogen concentrations in lichen tissue found in the Gorge are comparable to  
7 that found in lichen tissue sampled in urban areas. The Gorge now stands among the most  
8 polluted places in the country, including Pittsburgh and Los Angeles. Nitrogen deposition rates  
9 in the Gorge are comparable to the most polluted areas in the U.S.

10 38.

11  
12 Particulate Matter pollution also threatens human health and welfare. In fact, when  
13 reviewing the NAAQS for PM<sub>2.5</sub>, EPA found that there is no level of particulate matter  
14 pollution at which there are no human health effects. According to EPA, fine particulate matter  
15 pollution causes a variety of adverse health effects, including premature death, heart attacks,  
16 strokes, birth defects, and asthma attacks. 71 Fed. Reg. 2620, 2627–36 (Jan. 17, 2006). Even  
17 low levels of PM can cause low birth weights, damage lung function, and increase risks of heart  
18 attack and premature death. Studies reviewed by EPA revealed a linear or almost linear  
19 relationship between diseases like cancer and the amount of fine particulate matter in the ambient  
20 air. *Id.* at 2635–36. Consequently, any particulate matter contamination has adverse health  
21 effects.

22 39.

23 Coal dust is one kind of particulate matter that presents a particularly egregious threat.  
24 Coal dust contains a number of harmful elements, including: antimony, arsenic, beryllium,  
25

1 cadmium, chromium, cobalt, lead, manganese, mercury, selenium, uranium, tin, boron, copper,  
2 vanadium, molybdenum, and zinc, among others. 71 Fed. Reg. 2620, 2627–36 (Jan. 17, 2006).  
3 Coal dust causes health problems in humans, including development of lung fibrosis, lung and  
4 other cancers, and genetic damage. Coal dust, when deposited in water, can be harmful to  
5 aquatic organisms, including benthic organisms, which are food for juvenile salmonids.

6 40.

7 On or about February 3, 2012, Ambre applied for an ACDP to construct and operate a  
8 coal transfer and storage facility and a barge loading dock at the Port of Morrow in Boardman,  
9 Oregon. Ambre proposed to receive up to 8.8 million tons per year of Power River Basin coal  
10 from trains coming from the intermountain region. According to the permit application, trains  
11 will be off-loaded, and the coal will be stored before transfer to barges for shipment down the  
12 Columbia River to Port Westward. At Port Westward, the coal will be transferred to ocean-  
13 going vessels for transport to Asia. The transloading facility will be operated by Pacific  
14 Transloading, LLC, a subsidiary of Ambre Energy.  
15

16 41.

17 On or about February 14, 2012, DEQ informed Ambre that the company could construct  
18 and operate the facility without an ACDP. DEQ later determined that Ambre’s proposed facility  
19 would, in fact, require a Standard ACDP due to the facility’s potential yearly particulate matter  
20 (PM) emissions, the projection that the facility will be an air quality concern, and the need to  
21 create legally enforceable permit conditions to ensure that Ambre operates its proposed emission  
22 controls and mitigation measures. On July 26, 2012, Ambre submitted a revised ACDP  
23 application to DEQ for review.  
24  
25



42.

1  
2 On November 1, 2012, DEQ announced that it was accepting comments on Ambre's  
3 ACDP permit application and that it would hold three public hearings to answer questions and  
4 receive comments on the DEQ permit applications for the proposed facility. During the ensuing  
5 comment period, Petitioners submitted two sets of comments and evidence to DEQ: first on  
6 December 20, 2012; and later on August 12, 2013. These comments and evidence documented  
7 several flaws in the permit application and asked DEQ to delay its decision on Ambre's permit  
8 until ancillary federal processes were concluded. Further, these comments asserted that if DEQ  
9 decided that it must take action, DEQ should deny Ambre's ACDP application and issue an order  
10 prohibiting construction of the source until DEQ can issue the required PSD permit.

43.

11  
12 DEQ issued the ACDP over Petitioners' objections on February 11, 2014. On April 11,  
13 2014, Petitioners Sierra Club and Oregon PSR submitted a Petition for Reconsideration of  
14 DEQ's decision pursuant to ORS § 183.484, and OAR 137-004-0080. On May 20, 2014, DEQ  
15 denied the Petition for Reconsideration, allowing an appeal of a final agency order in other than  
16 contested cases by adversely affected and aggrieved persons. DEQ's denial is a final agency  
17 order in other than a contested case, subject to judicial review under O.R.S. § 183.484 *et seq.* and  
18 OAR 137-004-0080.

## LEGAL CLAIMS

44.

19  
20  
21  
22 In issuing the challenged ACDP number 25-0015-ST-01, DEQ erroneously interpreted a  
23 provision of law within the meaning of ORS 183.484(5)(a), acted in a manner inconsistent with  
24 state air quality laws, the Clean Air Act, implementing regulations, and prior agency practice  
25

1 within the meaning of ORS 183.484(5)(b), and acted in a manner unsupported by substantial  
2 evidence within the meaning of ORS 183.484(5)(c). DEQ acted contrary to law, erroneously,  
3 and otherwise unlawfully in one or more of the following ways:

4 (a) in issuing an ACDP that authorizes construction and operation of a source  
5 that will cause or contribute to violations of the National Ambient Air Quality Standard  
6 (NAAQS) for nitrogen dioxide (NO<sub>2</sub>) and particulate matter less than 2.5 microns in diameter  
7 (PM<sub>2.5</sub>) in violation of OAR 340-202-0100 and OAR 340-202-0060 respectively, and 42 U.S.C.  
8 § 7410. Emissions of NO<sub>x</sub> and Particulate Matter authorized by the ACDP will cause or  
9 contribute to violations of the applicable ambient air quality standards, violate Oregon DEQ's  
10 duty to regulate the construction of new sources to assure that national ambient air quality  
11 standards are achieved under 42 U.S.C. § 7410(a)(2)(C), and Oregon DEQ's duty to prohibit air  
12 pollution emissions in the state that will contribute to poor air quality in neighboring states such  
13 as Washington, 42 U.S.C. § 7410(a)(2)(D)(i)(I)-(II);

14 (b) in issuing an ACDP that authorizes construction and operation of a major  
15 source of emissions without the proper type of permit. Emissions of air pollution authorized by  
16 the ACDP will exceed the regulatory thresholds requiring an ACDP, that must meet PSD  
17 standards as required by 42 U.S.C. §§ 7475(a), 7479(1), OAR 340 Division 224. The ACDP  
18 issued by DEQ fails to satisfy PSD requirements in violation of 42 U.S.C. §§ 7470-7492;

19 (c) in excluding stationary source air emissions in calculating  
20 the Coyote Island Terminal's potential to emit in violation of OAR 340-200-0020(55), (100),  
21 (141).<sup>9</sup> DEQ erroneously calculated the facility's potential to emit excluding emissions from the  
22 source itself as secondary emissions in violation of OAR 340-200-0020(109);<sup>10</sup>  
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<sup>9</sup> SIP-approved OAR 340-200-0020(131).

1 (d) in miscalculating fugitive coal dust emissions for the Coyote Island  
2 Terminal in violation of OAR 340-200-0020(55),<sup>11</sup> OAR 340-224-0100. If calculated properly,  
3 the facility is a federal major source of particulate matter and would require a PSD permit;

4 (e) in including practically unenforceable terms and limits in the Coyote  
5 Island Terminal's ACDP in violation of OAR 340-216-0060(1)(b)(C); and

6 (f) in violating state and/or federal laws in other ways.

7 45.

8 Pursuant to ORS § 183.497, Petitioners request an award of attorneys' fees and costs  
9 incurred in this matter.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Petitioners pray that this Court, exercising its authority under ORS §§  
12 183.484, 183.486, 183.490, and 183.497:

13 (1) Declare that DEQ violated the Clean Air Act and Oregon law in issuing the  
14 Coyote Island Terminal ACDP;

15 (2) Set aside and remand DEQ's decision to issue the Coyote Island Terminal  
16 ACDP;

17 (3) Award Petitioners reasonable attorneys' fees and costs; and

18 (4) Award Petitioners such other relief as this Court deems just.

19 DATED: July 18, 2014.

20 Respectfully submitted,

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23 ALLISON LAPLANTE (OSB # 023614)

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25 <sup>10</sup> SIP-approved OAR 340-200-0020(100).

<sup>11</sup> SIP-approved OAR 340-200-0020(54).

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