The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs,
and
BNSF RAILWAY COMPANY,
Plaintiff-Intervenor,
v.
JAY INSLEE, et al.,
Defendants,
and
WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COMMERCE CLAUSE ISSUES

NOTE ON MOTION CALENDAR: MARCH 8, 2019

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I. INTRODUCTION

Plaintiff Lighthouse and its subsidiary, Millennium Bulk Terminals Longview, (Lighthouse) seek to construct a large coal export terminal on the banks of the Columbia River in Longview, Washington. The state Department of Ecology (Ecology) denied a water quality certification for the project under Section 401 of the Clean Water Act because Lighthouse failed to demonstrate that the project would comply with state water quality standards and because the facility would have significant, adverse, environmental impacts that could not be mitigated. Lighthouse and Plaintiff-Intervenor BNSF Railway Company (BNSF) claim that this denial violates the dormant interstate and foreign commerce clauses. In effect, Lighthouse and BSNF claim that Lighthouse has a constitutional right to construct the facility despite Ecology's conclusion that it will violate state water quality standards and state environmental policies. This sweeping claim must be rejected.

In order to prevail on their Commerce Clause claims, Lighthouse and BNSF must show either (1) that Ecology denied section 401 certification for the discriminatory purpose of protecting in-state businesses from out-of-state competition; or (2) in the absence of such discrimination, that the effects of Ecology's denial on interstate commerce are clearly excessive relative to the putative local benefits of the action.

Here, Plaintiffs' claims fail as a matter of law. First, in denying section 401 certification for the project, Ecology acted pursuant to authority expressly delegated to it by Congress. Congress intended that states have the primary role in protecting water quality within their borders and this is exactly what Ecology did here. Actions by states that are expressly and unambiguously delegated to them by Congress do not violate the Commerce Clause.

Second, in any case, there is no evidence whatsoever to show that Ecology's section 401 denial was discriminatory or had anything to do with protecting in-state industry. Rather, Ecology's decision was based on undisputed facts and made under unambiguous provisions of

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state and federal law that are laid out in detail in the decision, and which have been affirmed by an independent state Board. To prevail on their Commerce Clause claims, Plaintiffs must show that these reasons are mere pretexts for discrimination. This Plaintiffs cannot do.

Third, Ecology's section 401 denial has little or no impact on interstate commerce. The state's section 401 denial was a site-specific and fact-specific decision related to Lighthouse's specific proposal. While the decision may have an impact on Lighthouse itself, and those who would contract with Lighthouse or otherwise benefit if the project were built, that type of impact is inherent in every permit decision and it is not sufficient to establish a Commerce Clause violation. The Clause protects commerce generally, not the narrow interests of a particular company. Ecology's decision does not regulate commerce generally. As a result, there is no basis on which to conclude that Ecology's decision has an impact on interstate or foreign commerce that is clearly excessive relative to its benefits.

In a nutshell, Plaintiffs' Commerce Clause claims fail because Ecology did nothing more here than apply its environmental laws to the specific project before it. It is undisputed that the project fails many of the standards in both state and federal law. If the Commerce Clause forbids states from applying their environmental laws to specific projects, there would be little point in having such laws in the first place.

II. FACTS IN SUPPORT OF MOTION

Lighthouse's proposed coal export facility would be the largest coal export terminal in North America, capable at full build-out of exporting 44 million metric tons of coal per year. *See* Declaration of Thomas J. Young in Support of Motion for Summary Judgment on Commerce Clause Issues (Young Decl.) Ex. 1 (Final EIS, Ch. S.1, Summary). If constructed, the facility would export more tons of dry bulk commodities than all of the existing marine terminals in Washington, and Columbia River terminals in Oregon, combined. Young Decl. Ex. 2. Coal would be brought to the site by train from the Powder River basin in Montana and Wyoming, and the Uinta basin in Utah and Colorado, stockpiled on site, and then loaded on to

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ocean-going vessels for transport to Asia. At full build-out, eight trains—each over a mile long—would enter and depart from the site each day. Eight hundred and forty ships would call at the site each year, totaling 1680 trips up and down the Columbia River per year. At full build-out, the vessel traffic associated with the facility would account for approximately one-quarter of all the vessel traffic on the Columbia River. Young Decl. Ex. 1 § S.4.1 (project description).

The state Department of Ecology, acting as a co-lead agency with Cowlitz County under the State Environmental Policy Act (SEPA), issued an Environmental Impact Statement (EIS) analyzing the project and its impacts in detail. *See* Dkt. 130-1. Among other things, the EIS concluded the project would have significant, adverse, unavoidable impacts in nine resource areas. These impacts are: (1) an increase in the cancer risk rate in Cowlitz County from the emission of diesel particulates; (2) serious traffic delays[1] at several level crossings near the site; (3) severe noise impacts at approximately 60 residences in the vicinity from train horns; (4) a 22 percent increase in the rate of rail accidents in the state; (5) a disproportionate impact on low income and minority neighborhoods; (6) destruction of a historic district; (7) blockage of access to at least 20 federally established tribal fishing sites along the Columbia River, as well as an unquantified impact on fish survival; (8) an increase in the rate of vessel accidents on the Columbia River by approximately 2.8 incidents per year; and (9) capacity exceedances on portions of the rail line in Washington State. *Id*. § S.7 (summarizing the project's significant, adverse, unavoidable impacts); *see also* Young Decl. Exs. 3-11 (EIS chapters 3-2 through 3-5, 5-1 through 5-6). No party challenged the EIS and it is now final and binding under state law.[2] *See* Dkt. 1-3, at 49; Dkt. 130-6, at 8.

[1] The total gate downtime at all crossings affected by the project would be 130 minutes on an average day. *See* Dkt. 1-1, at 6.

[2] The EIS became final when Lighthouse issued a "Notice of Action" under state law that established an appeal period for the EIS and no one appealed. *See* Young Decl. Ex. 12 (Chapman Dep. at 178–85).

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The project requires dredging of the Columbia River to accommodate the ocean-going vessels that would call at the site, and construction of two large docks for berthing and loading coal. To conduct these activities, Millennium must obtain a dredge and fill permit from the Army Corps of Engineers under section 404 of the Clean Water Act. To obtain the federal permit, Millennium must in turn obtain a water quality certificate from the state under section 401 of the Act. *See* Dkt. 130-1 § S.8 (listing necessary permits for the project). To obtain the certificate, Millennium was required to demonstrate reasonable assurance of compliance with state water quality standards. *See generally PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

Ecology denied Millennium's request for water quality certification on two separate grounds. *See* Plaintiffs' Compl. Ex. A, Dkt. 1-1. First, Ecology concluded that the project's significant, adverse, unavoidable impacts were inconsistent with the state's environmental policies expressed in state administrative code, Wash. Admin. Code (WAC) 173-802-110. Relying on the authority conferred by SEPA, Wash. Rev. Code (RCW) 43.21C.060, Ecology exercised its discretion to deny the water quality certificate based on the project's impacts.[3] Dkt. 1-1, at 4–14. Second, Ecology denied the water quality certificate based on Millennium's failure to demonstrate reasonable assurance of compliance with state water quality standards. *Id.* at 14–19. In this proceeding, Lighthouse and BNSF challenge only the first of these grounds; Lighthouse and BNSF make no mention of, and do not challenge, the water quality grounds for denial. *See* Lighthouse Compl., Dkt. 1 ¶¶ 164–66; BNSF Compl., Dkt. 121 ¶ 63.

Under state law, Millennium appealed Ecology's section 401 denial to the state Pollution Control Hearings Board, an administrative agency tasked with hearing appeals of water quality permits. Dkt. 21-5; *see generally Port of Seattle v. Pollution Control Hearings*

[3] RCW 43.21C.060--referred to as "substantive SEPA authority"--allows a permitting agency to deny permits for a project based on its significant, adverse, unavoidable, environmental impacts. *See Polygon Corp. v. City of Seattle*, 90 Wn.2d 59 (1978). In this respect, Washington's SEPA differs from National Environmental Policy Act (NEPA), because NEPA is purely procedural and has no substantive effect. *See generally* Richard L. Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* § 3.01 (2014).

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Bd., 151 Wn.2d 568, 589–96 (2004) (describing the role of the Board in a section 401 certificate appeal). The Pollution Control Hearings Board upheld Ecology's denial, concluding that Ecology's section 401 decision was not exempt from SEPA, it was not preempted by the Clean Water Act, and it was not clearly erroneous. Dkt. 130-6. The Board's decision is now on appeal in Cowlitz County Superior Court.

III. STATEMENT OF ISSUES

1. When the state denies certification under section 401 of the Clean Water Act pursuant to an express delegation of authority by Congress, is the state's denial subject to challenge under the Commerce Clause?

2. When the state's denial of certification under the Clean Water Act was unrelated to the protection of any in-state industry, and instead was based on unchallenged environmental impacts affecting the health, safety and welfare of the state's citizens, was the state's denial discriminatory for purposes of applying strict scrutiny under the Commerce Clause?

3. When the state's denial of certification under the Clean Water Act was based on unchallenged environmental impacts, and regulated only the permit applicant, is there any basis upon which the Court could conclude that the impacts of the state's decision on commerce are clearly excessive relative to the putative local benefits?

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the opposing party must then set forth specific facts showing that there is some

genuine issue for trial in order to defeat the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

B. Legal Framework Applicable to Commerce Clause Claims

The Constitution grants Congress the power to regulate both interstate and foreign commerce. U.S. Const. art. I, § 8. Implicit in this affirmative grant is the negative or "dormant" Commerce Clause--the principle that states impermissibly intrude on this federal power when they enact laws that unduly burden interstate or foreign commerce. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013).

The first inquiry under the Commerce Clause is whether the state regulation at issue discriminates against out-of-state entities on its face, in its purpose, or in its practical effect. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). 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 Ky. v. Davis*, 553 U.S. 328, 337–38 (2008). In particular, the Commerce Clause protects against state regulation that burdens out-of-state competitors and benefits in-state industries in the same market. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

A state regulation that discriminates against out-of-state competitors is virtually *per se* unconstitutional unless it serves a legitimate local purpose and this purpose could not be served as well by nondiscriminatory means. *Maine v. Taylor*, 477 U.S. at 138. Such laws are subject to strict scrutiny and the burden falls on the state to establish that the law serves a legitimate local purpose that could not be served by nondiscriminatory means. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100-01 (1994).

By contrast, state laws that are non-discriminatory should be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). "Where the statute regulates

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evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979) (quoting *Pike*, 397 U.S. at 142).

"[T]he States retain 'broad power' to legislate protection for their citizens in matters of local concern such as public health." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). "[N]ot every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012) (quoting *Cottrell*, 424 U.S. at 371).

C. Congress Expressly Authorized the State to Deny Certification Under Section 401 of the Clean Water Act. As Such, Ecology's Denial Does Not Constitute an Undue Burden on Interstate or Foreign Commerce

As a threshold matter, Plaintiffs' Commerce Clause claims fail because 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. at 138; *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 933 (9th Cir. 2011). "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

Congressional authorization must be "unmistakably clear" and "unambiguous." *Maine v. Taylor*, 477 U.S. at 139. In determining whether Congress has authorized state action that might otherwise be barred, the court "must look primarily to the plain meaning of the statute, drawing its essence from the particular statutory language at issue, as well as the language and design of the statute as a whole." *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n*, 198 F.3d 1, 9 (1st Cir. 1999). "There is no talismanic significance to the phrase 'expressly stated,' . . . it merely states one way of meeting the requirement that for a state regulation to be

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removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

In this case, Congress expressly and unambiguously authorized the state to deny certification under section 401 of the Clean Water Act. 33 U.S.C. § 1341(a). In section 401, Congress granted states a veto power over projects requiring federal permits. *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."); *S.D. Warren Corp. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006) ("Section 401 recast pre-existing law and was meant to 'continue 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.' ") (citation omitted).

Throughout the Clean Water Act, Congress expressed its intent that states be the primary regulators of water quality. *City of Arcadia v. U.S. EPA*, 411 F.3d 1103, 1106 (9th Cir. 2005) (Congress intended states to "remain at the front line in combating pollution"); 33 U.S.C. § 1251(b) ("[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."). *See also Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489 (9th Cir. 1984) ("there is strong support in the legislative history [of the Clean Water Act] for a conclusion that Congress wanted to encourage a federal-state partnership for the control of water pollution") (quoting *Pac. Legal Found. v. Costle*, 586 F.2d 650, 657 (9th Cir. 1978)). Congress specifically allowed the states to enact 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 (10th Cir. 1996).

Thus, not only the express language of section 401, but also the overall structure and purpose of the Clean Water Act, support the conclusion that Congress intended to allow states to deny section 401 certification if state water quality standards are not met. 33 U.S.C.

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§ 1341(a)(1); *PUD No. 1 of Jefferson Cty.*, 511 U.S. at 712; *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F. 3d 87, 101 (2d Cir. 2017).

In the present case, Ecology did just what Congress authorized it to do: it denied certification based in part on Lighthouse's failure to demonstrate compliance with state water quality standards. *See* Dkt. 1-1, at 14–19. These grounds include Lighthouse's failure to submit an adequate wetlands mitigation plan, failure to submit adequate wastewater characterization and treatment data, failure to demonstrate compliance with all known, available, and reasonable methods of treatment, and failure to demonstrate compliance with state anti-degradation requirements, among other things. *Id.* When Ecology denied section 401 certification to Lighthouse on these grounds, Ecology was implementing federal law. Implementation of federal law does not give rise to a Commerce Clause violation. *See Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F. 2d 568, 570 (9th Cir. 1985); *Lake Carriers' Ass'n v. Envtl. Prot. Agency*, 652 F.3d 1, 8–9 (D.C. Cir. 2011). Thus, Plaintiffs' Commerce Clause claims must be rejected.

D. Plaintiffs' Commerce Clause Challenges Fail Because Ecology's Action Was Not Discriminatory in Purpose or Effect and It Did Not Impose Any Excessive Burden on Interstate Commerce

Even if Ecology's section 401 decision is subject to challenge under the Commerce Clause, that challenge must fail. First, strict scrutiny does not apply to Ecology's decision because the decision had nothing to do with protecting in-state businesses from out-of-state competition. Second, Ecology's decision easily passes muster under the deferential *Pike* balancing test, because the decision is a fact-specific one that applies only to one entity, not to commerce generally. Also, the benefits of the denial are substantial, because by denying certification Ecology prevented the many significant, adverse, environmental effects associated with the project.

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1. Strict Scrutiny Does Not Apply Because Ecology's Decision Had No Protectionist Motive or Effect

As noted above, the first inquiry under the Commerce Clause is whether the state's action discriminates against out-of-state commerce in favor of in-state industries. *Maine v. Taylor*, 477 U.S. at 138. Here, there is no evidence whatsoever of discrimination. The decision, on its face, is neutral. None of the reasons set forth in the decision have anything to do with favoring in-state industry or disfavoring out-of-state industry. Instead, they have to do with protecting the health, safety, and welfare of state citizens, and protecting state water quality. The decision applies only to the in-state business that Lighthouse, through its in-state subsidiary, proposed to conduct.

Plaintiffs' argument in this regard is that Ecology acted with a discriminatory intent towards the product involved—coal--rather than with any desire to protect in-state industry from out-of-state competition. *See* Lighthouse Compl., Dkt. 1 ¶¶ 9, 80, 98–99, 172, 184, 225, 241. State Defendants deny that they acted with any such discriminatory intent. However, even if they had such an intent, it would not trigger strict scrutiny under the Commerce Clause. The type of discrimination that is relevant under the Commerce Clause is between in-state and out-of-state businesses. *See Or. Waste Sys.*, 511 U.S. at 99 (relevant discrimination is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"); *see also Rocky Mountain Farmers Union*, 730 F.3d at 1089 (prohibited discrimination involves differential treatment based solely on the state of origin). State regulations intended to protect local health and safety from the deleterious effects of a particular product or activity that do not discriminate based on the product's state of origin, do not trigger strict scrutiny. *See Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 471–72 (1981); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960).

In any case, Plaintiffs have no evidence to support their claim that Ecology acted with discriminatory intent in making its section 401 decision. Plaintiffs' theory is that Ecology

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denied the section 401 certificate because of Governor Inslee's alleged concerns about coal's contribution to climate change. *See* Dkt. 1 ¶¶ 80–95. Yet neither climate change nor greenhouse gas emissions were a basis for denying the section 401 certificate. The Director of Ecology, who made the decision, testified that she did not rely on greenhouse gas emissions in making it nor did she harbor any "anti-coal bias." Young Decl. Ex. 13 (Bellon Dep. at 39–40; 234–36). Neither did anyone else involved in the decision. *See* Young Decl. Ex. 14 (the co-leads "wanted to make sure they got it right" and made no "anti-coal" comments during the process); Ex. 15 (Governor's advisor testified he did not have an opinion about coal, that government uses "science-based decision making" and that Ecology staff person Sally Toteff "was dedicated to make sure the process ran as smoothly as possible and was as timely as possible").

The Governor took no position on the project and instead left the decision to Ecology. Young Decl. Ex. 16 (Governor "did not direct the outcome" and was "pretty much uninvolved" once the timeline was set). Plaintiffs' anti-coal theory simply has no factual support.[4] *See* Young Decl. Ex. 17 (Lighthouse's Answer to Intervenor's Interrog. No. 21 (identifying no specific facts supporting theory of "anti-coal bias")); *see also* Young Decl. Ex. 18 (Plaintiffs expert unware of any protectionist motive by Ecology).

This case is remarkably similar to *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir. 1987). There, the state of Delaware determined that its state law banned Norfolk Southern from constructing a coal lightering facility in Delaware Bay. The offshore facility would have allowed Norfolk Southern to "top off" deep draft vessels with coal. According to Norfolk Southern, the facility was necessary because all the ports on the east coast were too shallow to allow for fully loading deep draft vessels with coal. *Oberly*, 822 F.2d at 390–91. Norfolk

[4] Plaintiffs may even have abandoned this theory. In supplemental discovery answers, they now appear to contend that Ecology acted to deny certification with the intent of preserving state rail capacity for instate products. Young Decl. Ex. 19. However, there is no evidence to support this claim either. *See* Young Decl. Ex. 13 (Bellon Dep. at 139–42, 144–46, 149-50).

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Southern sued the state alleging that the state law banning the facility violated the Commerce Clause.

The Third Circuit rejected Norfolk Southern's claim. The court first found that the state law at issue (Delaware's Coastal Zone Act or "CZA") was not discriminatory, and thus not subject to strict scrutiny, because it did not favor in-state businesses or constitute economic protectionism. *Oberly*, 822 F.2d at 400–01. The court rejected Norfolk Southern's claim that the law was subject to strict scrutiny because it allegedly blocked the shipment of coal at the state's border:

> The short answer is that the CZA does not prohibit the export, import, or transshipment of coal, and thus does not have the effect of blocking the flow of coal a Delaware's borders. Even if it did, however, Norfolk Southern's argument would be unpersuasive. . . . *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* . . . .

Oberly, 822 F.2d at 401 (emphasis added).

The court went on to consider whether the Delaware law passed the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). That is, the court considered whether the "incidental burdens" on interstate commerce imposed by the statute were "clearly excessive in relation to the putative local benefits." *Oberly*, 822 F.2d at 405–06. In conducting this inquiry, the court concluded that only discriminatory burdens were relevant. It held that burdens placed equally on both in-state and out-of-state businesses were not relevant to the Commerce Clause. *Id*. The court then rejected Norfolk Southern's claim because Norfolk Southern failed to identify any relevant, discriminatory, burden. The court held that the burden Norfolk Southern identified--increased transportation costs--was not relevant because it was a nondiscriminatory burden that "must be shouldered by any coal transporter, regardless of state affiliation." *Id.* at 406–07.

The court went on to hold that it would not balance the alleged need for the facility against its environmental harm, as urged by Norfolk Southern, because it concluded that such

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balancing was not called for by the Commerce Clause. The court rejected Norfolk Southern's argument that increasing coal exports was in the national interest, holding that "the dormant Commerce Clause does not authorize a federal court to engage in the kind of broad-based 'national interest balancing' requested by Norfolk Southern." *Oberly*, 822 F.2d at 407.

These conclusions by the Third Circuit are equally applicable here. Like Norfolk Southern, Plaintiffs here allege that State Defendants have "blocked" the flow of coal at the state's borders. BNSF Compl., Dkt. 121 ¶ 29. Plaintiffs further allege that the proposed coal export facility is necessary in order to lower the transportation costs of shipping coal to Asia. Lighthouse Compl., Dkt. 1 ¶¶ 49–51. They also allege that the proposed facility is in the national interest because it is allegedly consistent with national policy to increase U.S. energy exports. *Id.* ¶¶ 192–205. These arguments are nearly identical to the arguments made by Norfolk Southern, and this Court should reject them for the same reasons that the Third Circuit rejected them. The relevant inquiry is whether the state has engaged in economic protectionism, which it has not. *See also Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 299-300 (Me. 2018) (rejecting claim that city's ban on pipeline facilities violated the commerce clause).

As in Norfolk Southern, Ecology's action in denying 401 certification for the coal export project does not prevent the movement of coal through the state, or the export of coal to foreign nations. According to BNSF, it has transported millions of tons of coal through the state each year for the past five years, and will presumably continue to do so for the foreseeable future. Young Decl. Ex. 20 (BNSF's Answer to State's Interrog. No. 1). Lighthouse itself receives and transloads approximately 100,000 tons of coal each year at the site of the proposed project and will continue to do so for the foreseeable future. Young Decl. Ex. 17 (Lighthouse's Answer to Intervenor's Interrog. No. 10); Young Decl. Ex. 12. Lighthouse also exports substantial volumes of coal to Asia, as do several other western coal companies. *See* Young Decl. Ex. 21 (Lighthouse's Answer to State Interrog. No. 4); Young

Decl. Ex. 22 (Schwartz Dep. at 23–27, 29-31). As in Norfolk Southern, Ecology's decision here was not motivated by economic protectionism. Ecology simply denied the proposal because it failed to comply with state and federal environmental standards.

In short, the state's decision here was non-discriminatory, made under facially neutral state and federal laws, and consequently it is not subject to strict scrutiny. Furthermore, Plaintiffs fail to identify any discriminatory burden they have been forced to undertake that differs from the burden any other shipper of coal to Asia would have to undertake. As a result, their Commerce Clause claims fail as a matter of law and should be dismissed.

2. The Decision Clearly Passes the Deferential *Pike* Balancing Test

In the absence of strict scrutiny, the relevant inquiry is whether the state's action causes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. In applying *Pike*, courts proceed with caution to avoid second-guessing legislative judgments. *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007). State action does not violate the Commerce Clause merely because it affects interstate commerce--the burden on commerce must be "substantial." *Harris*, 682 F.3d at 1148. The Commerce Clause protects "the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978).

Protection of the environment is a legitimate state interest that the courts repeatedly have found outweighs incidental burdens on commerce. *Clover Leaf Creamery*, 449 U.S. at 473 (state's interest in promoting conservation of energy and easing solid waste disposal problems was "substantial" and supported ban on sale of plastic milk containers); *Huron Portland Cement*, 362 U.S. at 448 (state's interest in protecting health and welfare of state citizens supported regulation of air emissions from docked ships); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994) (state's interest in protecting native wildlife sufficient to support ban on the importation of exotic species); *Rocky Mountain Farmers*

Union, 730 F.3d at 1097 (state's interest in combating climate change justified state's regulation of carbon emissions from fuels); *Maine v. Taylor*, 477 U.S. at 151 (state's interest in protecting health and safety of its citizens, and integrity of its natural resources, justified ban on the importation of live baitfish); *Portland Pipe Line Corp.*, 332 F. Supp. 3d 264 (state's interest in protecting air quality, aesthetics, and redevelopment opportunities justified ban on construction of new pipeline facilities).

In the present case, the EIS for the project identified the many deleterious environmental impacts the project would cause. Young Decl. Exs. 3-11. These impacts include an increase in the cancer risk rate in the nearby community, traffic blockage at nearby intersections and throughout the state, an increase in the rate of vessel accidents on the Columbia River, severe noise impacts at nearby residences, an adverse effect on tribal resources and fishing opportunities, destruction of a designated historic district, an increase in the rate of rail accidents in the state, and increased congestion on rail lines throughout the state. The EIS was not appealed by any party and it is now final and binding under state law. *See* RCW 43.21C.080(2). Young Decl. Ex. 13. Two state administrative Boards, in separate state proceedings, concluded the impacts in the EIS justified denial of permits for the project. Young Decl. Ex. 23; Dkt. 130-6. These administrative findings must be given preclusive effect here. *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 394 (9th Cir. 1995) (in Commerce Clause case, findings of administrative tribunal entitled to preclusive effect).

By contrast, the impacts of the decision on commerce are minimal or non-existent. Ecology's section 401 decision regulates only a single company and only a single proposal. The decision does not prevent Lighthouse or any other company from proposing an export terminal at another location nor does it prevent Lighthouse or any other company from exporting coal from other existing locations. The impact that Lighthouse and BSNF identify is the impact on them and those companies that would contract with them or otherwise benefit if

the facility were built. *See* Dkt. 191-1, at 18-19 (impact on BSNF); Young Decl. Ex. 24 (impact on jobs). This type of impact is inherent in any permit denial and, without more, does not constitute a "clearly excessive" burden on commerce.[5] [redacted]; *see Harris*, 682 F.3d at 1154 (no significant burden on interstate commerce merely because a non-discriminatory regulation "precludes a preferred, more profitable method of operating in a retail market"); *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 847-48 (9th Cir. 2013).

Even assuming Ecology's section 401 decision reduces the amount of coal that Lighthouse can ship to Asia, this "burden" is, as a matter of law, incidental and must give way to the state's legitimate interest in protecting the health, safety, and welfare of the state's citizens and state water quality. To prevail, Plaintiffs must show that the state's justifications are "illusory," which Plaintiffs cannot do. *See Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) ("if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce"); *see also Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir. 2004) (putative local benefits entitled to credit unless "wholly irrational"); *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1277 (W.D. Wash. 2015) ("for a facially neutral statute to violate the Commerce Clause, the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational").

There is nothing "illusory" or "irrational" about the impacts identified in the EIS or Lighthouse's failure to demonstrate compliance with state water quality standards. While Plaintiffs may characterize some of the impacts in the EIS as "speculative" or uncertain, since

[5] Commerce Clause cases typically involve challenges to a state statute or regulation of general applicability. Even in those cases, as noted above, the courts routinely uphold environmental laws that indisputably have an impact on commerce. *See also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (upholding county ordinance requiring waste haulers to haul waste to county facilities).

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they are expressed as risks rather than certainties, this does not disqualify them from consideration by the state. *Maine v. Taylor*, 477 U.S. at 148 (recognizing Maine's "legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible"). The state is not required to wait until citizens actually get cancer, or there is an actual vessel or rail accident, before taking action to protect against such eventualities. In any case, the EIS's conclusions cannot be challenged here and they conclusively establish the benefits of Ecology's action in terms of avoided environmental harms. Also, Plaintiffs do not dispute Lighthouse's failure to demonstrate reasonable assurance of compliance with state water quality standards. As a result, Plaintiffs' cannot establish their Commerce Clause claims and those claims should be dismissed.

E. Ecology's 401 Decision Does Not Violate the Foreign Commerce Clause

For the same reasons that Ecology's section 401 decision does not violate the interstate Commerce Clause, it also does not violate the Foreign Commerce Clause. The analysis under each clause is the same, except that, 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. L.A. Cty.*, 441 U.S. 434, 449 (1979). This additional requirement means that the Foreign Commerce Clause arguably "places stricter constraints on states than its interstate counterpart." *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 328 (1st Cir. 2012).

In this case, Ecology's action denying certification for a single export terminal does not affect in any way the federal government's ability to "speak with one voice" regarding foreign commerce. Plaintiffs argue that the certification denial contradicts an alleged federal policy to encourage the export of United States energy products. Even if such a policy exists, Ecology's action does not contradict it--Ecology simply concluded that this particular project at this

particular location cannot be approved under state and federal environmental laws.[6] Plaintiffs are already exporting coal through Canada and are free to do so from other locations as well. Ecology's section 401 decision does not target or even mention any foreign nation or foreign commerce, and no foreign nation has objected or complained about it. At most, Plaintiffs offer only vague speculation that "customers" in foreign nations such as Korea might be "interested" in purchasing coal shipped through the terminal.[7] *See* Lighthouse Compl., Dkt. 1 ¶ 48. Such speculation does not establish a Commerce Clause violation.

Moreover, Congress has not preempted the siting of coal export terminals, indicating that national uniformity is not required in such matters. *See Portland Pipe Line Corp.* 332 F. Supp. 3d at 315. As discussed above, the Clean Water Act recognizes and preserves local control over state waters and states are expressly delegated the authority to make section 401 decisions. Plaintiffs' Foreign Commerce Clause claim is without merit and should be dismissed.

V. CONCLUSION

For the reasons stated above, the Court should dismiss Lighthouse's and BNSF's commerce clause claims. In denying section 401 certification for the project, Ecology acted pursuant to authority expressly delegated to it by Congress. Ecology's decision had nothing to do with protecting in-state businesses from out-of-state competition. Ecology simply applied

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[6] It is worth noting that the federal government itself denied a permit for a coal export terminal in Washington--the Gateway Pacific Terminal--which would have been even larger than Lighthouse's proposal. This suggests that the state's denial here is more consistent with federal "policy" than not. *See* Young Decl. Ex. 22 (Schwartz Dep. at 34–37).

[7] Lighthouse refers to two contracts it has with customers in South Korea (Dkt. 1 ¶¶ 45-46), but presumably it is able to meet these contract requirements without the terminal, as it entered into them in 2012 long before the terminal existed or the state took any action with respect to it. [redacted].

its environmental laws to the project in order to protect the health, safety, and welfare of its citizens, and state water quality. This is a quintessential state function that does not violate the Commerce Clause. Summary judgment should be entered in favor of State Defendants.

DATED this 13th day of February 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 13th day of February 2019.

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