The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
FOR THE 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

WEC MOTION FOR PARTIAL SUMMARY JUDGMENT ON BNSF FOREIGN AFFAIRS DOCTRINE CLAIM (COUNT IV)

Note on Motion Calendar: February 15, 2019

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TABLE OF CONTENTS

Earthjustice
705 Second Ave., Suite 203
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TABLE OF AUTHORITIES

Page(s)

Cases

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Constitutional Provisions

Statutes

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Regulations

Other Authorities

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INTRODUCTION

Defendant-Intervenors Washington Environmental Council *et al*. ("WEC") move for summary judgment on Plaintiff-Intervenor BNSF's claim that the Washington Department of Ecology's denial of state water quality certification for the proposed Millennium coal export terminal violates the foreign affairs doctrine. Dkt. 22-1, BNSF Compl., Count IV. Plaintiffs Lighthouse Resources *et al*. ("Lighthouse") do not join BNSF in this claim, and for good reason. BNSF's far-fetched argument would vastly expand the reach of the rarely invoked foreign affairs doctrine to apply to a single permit decision for a single export facility that does not meet several state regulatory standards. While the foreign affairs doctrine may sometimes be implicated when a state law or regulation conflicts with established federal foreign policy, Ecology's denial of a single project-specific certification does not conflict with U.S. foreign policy. To the contrary, the U.S. government's treaties, statutes, and policies with regard to coal and coal exports are far from clear and consistent.

Ecology based its denial of the § 401 certification for the proposed Millennium project on Lighthouse's failure to provide reasonable assurances that its project would meet state water quality standards. Ecology also relied on findings in the unchallenged Final Environmental Impact Statement ("FEIS") that the project would result in significant, unavoidable adverse impacts. Ecology's § 401 denial—made pursuant to state and federal law—does not affect the federal government's ability to conduct foreign affairs, let alone frustrate it. Accordingly, WEC asks the Court to grant it summary judgment and reject BNSF's foreign affairs doctrine claim.[1]

[1] The Court has expressed its preference for focused motions dealing with limited issues. This second motion for partial summary judgment addresses only BNSF's foreign affairs doctrine claim. WEC anticipates filing a final motion for summary judgment on the remaining claims prior to the February 12, 2019 deadline for filing dispositive motions.

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BACKGROUND

As the Court knows, Lighthouse sought various permits and authorizations from state and local jurisdictions to build a single coal export terminal on the banks of the Columbia River in Longview, Washington. Dkt. 1, Lighthouse Compl. As required under the State Environmental Policy Act ("SEPA"), Cowlitz County and Ecology jointly conducted a full environmental and public health review that culminated in a FEIS released in April 2017. *Id*. SEPA mandates disclosure and consideration of environmental and public health risks and harms of projects needing state or local permits. Wash. Rev. Code § 43.21C. It requires review of all impacts caused by a particular project, even if they occur outside the state or otherwise outside the jurisdiction of the permitting agency. Wash. Rev. Code § 43.21C.031(2)(f); Wash. Admin. Code § 197-11-060(4)(b). Following state law, the FEIS found nine areas of significant, adverse, and unavoidable harm from the proposed coal terminal. Dkt. 130-1, FEIS summary. No one appealed the FEIS.

The Washington Department of Ecology, the Washington Department of Natural Resources ("DNR"), and the Cowlitz County Hearing Examiner have all denied various permits or authorizations necessary under Washington state law to construct and operate the coal export terminal. Dkt. 1, Lighthouse Compl. Those denials were based on federal, state, and local laws, as well as Washington's substantive SEPA authority. *See* Dkt.1-1, Ecology's § 401 Certification Denial Order; Dkt. 1-2, DNR's Denial of Request for Approval of Improvements at Millennium Site; Dkt. 1-3, Cowlitz County Hearings Examiner's Denial of Shoreline Permits. Lighthouse is currently litigating the various denials (including the § 401 denial) in multiple state forums, in addition to challenging Ecology's § 401 certification denial in this Court under federal statutory and constitutional theories. *Millennium Bulk Terminals-Longview, LLC v. Wash. Dep't of Ecology*, No. 18-2-00994-08 (Cowlitz Cty. Super. Ct.); *Northwest Alloys/Millennium Bulk Terminals-Longview, LLC v. Wash. Dep't of Natural Res.*, No. 51677-2-II (Wash. Ct. of App.); *Millennium Bulk Terminals-Longview, LLC v. Wash. Shorelines Hearings Board*, No. 52215-2-II

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(Wash. Ct. of App.). The Cowlitz County Hearing Examiner's denial of necessary shoreline development permits is not properly before the Court.[2]

BNSF and Lighthouse also challenged the Washington Commissioner of Public Lands' denial of a request for approval of a sublease of state-owned aquatic lands, as well as a denial of proposed improvements, for the proposed project site. Dkts. 1 and 22-1, Lighthouse and BNSF Compls. On October 23, 2018, this Court found that it did not have jurisdiction to consider claims asserted against the Commissioner under the Eleventh Amendment and dismissed those claims. Dkt. 170, Order on Defendant Hilary Franz's Motion for Summary Judgment under the Eleventh Amendment. As a result, only Ecology's decision on state water quality certification for the project remains at issue.[3]

ARGUMENT

I. OVERVIEW OF THE FOREIGN AFFAIRS DOCTRINE

Under the foreign affairs doctrine, courts recognize that "[t]he Constitution gives the federal government the exclusive authority to administer foreign affairs" and "state laws that intrude on this exclusively federal power are preempted." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc); *see also U.S. v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."). While the Constitution "does not create an express, general power over foreign affairs … the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that

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[2] Despite the fact that Cowlitz County is not a party to this case and the County's decision to deny shoreline development permits for the project is not properly before this Court, BNSF seeks "[a]n order vacating any and all of Defendants' unconstitutional and illegal decisions regarding the Project, as well as any federal, state, or local decisions relying on Defendants' unconstitutional or illegal actions." Dkt. 22-1, BNSF Compl. at ¶132.

[3] On December 11, 2018, this Court found that Ecology's § 401 certification denial was not preempted under the Interstate Commerce Commission Termination Act ("ICCTA") or the Ports and Waterways Safety Act, and held that BNSF lacked standing to pursue its ICCTA claim. Dkt. 200, Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment.

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power over foreign affairs is reserved to the federal government." *Deutsch v. Turner Corp.*, 324 F.3d 692, 708-09 (9th Cir. 2003) (citing U.S. Const. art. I, § 8; *id.* art. II, § 2).

Cases analyzing the foreign affairs doctrine use the same structure as more common federal preemption claims; courts look for conflict preemption or field preemption. *Movsesian*, 670 F.3d at 1071. "Conflict preemption occurs when a state acts under its traditional power, but the state law conflicts with a federal action such as a treaty, federal statute, or executive branch policy." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 617 (9th Cir. 2013); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Under the doctrine of field preemption, even in the absence of any express federal treaty, statute, or policy, a state law may be preempted if the law "intrudes on the field of foreign affairs without addressing a traditional state responsibility." *Movsesian*, 670 F.3d at 1072; *see also id.* at 1076-77. The Supreme Court left open the question of whether "executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003), noting that the "two positions can be seen as complementary," *id.* at 419 n.11.

Courts rarely invoke the foreign affairs doctrine. *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003) ("the federal government's foreign affairs power .... is rarely invoked by the courts"); *Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir. 2001) (noting that the Supreme Court had not applied foreign affairs doctrine in over 30 years). In the few cases where courts have addressed the doctrine, the facts have involved unusual state statutes regarding foreign policy issues such as the resolution of World War II Holocaust or Armenian Genocide insurance claims. *See, e.g., Garamendi*, 539 U.S. 396 (California statute conflicted with U.S. executive agreements with foreign nations regarding resolution of Holocaust-era insurance claims); *Movsesian*, 670 F.3d 1067 (California statute "expresse[d] a distinct political point of view" on a "hotly contested matter of foreign policy" by creating new

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cause of action and extending statute of limitations for Armenian Genocide victims to sue foreign insurance companies).

Courts have also considered whether the foreign affairs doctrine preempted a municipal ordinance or regulations promulgated by a state agency, finding in each instance that the doctrine did not apply. *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 442 (D. Me. 2017) (holding ordinance prohibiting loading of crude oil in a city harbor did not interfere with foreign affairs); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007) (no foreign affairs doctrine preemption with respect to state agency's greenhouse gas regulations relating to vehicle emissions). WEC is unaware of any cases where a court has applied the foreign affairs doctrine to a state agency's individual permitting decision under a decades-old federal law.[4]

II. ECOLOGY'S DENIAL OF § 401 CERTIFICATION DOES NOT CONFLICT WITH ANY TREATY, FEDERAL STATUTE, OR EXECUTIVE BRANCH POLICY.

Under the foreign affairs doctrine, "[c]onflict preemption occurs when a state acts under its traditional power, but the state law conflicts with a federal action such as a treaty, federal statute, or executive branch policy." *Cassirer*, 737 F.3d at 617. There is no conflict between Ecology's § 401 certification denial and any foreign policies of the United States.

Cases where courts have found a "clear conflict" between state law and federal executive policy demonstrate how far afield BNSF's foreign affairs doctrine claim is in regard to Ecology's denial of § 401 certification. In *Garamendi*, the U.S. Supreme Court relied on U.S. executive agreements with Germany, Austria, and France regarding Holocaust-era insurance claims when

[4] Moreover, BNSF's standing to bring its foreign affairs doctrine claim is tenuous at best, as "BNSF's claimed injury is the denial of a third party's (Lighthouse's) application for a water quality certification." *See* Dkt. 200, Order on Motions for Partial Summary Judgment at 10-11 (Dec. 11, 2018). As the Court previously found, the denial of Lighthouse's application for a water quality certification "was not a regulation of BNSF or denial of an application by BNSF." *Id.* at 15. It is unclear how BNSF is injured by Ecology's § 401 denial or how that alleged harm could be redressed by the Court.

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using the foreign affairs doctrine to strike down a California statute that required insurance companies to disclose their European Holocaust-era insurance policies. *Garamendi*, 539 U.S. at 408. The U.S. executive agreement with Germany provided that, whenever a German company was sued on a Holocaust-era claim in an American court, the U.S. government would submit a statement saying that "it would be in the foreign policy interests of the United States for the [German Foundation] to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II." *Id*. at 406. The U.S. government also agreed to use its best efforts to get "state and local governments to respect the foundation as the exclusive mechanism." *Id*. The Supreme Court found that the California statute was contrary to these agreements, noting that "California [sought] to use an iron fist where the President has consistently chosen kid gloves." *Id*. at 427.[5]

Recently, the District Court of Maine held that a city ordinance that prohibited both loading crude oil onto tankers in the city harbor and building new structures for that purpose did not violate the foreign affairs doctrine. *Portland Pipe Line*, 288 F. Supp. 3d at 442. The Court found that the foreign affairs doctrine did not apply because 1) the ordinance did not target a specific country, whereas *Garamendi* involved a law targeting several European nations, and 2) the ordinance did not directly conflict with the "consistent policy" of the federal government. *Id*. On the latter point, the Court noted that

> There are several pieces of federal policy that confirm the importance of the oil supply to national interests…. There are other examples, like the Obama Administration's decision not to grant a Presidential Permit to the Keystone XL pipeline and the Trump Administration's counter-decision to do the opposite, that indicate a less than consistent foreign policy when it comes to cross border pipelines. The foreign affairs cases require a greater conflict with a more consistent federal policy; they do not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests.

[5] The *Garamendi* Court noted the difference between conflict and field preemption, but did not tailor its analysis to either doctrine in finding the statute preempted under the foreign affairs doctrine. *See Garamendi*, 539 U.S. at 408.

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Id. at 443. Substitute "coal" for "oil" in that paragraph and *Portland Pipe Line* could be discussing the facts of this case.

A. Ecology's § 401 Denial Does Not Conflict With Any Treaty Or Trade Agreement.

BNSF cannot identify any overarching federal policy favoring the export of coal at the expense of a state's right to protect its citizens and environment because no such treaty, statute, or policy exists. *See* Dkt. 22-1, BNSF Compl. at ⁋⁋ 86-89, 119-26; Decl. of Marisa Ordonia, Ex. 1 (BNSF Suppl. Responses to State Defendant's Interrogatories and Requests for Production No. 4 (Sep. 24, 2018)).[6] Instead, BNSF cited trade agreements, statutes, and policies that broadly address exports in general and do not address—let alone conflict with—a state permitting decision made pursuant to federal law. Dkt. 22-1, BNSF Compl. at ¶¶ 86-89.

BNSF's references to the General Agreement on Tariffs and Trade ("GATT") and the United States-Korea Free Trade Agreement are without merit. Dkt. 22-1, BNSF Compl. at ¶¶ 86-87. BNSF appears to rely on sections of these agreements that address prohibitions or restrictions on trade, such as quotas or licenses. Article XI:1 of the GATT provides that

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party…on the exportation or sale for export of any product destined for the territory of any other contracting party.

Id. at ¶ 86. Citing this provision of the GATT, Article 2.8 of the United States-Korea Free Trade Agreement states that "neither Party may adopt or maintain any prohibition or restriction on the importation of any good of the other Party or on the exportation or sale for export of any good destined for the territory of the other Party, except in accordance with Article XI of GATT 1994." Neither agreement addresses ordinary land-use and environmental/public health permitting regulations, nor envisions that such measures would be implicit trade restrictions.

[6] During discovery, BNSF failed to produce any documents supporting its claim that the United States has a foreign policy specific to coal exports to Asia. *See* Decl. of Marisa Ordonia, Ex. 1 at 7-8 (BNSF Suppl. Responses to State Defendant's Interrogatories and Requests for Production No. 4 (Sep. 24, 2018)).

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These agreements are simply inapplicable. Ecology did not prohibit or restrict the export of any goods—it denied a single permit to build a single facility that does not meet state regulatory standards. WEC is unaware of any case in any jurisdiction where a court found a single permit decision to violate the foreign affairs doctrine. Following BNSF's logic, Ecology would be required to issue the water quality certification regardless of the impacts the proposed project would have on Washington's citizens and resources. Indeed, by this rationale, any state or local permitting decision would be preempted if the decision would prevent the construction or expansion of any terminal that might export its product to unnamed countries. BNSF's position is clearly wrong; general prohibitions on export quotas in trade agreements do not provide for wholesale preemption of state and federal environmental laws. *See* 19 U.S.C. § 3512(a)(2)(A)(i)-(ii) (nothing in GATT "shall be construed to amend or modify any law of the United States, including any law relating to the protection of human, animal, or plant life or health [or] the protection of the environment"). Moreover, there are processes under the GATT that a member country can invoke when it believes that another member country is in violation of the agreement—processes that no country has invoked in regard to the Millennium project. *See* DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

B. Ecology's § 401 Denial Does Not Conflict With Any Federal Statutes.

BNSF's claim that Ecology's § 401 decision conflicts with federal statutes on energy policy is even more off base. Dkt. 22-1, BNSF Compl. at ¶ 88. Section 103(a)(1) of the Energy Policy and Conservation Act of 1975, which fell under the title of the Act related to domestic supply availability, authorized the president to restrict exports of coal. PL 94–163 (S 622), Dec. 22, 1975, 89 Stat. 871. Congress repealed that section in 2015. Consolidated Appropriations Act, 2016, PL 114-113, Div. O, Title I, § 101(a), Dec. 18, 2015, 129 Stat. 2242 (repealing 42 U.S.C. § 6212). Given its repeal, BNSF's statement that the president "has not used this power

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to impose significant coal export restrictions," is nonsensical. Dkt. 22-1, BNSF Compl. at ¶ 88. In any event, this Court should not use the president's inaction to infer that a U.S. coal export policy exists and is in conflict with Ecology's use of its Clean Water Act authority. *Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction").

BNSF also alleges that Ecology's decision conflicts with the Energy Policy Act of 1992 because that Act directed the Secretary of Commerce to submit a plan to Congress for expanding coal exports. BNSF Compl. ¶ 88; *see also* 42 U.S.C. § 13367(a). Not only was no plan ever submitted, a Congressional direction to create a plan cannot possibly be presented as clear U.S. coal export policy. Furthermore, even if the Energy Policy Act of 1992 itself could be read as the U.S. policy on coal exports, the state did not restrict coal export, it denied a single permit for a proposed project that did not meet federal and state law.

C. Ecology's § 401 Denial Does Not Conflict With Any Other Federal Foreign Policy.

Finally, BNSF claims that "[t]he federal government has made it clear that the policy of the United States is to favor the expansion of coal exports to foreign countries, including countries in Asia." Dkt. 22-1, BNSF Compl. at ¶ 121. In support of this allegation, BNSF points to 1) remarks by the president about "export[ing] American energy all over the world"; 2) remarks by the Secretary of the Interior about exporting energy to allies upon lifting a moratorium on federal coal leasing; 3) an agreement between the Ukranian government and the U.S. that "facilitates Ukraine's purchase of American coal"; and 4) the White House's December 2017 National Security Strategy, which discusses energy exports generally and mentions coal only once in the context of domestic energy resources. *Id*. at ¶ 89.

While it is true that President Trump has publicly expressed his support for the coal industry, these general statements in favor of American energy resources do not rise to the level

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of a clear and consistent U.S. foreign policy relevant to the proposed Millennium terminal.[7] In *Portland Pipe Line*, the district court found that there was no consistent foreign policy warranting foreign affairs preemption despite "several pieces of federal policy that confirm the importance of the oil supply to national interests." 288 F. Supp. 3d at 443. The court noted that "the Obama Administration's decision not to grant a Presidential Permit to the Keystone XL pipeline and the Trump Administration's counter-decision to do the opposite, [] indicate a less than consistent foreign policy when it comes to cross border pipelines." *Id*; *see also Cent. Valley Chrysler-Jeep, Inc*., 529 F. Supp. 2d at 1186 (meaning of "policy" in foreign affairs cases may include an executive agreement, an act of Congress, or a negotiated treaty, but not a mere "commitment to negotiate under certain conditions and according to certain principles").

No consistent federal policy exists regarding U.S. coal, let alone U.S. coal exports.[8] For instance, similar to the *Portland Pipe Line* case, the Obama Administration put a moratorium on new coal leasing on federal public lands; the Trump Administration lifted the moratorium. *See Portland Pipe Line*, 288 F. Supp. 3d at 443; *compare* Department of Interior, Secretarial Order 3338 (Jan. 15, 2016) (federal coal leasing moratorium), *with* Department of Interior, Secretarial Order 3348 (Mar. 29, 2017) (revocation of federal coal leasing moratorium). The Obama Administration adopted the Clean Power Plan, a rule aimed at reducing carbon dioxide emissions

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[7] Nor does President Trump's Executive Order on "Promoting Energy Independence and Economic Growth" create a clear U.S. foreign policy on coal exports. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017). Executive Order 13783 concerns domestic energy resources and nowhere refers to exports. *Id*.

[8] Moreover, even if the president had a clear and consistent policy regarding coal exports, and he does not, the federal executive has no role in a state's decision to grant or deny § 401 certification for a particular project. *See* 33 U.S.C. § 1341(a)(1); *see also Mass. v. EPA*, 549 U.S. 497, 534 (2007) ("while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws"); *Cent. Valley Chrysler-Jeep, Inc.*, 529 F. Supp. 2d at 1181 ("whatever the foreign policy of the executive branch might be, it does not conflict with or prevent EPA from carrying out its congressionally mandated regulatory duties"). Indeed, it is telling that Lighthouse does not join BNSF in its foreign affairs doctrine claim and has taken the position that it "is unaware of how the President of the United States can 'override' a 401 certification." Decl. of Marisa Ordonia, Ex. 2 at 6-7 (Lighthouse Response to State Defendants' Request for Production No. 30 (Nov. 26, 2018)).

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(206) 343-7340

from electrical power generation, particularly coal-burning power plants; the Trump Administration has proposed its repeal. *Compare* 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan Final Rule), *with* 82 Fed. Reg. 48,035 (Oct. 16, 2017) (proposed repeal of Clean Power Plan).

Though BNSF's challenge involves just one certification decision for one particular project, rather than a citywide ordinance, *Portland Pipe Line* is particularly instructive here. Like the ordinance at issue in *Portland Pipe Line*, Ecology's decision is facially neutral, does not target any particular country, and has drawn no criticism from any other nation. *Portland Pipe Line*, 288 F. Supp. 3d at 445 (no foreign affairs preemption where ordinance "impacts a large and important industry and therefore inevitably will touch on federal foreign affairs in a broad sense, given the realities of a modern globalized economy" but does so "in a facially neutral manner and has no more than an incidental or indirect effect on foreign relations").

Even reports by coal proponents admit that there is no consistent federal policy on coal exports. The National Coal Council, a Federal Advisory Committee to the U.S. Secretary of Energy, recently outlined several ways that inconsistent federal policies are a barrier to exporting U.S. coal, and recommended steps the federal government could take to address those barriers. Dkt. 194-9, National Coal Council Report (Oct. 22, 2018). Significantly, the report details how the President's trade war with China illustrates how "escalating trade tensions are a serious concern that could result in significantly restricted markets for U.S. coal." *Id*. at 55; *see also id.* ("In addition to China, a number of other countries have initiated retaliation measures to U.S.-imposed tariffs on steel and aluminum imports, and at least one…has included coal among the list of targeted U.S. products."). The report also recommends that the Trump Administration reverse U.S.-driven prohibitions on international coal plant financing in order to expand market opportunities for U.S. coal exporters. *Id*. at 47-51. While BNSF can point to affectionate statements from the current presidential administration regarding coal and other fossil fuels, the National Coal Council's report highlights existing U.S. policies that create barriers for U.S. coal

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exports – failing to demonstrate any coherent federal policy. There is no clear and consistent policy; instead, there is a handful of cherry-picked public statements that are at odds with the actual substantive actions of the federal government. There is no conflict preemption.

III. ECOLOGY'S § 401 CERTIFICATION DENIAL ADDRESSES AN AREA OF TRADITIONAL STATE RESPONSIBILITY AND DOES NOT INTRUDE ON THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

Even in the absence of an express federal policy, a state action may be preempted under the foreign affairs doctrine when "(1) its 'real purpose' does not concern an area of traditional state responsibility, and (2) it intrudes on the federal government's foreign affairs power." *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016). The Ninth Circuit has found "that a state or local government is more likely to exceed the limits of its power when it creates remedial schemes or regulations to address matters of foreign affairs." *Id*. Such is not the case here. First, under the express statutory scheme designed by Congress, Clean Water Act § 401 certification decisions govern a "state responsibility," that is, compliance with state water quality standards. Second, a state's decision to deny a permit for localized environmental and public health and safety reasons does not "intrude" on the federal government's foreign affairs authority. *See* 33 U.S.C. § 1341(a)(1).

A. Ecology Properly Denied § 401 Certification For Lighthouse's Project Pursuant To State And Federal Law.

Under the federal-state scheme designed by Congress, Ecology has exclusive power to grant, condition, or deny Clean Water Act § 401 certification for projects that will discharge into Washington's navigable waters. *See* 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 121.2(a)(3). Washington has added its own regulatory standards to this federal delegation of authority. Wash. Rev. Code § 90.48.260; Wash. Admin. Code § 173-225-010.

Courts have long recognized that Congress intended for § 401 certification to provide states with an effective veto of projects, federal permits, or licenses pursuant to states' broad authority under the federal Clean Water Act. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*,

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Seattle, WA 98104
(206) 343-7340

547 U.S. 370, 380 (2006) (states have authority "to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State"); *Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87, 101 (2d Cir. 2017) (§ 401 is "a statutory scheme whereby a single state agency effectively vetoes" a project that has secured other federal and state approvals) (internal quotations omitted, emphasis in original); *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 971 (D.C. Cir. 2011) (states have "the power to block, for environmental reasons, local water projects that might otherwise win federal approval.") (internal quotations omitted); *Islander E. Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008) (Congress "provide[d] states with the option of being deputized regulators" of the Clean Water Act through statutory scheme in which a single state agency can veto a project) (internal quotations omitted, alteration in original). Ecology exercised the veto power granted to it by Congress because Lighthouse failed to show that its project would meet state and federal laws—as a result, a single coal terminal will not be built.

Moreover, the denial is facially neutral. *See Portland Pipe Line*, 288 F. Supp. 3d at 445 (facially neutral ordinance that only incidentally affects foreign relations not preempted); *cf. Movsesian*, 670 F.3d at 1075 (insurance regulation preempted where text and legislative history of statute demonstrate that it was not a "neutral law of general application"). In *Movsesian*, because the challenged statute applied only to insurance policies issued or in effect in Europe and Asia between 1875 and 1923 and specified that its intended beneficiaries were Armenian Genocide victims and their heirs, the appellate court concluded that the real purpose of the statute was "to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events." *Id.* at 1075-76. Because the real purpose of the statute did not address an area of traditional state responsibility, the court proceeded to the second prong of the field preemption analysis, and, finding that the statute intruded on the federal foreign affairs power, the court invalidated the law. *Id.* at 1076-77. Here, even if BNSF makes up stories of Ecology's "true reasons," the denial itself remains neutral and supported by uncontested factual

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(206) 343-7340

evidence in the FEIS as well as Lighthouse's admission that it did not provide reasonable assurances that the Millennium project would meet state water quality standards.[9]

B. Ecology's § 401 Certification Denial Does Not Intrude On The Federal Government's Foreign Affairs Power.

State action that has only an incidental or indirect effect on foreign affairs does not intrude on the field of the federal government's foreign affairs power. *Gingery*, 831 F.3d at 1230-31 (city's installation of Korean "Comfort Women" monument did not intrude on federal foreign affairs power even though various Japanese officials had expressed disapproval of the monument). As prior cases illustrate, states may violate the foreign affairs doctrine by establishing their own foreign policy—Ecology did no such thing here. *Deutsch*, 324 F.3d at 709 (citing *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)).

In *Zschernig*, the Supreme Court invalidated an Oregon law that required state court judges to evaluate the policies of foreign governments, in particular the policies of Communist countries, in probate proceedings. 389 U.S. at 440. The Oregon law provided for escheat unless nonresident aliens that sought to take real or personal property could prove that their home countries granted certain reciprocal rights to United States citizens. *Id*. at 430-31. While regulating property is an area of traditional state responsibility, in reviewing Oregon decisions applying the probate statute, the Court noted "that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata," and that such are "matters for the Federal Government, not for local probate courts." *Id*. at 437-38. The Court determined that

[9] In its challenge to the § 401 certification denial before the Washington Pollution Control Hearings Board, Lighthouse/Millennium stated that "Millennium would have a hard time disputing that Ecology may still need some of the information it claims is missing…. Accordingly, Millennium does not intend to separately pursue any claim that Ecology actually had 'reasonable assurance.'" Decl. of Marisa Ordonia, Ex. 3 at 5 n.1 (MBTL's Opposition to Ecology's Motion for Summary Judgment On Issue No. 2 (filed Apr. 20, 2018), *Millennium Bulk Terminals-Longview, LLC v. Wash. State Dep't of Ecology*, Wash. Pollution Control Hearings Bd. No. 17-090).

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Oregon, through its probate courts, had established its own foreign policy and that policy had a "direct impact upon foreign relations." *Zschernig*, 389 U.S. at 441.

Applying *Zschernig*, the First Circuit Court of Appeals invalidated a Massachusetts law that restricted the authority of state agencies to purchase goods or services from companies doing business with Burma following the enactment of a federal statute and an Executive Order regarding U.S. relations with Burma. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 47-48 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).[10] The Court found that "[t]he Massachusetts law presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma, and in particular to the strategy that the Congress and the President have chosen to exercise." *Id*. at 55. Moreover, the law generated protests from a number of U.S. trading partners, including Japan, the European Union, and the Association of Southeast Asian Nations. *Id*. at 47; *see also id.* at 54 ("The protests of America's trading partners are evidence of the great potential for disruption or embarrassment caused by the Massachusetts law.").

More recently, in *Movsesian*, the Ninth Circuit Court of Appeals invalidated a statute that vested California courts with jurisdiction over certain insurance claims brought by Armenian Genocide victims and extended the statute of limitations for such claims. *Movsesian*, 670 F.3d 1067. While that statute did not conflict with any express U.S. foreign policy, the Court concluded that the statute "imposes the politically charged label of 'genocide' on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for 'Armenian Genocide victim[s].'" *Id*. at 1076 (alteration in original, citation omitted). Additionally, the Court noted that though the statute sought to address alleged wrongs that were nearly a century old, Turkey continued to expresses great concern over the issue which "continues to be a hotly contested matter of foreign policy around the world." *Id*. at 1077 (citing

[10] The Supreme Court affirmed the First Circuit's decision on other grounds and declined to reach the foreign affairs issue. *Crosby*, 530 U.S. at 374 n.8.

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to news article about Turkey's retaliation over French bill regarding Armenian Genocide). Under these circumstances, the Court held that the statute had a direct impact upon foreign relations that was more than incidental as it could adversely affect the federal government's power to conduct and regulate foreign affairs. *Id*. at 1076.

Ecology's water quality certification decision is vastly different and easily distinguished from these examples. In *Movsesian*, the challenged statute established "a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for Armenian Genocide victims by subjecting foreign insurance companies to lawsuits in California." *Id*. (internal quotations and alterations omitted). By contrast, Ecology's § 401 decision does not by its plain language or effect establish a particular foreign policy for Washington—nor does it cast judgment on or even mention any foreign country. Unlike *Natsios*, no U.S. trading partners have protested Ecology's certification denial. In *Zschernig*, nonresident aliens had to prove that their home countries granted certain reciprocal rights to United States citizens in order to take real or personal property in probate proceedings. Here, Lighthouse had only to show that its proposed coal terminal would meet applicable state and federal laws—and yet it failed to do so.

Ecology's denial of a single certification for one coal terminal project has no effect on foreign affairs, even assuming that unknown Asian customers might one day buy U.S. coal shipped through the Millennium coal terminal if the project were built. If the Court applied BNSF's reasoning, the foreign affairs doctrine would preempt any state or local permitting decision for any export project where the federal executive might "favor" the commodity to be exported. That simply is not the law. *See* 33 U.S.C. § 1341; *see also Deutsch*, 324 F.3d at 710 ("the federal government's foreign affairs power ... is rarely invoked by the courts"); *Portland Pipe Line*, 288 F. Supp. 3d at 443 (foreign affairs cases "do not authorize preemption of local restrictions whenever an industry as a whole is economically powerful enough to affect this Country's national and by extension international interests"). There is no field preemption.

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CONCLUSION

For the reasons stated above, Defendant-Intervenors Washington Environmental Council, Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, and Sierra Club respectfully ask the Court to grant their motion for partial summary judgment on BNSF's foreign affairs doctrine claim.

Respectfully submitted this 24th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 24th of January, 2019.

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