No. 22O152

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,

PLAINTIFFS,

v.

STATE OF WASHINGTON,

DEFENDANT.

ON MOTION FOR LEAVE TO FILE COMPLAINT

WASHINGTON'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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INTRODUCTION

There is no reason for this Court to waste its valuable time reviewing this case. The issues raised are meritless and already being litigated in other courts, and Plaintiffs lack standing in any event.

This case involves a private company's proposal to build a massive coal export terminal in the State of Washington. Because of the size, location, and negative environmental consequences of the proposed project, various federal, state, and local permits and approvals were required. Here, Montana and Wyoming seek to challenge the denial of one permit application, claiming that denial harms them economically. But even if that speculative claim were true, the States' interests could not be vindicated in this action. The permit denial they seek to challenge would not, if granted, authorize the project to proceed. The private applicant failed to complete several other necessary steps. Most notably, because of the company's financial instability and refusal to provide information, it failed to obtain a sublease for state lands necessary for its project. The sublease decision was entirely independent of the unsuccessful application in this case. It was made by a different state agency headed by a separately elected state officer, it was extensively litigated in state court, and that denial is now final as a matter of state law. Without the sublease, which is not at issue here, the project cannot proceed. Plaintiffs' claim is thus not redressable here, which is one of several reasons why they lack standing.

Independent of the sublease, Washington's Department of Ecology, acting under authority

granted by Congress and consistent with federal and state law, denied the permit application at issue here. Its decision was based on the negative environmental consequences of the project, was affirmed by an independent state review board, and is now on review in the state courts. The private applicant separately challenged the permit decision in federal court, alleging the same facts and raising the same constitutional claims Montana and Wyoming seek to raise here. Montana and Wyoming have participated in that case as amici curiae. The federal district court ruled in Washington's favor, and the applicant's appeal is pending in the Ninth Circuit. In short, the precise issues raised here can be and are being litigated in another adequate forum.

Even if Plaintiffs had standing, and even if this Court were the only forum available, there would still be no reason for the Court to hear this case because Plaintiffs' claims are meritless. Their case is premised on the idea that Washington is "blockading" their coal, preventing them from shipping their goods to foreign markets. In reality, millions of tons of coal from Montana and Wyoming pass through Washington each year for export, and there is unused coal export capacity at existing west coast ports. The permit denial at issue here was based on valid environmental concerns specifically authorized by federal law, not discriminatory motives.

Ultimately, this case is not a dispute between States. It is about the denial of one permit application submitted by one private company. That dispute can be resolved in the litigation that already is proceeding. Nothing about this case merits the exercise of this Court's original jurisdiction.

STATEMENT

The procedural history of this case began in 2010, when a private company, Millennium Bulk Terminals-Longview, LLC, leased private property along the Columbia River in Washington and attempted to sublease adjacent aquatic lands owned by the State. Millennium began receiving and transloading shipments of coal from Montana and Wyoming on the privately owned property. App. at 13a-14a. But in seeking to sublease the State land Millennium claimed that it intended to continue using the land primarily as it was then used—for shipping alumina—with the addition of a relatively small amount of coal export. *Northwest Alloys, Inc. v. Washington State Dep't of Nat. Res.*, 10 Wash. App. 2d 169, 172-74, 447 P.3d 620 (2019), *review denied*, 194 Wash. 2d 1019 (2020). In reality, "internal . . . documents later revealed that Millennium intentionally concealed the extent of its plans for the coal export facility in order to avoid full environmental review. After Millennium's deception made national and local news, Millennium withdrew its terminal proposal." *Id.* at 174.

In 2012, "Millennium filed a revised permit application, this time disclosing the full scope of its plans for facilities on the property," namely, "to build, operate, and maintain the largest coal export terminal on the west coast, exporting 44 million metric tons of coal per year." *Id.* The proposed project would have a wide range of environmental consequences, including destroying dozens of acres of wetlands and forest habitat; adding over 1,600 huge ships to traffic on the Columbia River each year, with associated risks of accidents and fuel spills; creation of a 1.5 million ton

pile of coal, roughly 85 feet high and running the length of the National Mall, with associated dust and polluted runoff; and new mile-long coal trains traveling across Washington every hour and fifteen minutes all day and night, with associated dust, noise, traffic impacts, and risk of accidents.[1]

A project of this scale of course required a number of federal, state, and local approvals. While this case involves only a challenge to the State of Washington's denial of a permit under the Clean Water Act, Millennium also failed to secure other independent approvals without which the project cannot proceed, which is key to understanding the project's current status.

A. The Company Seeking to Build the Coal Export Terminal Fails to Obtain a Crucial Lease Because of Financial Insolvency and Refusal to Provide Financial Information

Millennium proposed to build its massive coal export facility on land that was partly private property and partly state-owned aquatic lands leased from the state. *Northwest Alloys, Inc.*, 10 Wash. App. 2d at 173-74. Millennium sought to sublease the state-owned aquatic lands, which required the consent of

[1] Letter to Senators John Barrasso and Tom Carper, from Maia Bellon, Director, Washington State Dep't of Ecology at 1-2 (Aug. 15, 2018), https://ecology.wa.gov/DOE/files/2b/2bdeb87c-7b59-428f-b7b1-01dcc6c8dac2.pdf.

the Washington Department of Natural Resources. *Northwest Alloys, Inc.*, 10 Wash. App. 2d at 174. The Department is headed by the Commissioner of Public Lands, a statewide elected official independent of the Governor. *See* Wash. Const. art. III, §§ 1, 23.

As part of its due diligence, and consistent with the terms of the lease, the Department of Natural Resources requested information from Millennium regarding the company's financial condition, ability to fulfill its obligations under the sublease, and protocols to protect the leased state-owned aquatic lands from the release of hazardous substances. *Northwest Alloys, Inc.*, 10 Wash. App. 2d at 175-76. Millennium repeatedly failed or refused to provide information the Department requested. *Id.* at 177-79. Meanwhile, a major downturn in the coal market caused Millennium's financial condition to nosedive. *See id.* at 174-75. Millennium had been owned by two parent companies, but one was forced to sell its stake in Millennium to a creditor, Lighthouse Resources, Inc. (Lighthouse), and the other went bankrupt and also sold its stake to Lighthouse. *Id.* After this turmoil, the Department requested from Millennium such basic information as a balance sheet and business plan, which Millennium never provided. *Id.* at 178-79.

Millennium's financial condition and refusal to provide information led the Department to question whether Millennium could fulfill the terms of the sublease and its environmental protection obligations; when Millennium was unable to satisfy those concerns, the Department withheld its consent to Millennium's sublease of the site. *Id.* at 179-81. The Department's refusal to consent to the sublease was

upheld on appeal by the Washington Court of Appeals. *Northwest Alloys, Inc.*, 10 Wash. App. 2d at 181-92. The Washington Supreme Court denied Millennium's petition for review. *Id.*, 194 Wash. 2d 1019. Without the sublease, Millennium's proposed coal export terminal cannot be built. *See* Wash. Rev. Code § 79.105.110 (authorization must be obtained from the Department of Natural Resources before leasing State-owned aquatic lands); *see also Northwest Alloys, Inc.,* 10 Wash. App. 2d at 185 (the Department of Natural Resources is "vested with the discretionary, administrative responsibility to reject a bid to lease state lands as the interests of the State or affected trust require").

Millennium's parent company, Lighthouse, brought an action in federal court challenging the sublease denial, naming as the defendant the Commissioner of Public Lands. On summary judgment, the District Court dismissed the claim, ruling that the Commissioner is immune from suit under the Eleventh Amendment for her management decisions regarding the state-owned aquatic lands at issue, under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), because the relief Lighthouse sought—requiring the Department to approve the sublease—was "'close to the functional equivalent of [a] quiet title [action] in that substantially all benefits of ownership and control would shift' from Washington to a private company for the life of the sub-lease." Order on Defendant Hilary Franz's Motion for Summary Judgment Under the Eleventh Amendment at *5, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 5264334

(W.D. Wash. Oct. 23, 2018) (alterations in original) (quoting *Coeur d'Alene Tribe of Idaho,* 521 U.S. at 282). "It would force the state to accept structures on its own land [and] functionally prevent Washington State's officers from exercising their authority over Washington's sovereign lands." *Id.* (alteration ours). Lighthouse's appeal is pending. *Lighthouse Res., Inc. v. Inslee*, No. 19-35415 (9th Cir.).

B. The County Where the Project Would Be Located Denies a Necessary Permit Because the Project "Conflicts with Virtually Every one of the County's Environmental Policies"

In 2016, Millennium applied to Cowlitz County, Washington for a Shoreline Substantial Development Permit and a conditional use permit, as required under Washington's Shoreline Management Act of 1971 (SMA), Wash. Rev. Code 90.58. The Cowlitz County hearing examiner, who is entirely independent of Washington's Governor, denied the application, concluding that (1) Millennium failed to propose reasonable mitigation for any of the unavoidable, significant adverse environmental impacts identified in the Final Environmental Impact Statement (FEIS); and (2) the project's failure to mitigate "conflicts with virtually every one of the County's environmental policies" and did not satisfy the requirements of the SMA and the County's Shoreline Management Plan adopted pursuant to the SMA. *Millennium Bulk Terminals-Longview, LLC v. Washington*, No. 52215-2-II, 2020 WL 1651475, at *3-4 (Wash. Ct. App. Mar. 17, 2020) (unpublished). Millennium appealed the hearing examiner's decision to the Shoreline Hearings Board, an independent

state board established to hear administrative appeals of local decisions regarding applications for substantial development permits, conditional use permits, and variance permits under the SMA. Wash. Rev. Code §§ 90.58.170-.185. The Board upheld the hearing examiner's decision, and the Washington Court of Appeals affirmed. *Millennium*, 2020 WL 1651475, at *4-11. On April 16, 2020, Millennium filed a petition for review in the Washington Supreme Court, which remains pending.

C. The State Department of Ecology Denies the Clean Water Act Permit at Issue in This Action for Reasons Unrelated to Greenhouse Gas Emissions

Also in 2016, Millennium submitted an application for a Section 401 water quality certification, required under the Clean Water Act, 33 U.S.C. § 1341. Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment at *2, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018). In September 2017, the State Department of Ecology denied the application on two grounds. First, the FEIS issued in April 2017—which Millennium did not timely appeal—identified nine environmental resource areas that would suffer unavoidable and significant adverse environmental impacts from the construction and operation of the proposed terminal. *Id.* These harms included increased vessel accidents on the Columbia River, increased cancer risk in the community surrounding the export terminal, blocking access to treaty-protected tribal fishing sites, increased rail accidents, and serious traffic delays at several rail crossings near

the site. *See* Plfs.' App. C at 16-33 (Order Denying Section 401 Water Quality Certification at 4-15). The Department concluded that allowing those environmental impacts would conflict with the Washington State Environmental Policy Act, Wash. Rev. Code 43.21C. Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment at *2, *Lighthouse Res. Inc.*, 2018 WL 6505372. Second, Millennium did not meet its burden to provide the required "reasonable assurance" that the proposed terminal would meet applicable water quality standards. Wash. Rev. Code 43.21C.

Millennium appealed the Department's denial to the Pollution Control Hearings Board, a state board established to provide independent administrative review of certain permit decisions, including decisions regarding Section 401 certification applications.[2] Wash. Rev. Code 43.21B. The Board affirmed the denial in August 2018. Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment at *2, *Lighthouse Res. Inc.*, 2018 WL 6505372. The Board's decision affirming the permit denial became final when Millennium did not timely perfect its petition for judicial review of the Board's decision, although a collateral challenge to the Board's decision remains pending in Cowlitz County Superior Court (Cause No. 18-2-00994-5).

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[2] Millennium also appealed the denial to Cowlitz County Superior Court, which dismissed the case for failure to exhaust administrative remedies. Order Granting Motion to Dismiss, *Millennium Bulk Terminals-Longview v. Ecology*, Cowlitz County Superior Ct. No. 17-2-01166-08 (Mar. 3, 2018).

Meanwhile, in the same federal court action in which Lighthouse challenged the sublease denial on behalf of Millennium, Lighthouse—joined by BNSF Railway Company—also challenged the denial of the Section 401 certificate, raising the same claims that Montana and Wyoming now assert: alleged violations of the Commerce Clause and Foreign Commerce Clause, along with others. [Lighthouse] Complaint for Declaratory and Injunctive Relief, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 316729 (W.D. Wash. Jan. 3, 2018) (*see* ¶¶ 224-39 (Count I—Dormant Foreign Commerce Clause), ¶¶ 240-48 (Count II—Dormant Interstate Commerce Clause)); [BNSF] Complaint in Intervention for Declaratory and Injunctive Relief, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 8112564 (W.D. Wash. June 28, 2018) (*see* ¶¶ 99-109 (Count II—Foreign Commerce Clause), ¶¶ 110-18 (Count III—Interstate Commerce Clause)).

The District Court granted summary judgment to the State on BNSF's Foreign Affairs Doctrine Claim. Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment on BNSF Foreign Affairs Doctrine Claim, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2019 WL 1436846 (W.D. Wash. Apr. 1, 2019). The court denied the parties' cross motions for summary judgment on the other issues, ruling that the Pollution Control Hearings Board's findings and decisions affirming the denial of the Section 401 permit are entitled to preclusive effect under the Full Faith and Credit Act, 28 U.S.C. § 1738, and *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966); and under the doctrine of collateral

estoppel. Order Staying Case, *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2019 WL 1572605, at *1-2 (W.D. Wash. Apr. 11, 2019). Noting that the Board's decision had been appealed in state court, and finding the elements of *Pullman* abstention met, the District Court stayed the case until the state court proceedings are concluded. *Id.* at *3-4. Lighthouse did not wait for state court proceedings to conclude, however, and instead filed the appeal, referenced above, now pending in the Ninth Circuit. *Lighthouse Res., Inc. v. Inslee*, No. 19-35415 (9th Cir.).

ARGUMENT

A. This Dispute Does Not Require Exercise of the Court's Original Jurisdiction

This Court has long recognized that its authority to adjudicate original disputes between States is of a "delicate and grave [] character," not to be exercised "save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). Such suits ask the Court to exercise its "extraordinary power under the Constitution to control the conduct of one state at the suit of another[.]" *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Original jurisdiction cases also burden the Court's resources, require it to assume the role of fact-finder, and constrain its ability to exercise its appellate jurisdiction to address questions of national importance arising in cases that have proceeded through the lower courts in the ordinary course. *See Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498-99 (1971).

Accordingly, the Court has "said more than once that [its] original jurisdiction should be exercised only 'sparingly.'" *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992); *accord Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981)). Original jurisdiction "will not be exerted in the absence of absolute necessity." *Alabama v. Arizona*, 291 U.S. 286, 291 (1934); *accord Louisiana*, 176 U.S. at 15.

The Court looks to two factors in determining whether to exercise its original jurisdiction. First, the Court considers "the nature of the interest of the complaining State" and, in particular, the "seriousness and dignity of the claim." *Mississippi*, 506 U.S. at 77 (internal quotation marks omitted). Second, the Court considers "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Both factors here counsel strongly against the exercise of original jurisdiction.

1. Plaintiffs ask the Court to exercise original jurisdiction over a private grievance

In applying the first factor—"the nature of the interest of the complaining State" and the "seriousness and dignity of the claim" *Mississippi*, 506 U.S. at 77 (internal quotation marks omitted)—this Court has set a high bar. "Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by

clear and convincing evidence." *Maryland*, 451 U.S. at 736 n.11 (quoting *New York*, 256 U.S. at 309). The Court's original jurisdiction is appropriate only in cases in which a State's "sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam).

This case is not appropriate for the Court's original jurisdiction because, at its core, it is a challenge to the denial of a private company's permit application to build a privately owned project. That project, according to the Final Environmental Impact Statement (which is no longer subject to appeal), would occupy and adversely impact state-owned aquatic lands and result in other unavoidable and significant adverse environmental impacts within the State of Washington. The denial of a Section 401 certificate for a project that fails to meet the criteria for issuance of that certificate does not directly implicate any other State's sovereign or quasi-sovereign interests. This case is not one requiring the exercise of this Court's original jurisdiction as "a substitute for the diplomatic settlement of controversies between sovereigns[.]" *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923). "[I]f, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated." *Pennsylvania*, 426 U.S. at 665; *see also Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976).

The subject matter of this proposed Complaint contrasts sharply with those "sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." Stephen M. Shapiro et al., *Supreme Court Practice* 622 (10th ed. 2013). Those disputes provide "the paradigm subject matter for original jurisdiction cases." Vincent L. McKusick, *Discretionary Gate-keeping: the Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 198 (1993). In boundary cases, each State relies on a competing but inconsistent claim to territory, reflecting their status as sovereigns in our federalist system. *E.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838). Similarly, when two States litigate over a finite resource in an interstate watercourse, the Court addresses mutually inconsistent sovereign claims to water. *E.g.*, *Colorado v. New Mexico*, 467 U.S. 310 (1984). Such cases, which involve conflicts between competing state sovereign powers, are vastly different from this case, where the Plaintiff States seek to take up the cause of a disappointed private project proponent who failed to meet established, neutral permit requirements in another State.

2. The private dispute at issue here already is in litigation in state and federal court

The second factor the Court considers is "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi*, 506 U.S. at 77. This alternative forum need not be one in which the States themselves could be opposing parties; rather,

the question is whether the legal issues can be adjudicated as readily—or more readily—in the other forum. *Arizona*, 425 U.S. at 796-97 (denying original jurisdiction because private parties "raise[d] the same constitutional issues" in a state court proceeding). This factor reflects the Supreme Court's central role as appellate "overseer[]" rather than as a tribunal of first resort. *Ohio*, 401 U.S. at 498. In applying this factor, the Court has "'substantial discretion to make case-by-case judgments as to the practical necessity'" of its review. *Mississippi*, 506 U.S. at 76 (quoting *Texas v. New Mexico*, 462 U.S. 554, 570 (1983)). This factor weighs in favor of declining jurisdiction here.

The legal issues the Plaintiff States seek to present can be resolved in suits brought by the private applicant. Indeed, they already are being litigated by the private applicant. Millennium and its parent company, Lighthouse, have filed a multitude of lawsuits to challenge the permit decisions made in this case. As summarized above, the precise claims Montana and Wyoming bring forward now—alleged violations of the Commerce Clause and the Foreign Commerce Clause—are raised in the case Lighthouse filed in federal district court in 2018. Those claims are pending.

Thus, there is another forum "where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). The questions presented are—and more appropriately should be—litigated in the

lower courts, subject to this Court's usual appellate review if warranted.[3]

B. The Plaintiff States Lack Standing

To establish standing, the Plaintiff States must show that they have been harmed because Washington denied a Section 401 certificate to Millennium, and that this Court can redress that harm. *See Maryland*, 451 U.S. at 735-36 ("In order to constitute a proper 'controversy' under our original jurisdiction, 'it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.'" (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). Given that

[3] Where litigation in the lower courts is an alternative means for resolving a dispute, the Court often has declined jurisdiction—even in cases that, unlike this one, "plainly present[ed] important questions of vital national importance." *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112-14 (1972) (declining to accept case in part because of "the availability of the federal district court as an alternative forum"); *see, e.g.*, *Arizona*, 425 U.S. at 796-97 (declining jurisdiction over constitutional challenge to electrical energy tax, where taxed Arizona utilities had filed suit in New Mexico state court); *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (summary denial of boundary dispute that was already the subject of state-court suit); *Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam) (declining suit to enforce reciprocal insurance statute on ground that the "original jurisdiction of the Court is not an alternative to the redress of grievances which could have been sought in the normal appellate process, if the remedy had been timely sought").

Washington denied a permit to Millennium, a private company, the Plaintiff States face a high bar: "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing . . . is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen v. Wright*, 468 U.S. 737 (1984)). And a State has standing to bring an original action "only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania*, 426 U.S. at 665 (collecting cases).

The harm Montana and Wyoming allege here is entirely speculative. They claim that if this private project is not constructed in Washington, they will lose tax revenues they hope to receive because coal mined in their States will be barred from access to Asian markets. Bill of Complaint at 2. But there is no bar. Montana and Wyoming already send millions of tons of coal through Washington for export, and the capacity of west coast ports exceeds the demand for coal exports. *See* App. at 15a-17a (showing that in 2017, American coal producers exported approximately 16.4 million tons of thermal coal, the kind of coal mined in Montana and Wyoming, from west coast ports); Ian Goodman, *Expert Report on Millennium Bulk Terminals-Longview/Lighthouse* (Goodman, *Expert Report*) at 37 (Table 5), 198 (Nov. 14, 2018), https://www.docketbird.com/court-documents/Lighthouse-Resources-Inc-et-al-v-Inslee-et-al/Exhibit-1/wawd-3:2018-cv-05005-00257-001 (Docket No. 257-1 in *Lighthouse Res. Inc. v. Inslee*, No. 3:18-cv-05005-RJB (W.D. Wash.)) (estimating current annual capacity of west coast coal export terminals,

excluding Millennium, as 42 million metric tons, and concluding: "[I]t is unclear to what extent, if any, Lighthouse exports have actually been constrained by a lack of sufficient economic West Coast coal export capacity. Lighthouse has failed to demonstrate actual and likely impacts, and the publicly available information indicates that any impacts are (at most) small and speculative.").

Moreover, Plaintiffs' suggestion that the Millennium project would provide them a tax windfall is speculative at best. While Plaintiffs acknowledge a declining domestic market for thermal coal, Plfs.' Br. at 4-6, their rosy projection for Asian markets is not supported by independent analysts. *See* Goodman, *Expert Report* at 106 (projecting unfavorable market conditions "given the shrinkage of imports in most mature Asian markets, which may only be partially offset by growth in emerging Asian markets"; noting the impact of "global shifts to renewables"; and observing that neither the International Energy Agency nor the federal Energy Information Administration projects a high volume of U.S. thermal coal exports to Asia after 2017).

But even assuming the Plaintiff States could show harm and causation, they cannot show redressability, because even if this Court were to hold that Washington erred in denying the Clean Water Act certificate at issue here, the proposed coal export terminal would not proceed for both legal and practical reasons.

As explained above, the proposed private project proponent at issue here already failed to obtain two approvals critical to the project. The

proposed coal terminal cannot go forward unless Lighthouse is able to sublease aquatic lands owned by the State of Washington and managed by the Washington Department of Natural Resources, headed by the independently elected Commissioner of Public Lands. The Department denied Lighthouse's sublease request in 2017, for reasons entirely unrelated to the Plaintiff States' allegations here, namely, because of Lighthouse's precarious financial position and refusal to provide information requested by the Department. Lighthouse appealed the Department's decision in state court, but the Washington Court of Appeals rejected Lighthouse's claim, and the Washington Supreme Court denied review. *Northwest Alloys, Inc.*, 194 Wash. 2d 1019. As a matter of state law, that decision is final, and it precludes the proposed private project from going forward.

As also explained above, the proposed private project cannot proceed without a Shoreline Substantial Development Permit, as required under Washington's Shoreline Management Act of 1971 (SMA), Wash. Rev. Code 90.58. *See* Wash. Rev. Code § 90.58.140(2). That permit was denied by a decisionmaker entirely independent of any state agency or the Governor, and the denial was upheld by an independent state board and the state Court of Appeals. *See Millennium*, 2020 WL 1651475.

The Plaintiff States here do not ask this Court to review those denials, and nothing in this case could redress Lighthouse's failure to obtain those necessary approvals. Thus, no ruling in this case could redress the Plaintiff States' asserted injuries.

C. The Plaintiff States' Commerce Clause Claim Lacks Merit

The Plaintiff States' Commerce Clause claim does not warrant this Court's time because it suffers from at least three fatal flaws. First, Congress has expressly authorized States to deny Clean Water Act permits for violating state law, so there is no dormant Commerce Clause violation when a State does so, as here. Second, Plaintiffs' argument is based on the false premise that Washington has placed an embargo on coal from Montana and Wyoming, when in fact millions of tons of coal from those states pass through Washington each year. And finally, Plaintiffs' claim that Washington's decision to deny a permit for a large project *in Washington* was motivated by economic protectionism makes no sense and is refuted by the record.

1. Washington's denial of the permit application is authorized under federal law

As a threshold matter, Plaintiffs' Commerce Clause claim fails because the Department of Ecology's Section 401 denial was expressly authorized by Congress in the Clean Water Act. "It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

Congress expressly and unambiguously authorized States to deny certification under Section 401 of the Clean Water Act where state water quality standards are not met. 33 U.S.C. § 1341(a); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006) ("Section 401 recast pre-existing law and was meant to 'continu[e] the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State.'" (alterations in original)); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution[.]"). Congress also specifically allowed the States to enact and enforce state water quality standards that are more stringent than federal standards. 33 U.S.C. § 1370; *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996).

In this case, the State Department of Ecology did just what Congress authorized it to do: it denied certification based in part on Millennium's failure to demonstrate compliance with state water quality standards, including its failure to submit an adequate wetlands mitigation plan; failure to submit adequate wastewater characterization and treatment data; failure to demonstrate compliance with necessary methods of wastewater treatment; failure to demonstrate compliance with state antidegradation requirements; and failure to provide sufficient

information regarding potential toxic discharges to the Columbia River. *See* Plfs.' App. C at 33-43 (Order Denying Section 401 Water Quality Certification at 14-19 (setting out the omissions and inadequacies in detail)). A denial on these grounds implements the Clean Water Act, and implementation of federal law does not violate the dormant Commerce Clause. *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 8-9 (D.C. Cir. 2011).

Under Section 401 of the Clean Water Act, for the Department of Ecology to issue a water quality certification it must have reasonable assurance that the project as proposed will meet both applicable water quality standards and "any other appropriate requirement of State law[.]" 33 U.S.C. § 1341(d); *PUD 1 of Jefferson County v. Washington State Dep't of Ecology*, 511 U.S. 700, 711-13 (1994). Millennium's permit application appropriately was denied also because the FEIS issued in April 2017—which Millennium did not appeal—identified nine environmental resource areas that would suffer unavoidable and significant adverse environmental impacts from the construction and operation of the proposed terminal. Impacts on at least two of these resource areas implicate water quality—vastly increased vessel traffic on the Columbia River, leading to a predicted increase in the number of collisions, groundings, fires, and fuel and cargo spills, with resulting environmental impacts; and impacts on aquatic habitat, fish survival, and tribal fishing and treaty rights. *See* Plfs.' App. C at 27-29, 30-33 (Order Denying Section 401 Water Quality Certification at 10-11, 12-13). Millennium has never proposed reasonable mitigation measures for those

impacts. *Millennium*, 2020 WL 1651475, at *3. Approving the proposed project under those circumstances would conflict with applicable State Environmental Policy Act policies under Wash. Rev. Code § 43.21C.060 and Wash. Admin. Code § 173-802--110. *See Millennium*, 2020 WL 1651475, at *10. A private company's desire to ship coal from Washington's coast does not require Washington to set aside its longstanding water quality laws, laws that Congress has explicitly authorized the State to enforce in this context.

2. Washington's denial of a permit for a single project does not amount to an "embargo" against Montana and Wyoming coal, which passes through Washington in massive quantities

The Plaintiff States' Commerce Clause claim rests entirely on a false premise: that the State of Washington has "deni[ed] port access" or imposed a "de facto embargo" on Montana and Wyoming coal. Bill of Complaint at 7; Plfs.' Br. at 18. Plaintiffs repeat this claim over and over in their briefing, using this notion to invoke historical concerns about State embargoes.

In reality, there is no embargo and no denial of port access. Every year, millions of tons of coal from Wyoming and Montana pass through Washington for

export.[4] Lighthouse itself receives roughly 100,000 tons of Montana and Wyoming coal annually at the existing facility it seeks to expand.[5] Moreover, there is unused capacity for exporting coal at existing west coast ports, capacity that goes unused because of the lack of demand for coal, not because of any imagined "embargo." *See supra* p. 17-18.

The truth is thus that this case involves no "embargo," but rather only the failure of a private entity to meet well-established requirements for state and local permits to construct a proposed private project on state-owned land in Washington. That private failure does not prevent Montana and Wyoming coal—or anyone else's coal—from being exported through existing ports. It also does not inexorably doom any other proposed coal terminal.

Even if Montana and Wyoming were unable to export as much coal as they desire because of the permit application failure in this case, the Commerce Clause would not be offended. "[N]ot every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). The dormant Commerce Clause "does not elevate free trade above all other values. As long as a

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[4] App. at 11a-12a; Nat'l Coal Council, *Advancing U.S. Coal Exports: An Assessment of Opportunities to Enhance Exports of U.S. Coal* 15 (Oct. 22, 2018), https://perma.cc/MR7C-RJE7.

[5] App. at 13a-14a.

State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine*, 477 U.S. at 151 (citation omitted). The "modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-74 (1988)). As detailed in the next section, Plaintiffs have not presented any remotely persuasive evidence that economic protectionism drove Washington's permit denial here.

The Third Circuit's decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987), illustrates the problems with Plaintiffs' theory here (and shows an example of the same type of theory being litigated without abusing this Court's original jurisdiction). There, Delaware law banned construction of a facility in Delaware Bay that would have allowed Norfolk Southern to "top-off" deep draft vessels with coal, which would have reduced shipping costs and "render[ed] United States coal more competitive in overseas markets." *Id.* at 390. Delaware Bay was the only location on the entire east coast where such a facility could be built. *Id.* at 390-91. Norfolk Southern sued, alleging violations of the dormant Commerce Clause and Foreign Commerce Clause.

In rejecting the Commerce Clause claim, the Third Circuit specifically rejected Norfolk Southern's argument that the law was subject to strict scrutiny because it allegedly blocked the shipment of coal: "The short answer is that [Delaware law] does not prohibit the export, import, or transshipment of coal, and thus does not have the effect of blocking the flow of coal at Delaware's borders." *Norfolk Southern Corp.*, 822 F.2d at 401. Even if it did, however, the court explained that Norfolk Southern's argument would fail. "It is the discrimination against interstate versus intrastate movement of goods, rather than the 'blockage' of the interstate flow *per se*, that triggers heightened scrutiny[.]" *Id.*

As in *Norfolk Southern*, the Department of Ecology's action in denying Section 401 certification does not prevent either the movement of coal through the State or the export of coal to foreign nations. In the federal district court, BNSF Railroad, Plaintiff-Intervenor in Lighthouse's litigation, admitted that it annually transports millions of tons of coal through Washington. App. at 11a-12a. Lighthouse itself receives and transloads approximately 100,000 tons of coal each year at the site of the proposed project. App. at 13a-14a. And Washington submitted expert testimony concluding that "Washington State's permit denials for the Project do not significantly affect the US coal industry, nor US coal exports to Asian markets." Goodman, *Expert Report* at 1. Among other "Key Findings," the report concluded that: "The US will not export large volumes of thermal coal to Asia via Millennium because supply from the US will not be generally economically competitive in destination markets"; and that "A number of other

port alternatives exist that can meet the intermittent and shrinking Asian demand for US thermal coal exports." Goodman, *Expert Report* at 1.

In short, this case simply does not involve an "embargo," and Plaintiffs' arguments based on that false premise necessarily fail.

3. Washington's denial of a private permit application for failure to comply with state law is neither protectionist nor discriminatory

The usual Commerce Clause challenge alleges that a state law, on its face or in its operation, discriminates against out-of-state competitors to benefit in-state industries in the same market. *See*, *e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997). This case could not be more different. Here, Montana and Wyoming allege that Washington denied a permit for a project in Washington, which would have created jobs and tax revenues in Washington, in order to protect Washington agricultural interests and serve the Washington Governor's interest in reducing greenhouse gas emissions. Bill of Complaint at 16-17. Plaintiffs provide no credible evidence to support these claims, but even if they did, these arguments would fail to show discrimination under the dormant Commerce Clause.

Plaintiffs first contend that the State denied Section 401 certification to preserve state rail capacity for Washington agricultural products. Plfs.' Br. at 15-16; Bill of Complaint ¶ 39. The entirety of their evidence to support this claim is a single email and set of talking points, prepared by staff at the Department

of Ecology to respond to "editorials and media stories circulating around the state giving inaccurate facts about how building the Millennium coal export terminal would boost Washington ag exports." Plfs.' App. 76. Correcting misstatements about the proposed Millennium project is not evidence of discrimination against out-of-state industry.

Even if Plaintiffs had actual evidence that Washington sought to favor its own agricultural products at the expense of coal exports, Plaintiffs have not cited a single case finding a dormant Commerce Clause violation based on favoring one industry over another, as opposed to favoring in-state participants over out-of-state participants *in the same industry*. Indeed, the Third Circuit in *Norfolk Southern* rejected the argument that differential treatment of industries violated the dormant Commerce Clause: "The Supreme Court has never adopted such a broad gauged view of a discriminatory effect; it has found . . . discriminatory effects only where the state law advantages in-state business in relation to out-of-state business *in the same market*." *Norfolk Southern Corp.*, 822 F.2d at 402 (emphasis added).

Plaintiffs also argue that in denying the permit at issue here, Washington intended to discriminate against out-of-state coal to further a political interest in reducing greenhouse gas emissions. This exact claim has been advanced by Lighthouse in its federal court litigation, so there is no need for this Court to consider it. *Compare* Bill of Complaint, ¶¶ 6, 27-46, 49-57, *and* Plfs.' Br. at 9-17, 24-31, *with* Lighthouse's Complaint, ¶¶ 9, 80-99, 117-48, 161-72, 184-91, 241-45. But the Court should be especially loathe to

consider this theory because it is factually and legally baseless.

None of the reasons set forth in the Department of Ecology's Order denying the application have anything to do with favoring in-state industry or disfavoring out-of-state industry. The exclusive focus is protecting state water quality and the health, safety, and welfare of state citizens. The decision on its face is neutral and it applies only to this in-state project that Lighthouse proposed through its in-state subsidiary, Millennium. Under this Court's precedent, the Court should defer to the stated reasons for the decision unless those reasons "could not have been a goal" of the decision. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7, 471 n.15 (1981).

Plaintiffs claim that the stated rationale could not have been the real rationale based on a declaration of a county official who supported the project and a few misconstrued emails. Ignoring all other evidence, they also contend the Governor "commandeered" the approval process. Plfs.' Br. at 12-13.

The author of the declaration, Dr. Elaine Placido, Director of Community Services for Cowlitz County, is entitled to her opinion. But the unbiased decision-makers that reviewed the records of this project proposal have consistently disagreed with her assessment—the Cowlitz County hearing examiner, the state Shorelines Hearings Board, the state Pollution Control Hearings Board, a panel of the Washington State Court of Appeals, and an experienced federal district court judge.

The Director of the Department of Ecology, who made the decision denying the application, testified that she did not rely on greenhouse gas emissions in making it nor did she harbor any "anti-coal bias." App. 1a-5a. Consistent with that testimony, the FEIS did not list greenhouse gas emissions among the project's significant adverse impacts. *Millennium*, 2020 WL 1651475, at *2. The Governor took no position on the project and instead left the decision to the Department. App. 6a-10a (Governor "did not direct the outcome" (App. at 9a) and was "pretty much uninvolved" (App. at 10a) once the timeline was set). Indeed, even the media reports Plaintiffs cite show that the Governor's consistent focus has been to ensure that specific project proposals were properly reviewed, not rejected for political reasons. For example, Plaintiffs cite a report on his first press conference as governor, Plfs.' Br. at 13, but they omit the concluding sentence of the report: "Inslee was careful to note in his press conference that he 'has not made a decision' on how his administration will address the issues of carbon pollution from coal exports, and how it is intending to move forward on this issue in general."[6]

[6] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint*," ThinkProgress, Jan. 22, 2013, 7:56 PM, https://thinkprogress.org/governor-inslee-calls-coal-exports-the-largest-decision-we-will-be-making-as-a-state-from-a-carbon-9c73e7ba1079/.

Plaintiffs cite as evidence of bias an email exchange that suggests the outcome of an environmental review for Boeing's 777x project likely would be different than for a coal terminal. Plfs.' Br. at 14. That is not evidence of bias; it recognizes both that environmental review is project-specific and that the goal of the 777x project was to reduce fuel use, leading to reduced greenhouse gas emissions, while the combustion of coal produces greenhouse gases. Responding to an inquiry from a state senator, the Director of Ecology explained at length both this distinction and the consistent standard the agency uses to determine the appropriate scope of environmental review in each case. *See* Plfs.' App. M.

The Director of Ecology also directly refuted allegations that the denial of the Section 401 certification was based on "philosophical opposition":

> The facts of this denial are simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan for the areas the project would devastate – especially along the Columbia River. To approve this permit under the circumstances would not only have been irresponsible, it would have posed a serious health risk to impacted communities and the surrounding environment.
>
> . . . .

All you have to do is look at a list of the impacts from this project to understand its potential to damage Washington's water quality:

- Destroying 24 acres of wetlands and 26 acres of forested habitat.
- Dredging 41 acres of river bed.
- Driving 537 pilings into the river bed for over 2,000 feet of new docks, resulting in the loss of five acres of aquatic habitat.
- Increasing vessel traffic on the Columbia River by 25 percent – an additional 1,680 ship trips a year.

The sheer scale of the proposal poses obvious environmental challenges, regardless of the material being handled:

- 1.5 million tons of material stockpiled on site – picture an 85-foot-high pile of coal running the length of the National Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.
- Contaminated stormwater running off those piles (in addition to the coal dust and spillage tied to moving material from rail to ship).
- Sixteen train trips a day, each over a mile long and pulled by four diesel locomotives.

> In short, there are multiple, insolvable problems with the proposal. . . .

Letter to Senators John Barrasso and Tom Carper, from Maia Bellon, Director, Washington State Dep't of Ecology at 1-2 (Aug. 15, 2018), https://ecology.wa.gov/DOE/files/2b/2bdeb87c-7b59-428f-b7b1-01dcc6c8dac2.pdf.

For the Plaintiff States to characterize this denial of a Section 401 certification as a "political and moral judgment" on other States, Plfs.' Br. at 21, is to grossly mischaracterize the record and the facts. In our federalist system, each State has substantial latitude to ensure the health, safety, and welfare of its residents, and to protect its environment and natural resources. The application of state and local laws to regulate the use of land and water and to ensure a safe and healthful environment for the State's residents is not discriminatory and does not impose a "political and moral judgment" on another State.

The type of discrimination that is relevant under the Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). There is no evidence of such differential treatment here.[7]

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[7] The Plaintiff States claim in a footnote that Washington's permit denial also fails under the *Pike* balancing test. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). That argument is meritless, as evidenced by Plaintiffs' complete failure to argue the issue.

D. The Plaintiff States' Foreign Commerce Clause Claim Is Meritless

The Plaintiff States' Foreign Commerce Clause claim is untenable and in any event can be litigated in other venues.

On the merits, Washington's Section 401 decision does not violate the Foreign Commerce Clause for the same reasons it does not violate the dormant Commerce Clause. The analysis under each clause is initially the same, but under the Foreign Commerce Clause there is an additional requirement that state actions not interfere with the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments." *Japan Line Ltd. v. Los Angeles County*, 441 U.S. 434, 449 (1979). Washington's denial of Section 401 certification for a single export terminal does not affect the federal government's ability to "speak with one voice" regarding foreign commerce.

To begin with, just as with the dormant Commerce Clause, where the federal government has authorized the state action at issue, there can be no violation of the Foreign Commerce Clause. *See, e.g.*, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 9 (1986). As detailed above, this rule controls here, where Congress has explicitly authorized States to deny certification under Section 401 of the Clean Water Act where state water quality standards are not met. *See* 33 U.S.C. § 1341(a); *supra* p. 21. Nothing

in the Clean Water Act or this Court's cases says or implies that a State's authority to enforce state water quality laws evaporates when a proposed project would be used to ship products overseas.

Setting that aside, Plaintiffs have not shown and cannot show that denying Section 401 certification contradicts any federal policy. Plaintiffs claim that the "unambiguous foreign policy of the United States is to support coal export," Plfs.' Br. at 32, but that claim is untenable. Just months before Washington denied the permit at issue here, the federal government denied a permit for a far larger coal export terminal in Washington—the "Gateway Pacific Terminal."[8] To support their claimed "unambiguous foreign policy," Plaintiffs cite not a single statute or regulation, instead citing a speech by the President, an Executive Order that never mentions exports,[9] and an advisory committee report prepared by coal industry representatives. Plfs.' Br. at 32-33. This is hardly evidence of an "unambiguous foreign policy" supporting coal exports.

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[8] *See* Army Corps of Eng's, *Army Corps halts Gateway Pacific Terminal permitting process* (May 9, 2016), https://www.nws.usace.army.mil/Media/News-Releases/Article/754951/army-corps-halts-gateway-pacific-terminal-permitting-process/.

[9] Exec. Order No. 13783, 82 Fed. Reg. 16,093, 2017 WL 1176680 (Mar. 28, 2017).

In any event, even if there were a clear federal policy supporting coal exports, Washington's denial of the permit at issue here would not contradict it. The State simply concluded that this particular project at this particular location cannot be approved under state and federal water quality laws. That decision does not preclude the export of coal through other terminals and it does not "block" Montana and Wyoming from accessing foreign markets. Indeed, millions of tons of coal from Montana and Wyoming pass through Washington each year for export, as documented by the very report Plaintiffs cite, among other sources.[10]

Even if Plaintiffs' Foreign Commerce Clause claim had any merit, the same claim is raised in the federal litigation Lighthouse initiated. *Compare* Bill of Complaint, Count II, *with* Lighthouse's Complaint, Count I. Because judicial review of this claim is available (and ongoing) through normal avenues of litigation in federal courts, there is no need for this Court to assert original jurisdiction. *Mississippi*, 506 U.S. at 77; *Illinois*, 406 U.S. at 93.

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[10] The National Coal Council report Plaintiffs cite, Plfs.' Br. at 33 n.41, shows substantial coal destined for export passes through Washington State. Nat'l Coal Council, *Advancing U.S. Coal Exports: An Assessment of Opportunities to Enhance Exports of U.S. Coal* 15 (Oct. 22, 2018), https://perma.cc/MR7C-RJE7; *see also* App. at 11a-12a.

CONCLUSION

The motion for leave to file a bill of complaint should be denied.

RESPECTFULLY SUBMITTED.

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June 8, 2020

APPENDIX

[Exhibit 13]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

LIGHTHOUSE RESOURCES INC., et al., Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, vs. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant Intervenors.	No. 3:18-cv-05005-RJB

DEPOSITION OF MAIA D. BELLON

January 7, 2019

Olympia, Washington

* * * * *

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Does that mean that Ecology did not rely upon any greenhouse gas reason for denying

the 401 quality--excuse me, the 401 water quality certificate here?

A Let me take a look at your question here, Dave.

Q Sure.

A What I think it means is that this document contained the fatal flaws and major prohibitions under our state environmental laws to be able to approve the decision, so we didn't necessarily list other particular categories that were reviewed in the EIS that were able to meet our environmental review or were able to be consistent with state law.

For example, on the greenhouse gas issue, this project was not denied on the basis of greenhouse gas emissions. The EIS said that they would be significant, but not unmitigable or unavoidable.

I think in fairness to the company, I would like to acknowledge that I worked very hard to make sure that a gross calculation of greenhouse gas emissions at end-use combustion, which was the nonspeculative proposal, was not essentially a gross calculation.

44 million metric tons, quick math, that's about 90 million metric tons of greenhouse gas emissions.

I was not comfortable just doing simple math on

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this, and I believed I owed a duty and I ought provide fairness to the permit applicant to look at the true SEPA analysis, which is what is the current state of the environment without the project and then what would be the state of the environment with the project.

I believed that the company, based on some suggestions and urging of the CEO of the company at the time--that I ought to do a very fair analysis that would more be a net analysis.

In light of that analysis, the EIS that Cowlitz County and Ecology finalized determined that greenhouse gas emissions, the net emissions, would not be unmitigable, and therefore it was not a reason for denial.

* * * * *

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Q Do you agree with the Power Past Coal organization or do

Page 235

you agree, as a general matter, that all coal exporting terminals should be stopped from being constructed or permitted on the west coast of the United States?

A I am not anti-coal.

Q I understand you are not anti-coal.

Do you agree with the Power Past Coal organization or do you agree, as a general matter, that all coal exporting facilities should be stopped from being constructed or not being permitted on the west coast of the United States?

MR. YOUNG: I object.

Are you asking for her personal opinion or what--

Q (By Mr. Feinberg) I am asking for your opinion as the director of the Department of Ecology.

MR. FEINBERG: Thanks for the clarification.

THE WITNESS: I have not formulated an opinion on that.

I don't have a luxury--in this current role I am looking at the current application in front of me, Washington state's laws, and the facts and the science behind the proposal, and I'm making decisions on a case-by-case basis.

I have not formed a generic opinion as such.

Q (By Mr. Feinberg) At the time that you wrote Exhibit

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No. 52, is that also true that you had not formed a generic opinion on whether coal terminals should or should not be permitted on the west coast of the United States?

A That wouldn't necessarily be appropriate in my role as the objective decision-maker, that our state laws expect that I allow the facts, the law, and the science to my decision-making to be fair and transparent.

[Exhibit 16]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC., et al., Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, vs. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant Intervenors.	No. 3:18-cv-05005-RJB

DEPOSITION OF KEITH PHILLIPS

VOLUME II

January 10, 2019

Olympia, Washington

* * * * *

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* * * * *

Q And -- and why didn't the governor take that option, option five?

A We advised against it. We said, "It would be very difficult for you. Your agency would be under tremendous pressure to demonstrate that they had no contact with you, that you had given them complete independence and you had put up a wall. And most folks would not believe that a person appointed by you, serving at your pleasure, wouldn't be influenced by your public opposition."

So we advised him strongly if he wanted the process to run the way it should run that he should stay out of it. And we gave him examples of past electeds who had done otherwise and what happened there.

Q And -- and was that the path he then chose?

A He chose to not take a position on the project. He's got very strong views on coal, and he's been very clear, and he's been advocating them in multiple venues: Legislature, clean power plan, White House. He's been

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doing that. But at every turn he's been very clear, "Maia, you have a job to do. You do it. Now, these are my views; these are not -- this is not your authority."

* * * * *

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* * * * *

Q So it seems, at least with Governor Inslee, starting January of 2013, coal export facilities are a issue that he has a -- a great deal of interest in and that you're having numerous meetings about and we've seen lots of documents similar to this where at those meetings discussions are had. There's agenda items about policies, practice, procedures.

In the course of all of that from 2013 to now, whatever -- what resulted from that entire process in terms of decisions by the governor? Out of this five-year discussion of coal export projects and -- and infrastructure for them and these various questions that have been raised and that he had asked, what kind of policies or decisions have come out of this?

* * * * *

THE WITNESS: Most of the actions that

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he settled on were attempts to formally change policy through the introduction of legislation; through executive action where he had the authority in the issuance of executive orders; by weighing in in national or, in some cases, residual venues and making a position known on where he wanted to go on climate and, as a result, fossil fuel in general. That's where most of his actions have been.

He also took, and continues to take, a lot of actions as it relates to working with other states, premiers, kingdoms, national governments, trying to advocate for a broader climate change package, a broader ocean health package, broader clean energy initiatives at the international level. He's been very active in the effort to organize subnational governments to try to push nation states to endorse more aggressive carbon reduction initiatives.

On the projects, he spent a lot of time exploring the edges of how far you could go with the scope and ultimately had to, and did, accept staff's advice on where -- and attorneys' advice on where the lines were appropriate within the scoping assessment, whose decisions it was going to be on. And this was along many kinds of projects, not just coal. "But do I have any role here? Can I get engaged?" "You're gonna have

a future role. You can't get engaged. That's Vancouver, EFSEC. You don't have any role here, but one of your cabinet agencies has a decision to make at some future time. You can have conversations all you want." "Can I direct the outcome?" "No."

He did not direct the outcome. We told him he couldn't. We told him he couldn't without consequences, stepping across that line, and he did not. He was very clear about -- and we had those conversations in private with him before he engaged the agencies or brought the team in for a conversation. And he was

usually pretty good. He says, "I'm frustrated by this, that, and the other thing in the law, but I'm not giving you direction. I'm just telling you I'm frustrated. Now what can you do?" And the agency or the attorneys could say, "Here's what you can do. Here's what you need to think about:

Q (By Mr. Jones) Uh --

A And so as a result on Millennium, he was pretty much uninvolved and not briefed on any ongoing basis after the whole timeline thing got settled and the conversations normalized between the company and the county and the agency. We got periodic updates, but there was very little petitioning from either side of the issue for the governor to do anything in particular.

And so when it got close to decision time, we needed

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to bring him back up to speed on what happened over the last few months that he hadn't heard about.

* * * * *

[Exhibit 20]

The Honorable Robert J. Bryan

AGO rec'd by email 7/27/2018

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC., et al., Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, vs. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant Intervenors.	No. 3:18-cv-05005-RJB PLAINTIFF INTERVENOR BNSF RAILWAY COMPANY'S RESPONSES TO STATE DEFENDANTS' INTERROGATORIES AND REQUESTS FOR PRODUCTION

PROPOUNDING PARTIES: Governor Jay Inslee, Director Maia Bellon, and Hilary Franz ("Defendants")

RESPONDING PARTY: BNSF Railway Company ("BNSF")

SET NUMBER: ONE

* * * * *

Page 7

INTERROGATORY NO. 1: Please state, for each of the past five years, the volume of coal that BNSF has transported into or through the state of Washington

ANSWER TO INTERROGATORY NO. 1:

Subject to the General Objections lodged above, BNSF answers:

Year	Tons of Coal
2013	15,602,707.00
2014	17,046,714.00
2015	14,587,770.00
2016	11,149,616.00
2017	15,693,032.00

* * * * *

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC., et al., Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, vs. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant Intervenors.	No. 3:18-cv-05005-RJB DEFENDANT-INTERVENORS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO LIGHTHOUSE RESOURCES INC *ET AL.* **AND LIGHTHOUSE'S OBJECTIONS, ANSWERS, AND RESPONSES THERETO**

* * * * *

Page 13

* * * * *

INTERROGATORY NO. 10: Identify the volumes of coal that Lighthouse has received at the project site, including coal ultimately bound for another destination, for each of the last 8 years. (Complaint § 62)

ANSWER: Lighthouse objects to this interrogatory as unduly burdensome, overbroad, and

seeking information not relevant to any claim or defense because it requests information about coal outside the scope of the decisions and permits being challenged in this litigation. The volume of coal received at the project site is irrelevant to Lighthouse's plans to export different coal to Asia. Lighthouse also objects to this interrogatory as seeking publically available information. Subject to andwithoutwaiving these objections, Lighthouse answers that it did not receive any coal at the project site in 2010. In 2011, Lighthouse received 94,612 tons of coal at the project site. In 2012, Lighthouse received 99,272 tons of coal at the project site. In 2013 Lighthouse received 93,860 tons of coal at the project site. In 2014, Lighthouse received 123,027 tons of coal at the project site. In 2015, Lighthouse received 101,854 tons of coal at the project site. In 2016, Lighthouse received 94,212 tons of coal at the project site. In 2017 Lighthouse received 84,391 tons of coal at the project site.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al., Plaintiffs, and BNSF RAILWAY COMPANY, Plaintiff-Intervenor, vs. JAY INSLEE, et al., Defendants, and WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant Intervenors.	No. 3:18-cv-05005-RJB

DEPOSITION OF SETH SCHWARTZ
Wednesday, January 31, 2019
San Francisco, California

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Q. All right. So, looking at column M, it would appear that, at least in 2017, the company called Single Peak, exported 6.2 million metric

tons through Westshore; is that what this indicates?

A. Yes.

Q. Sorry. · 6.2 short tons I should say?

A. Yes it does. · Those are millions, so 6.2 million short tons.

Q. Yes.

A. Was my calculation of exports from Signal Peak through Westshore Terminal in 2017.

Q. And Cloud Peak, not to be confused with Signal Peak -- Cloud Peak exported 4.8 million tons through Westshore in 2017; is that right?

A. Yes. · Again that's my calculation from the data available.

Q. And Lighthouse, the plaintiff here, exported 1.2 million tons through Westshore in 2017; is that right?

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A. Yes.

Q. And continuing, we see that various companies have exported from the Uinta Basin through the terminals in California and Lemas in 2017 as well; is that accurate?

A. Yes, although the specific mine origins are an estimate or a generalization. · There may have been more origins than the companies listed.

Q. So, I'm just doing the quick math here, but it looks to me like, in total then in 2017, through

the Westshore Terminal, U.S. producers shipped approximately 12 tons?

A. These are millions.

Q. 12 million tons, excuse me.

A. A little over 12 million short tons, yes.

Q. From the Uinta Basin, U.S. producers shipped through the terminals in California and Mexico approximately four and a half million tons; is that right?

A. Approximately 4.4 million tons, yes.

Q. So, these numbers here, these are consistent with your recollection of what you calculated?

A. Yes.

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