

THE HONORABLE ROBERT J. BRYAN

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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,

v.

JAY INSLEE, *et al.*,

Defendants,

WASHINGTON ENVIRONMENTAL
COUNCIL, *et al.*,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE RESOURCES,
ET AL. AND PLAINTIFF-INTERVENOR
BNSF RAILWAY COMPANY’S MOTION
FOR PARTIAL SUMMARY JUDGMENT
ON FOREIGN COMMERCE CLAUSE
CLAIMS

**NOTE ON MOTION CALENDAR:
Friday, March 15th, 2019**

ORAL ARGUMENT REQUESTED

1 **I. INTRODUCTION**

2 Among the Framers’ chief concerns during the 1787 Constitutional Convention was
3 creating a national government that would prevent states with port access from impeding the
4 free flow of foreign commerce to and from the other states. By conferring on Congress the
5 power “to regulate Commerce with foreign Nations,” the Constitution did just that. As the U.S.
6 Supreme Court has explained, the federal government’s authority over foreign commerce is
7 exclusive and plenary. State actions that infringe on that authority are invalid violations of the
8 dormant foreign Commerce Clause.
9

10 Lighthouse Resources, its affiliates, and BNSF Railway Company, the plaintiffs in this
11 case, are attempting to engage in foreign commerce. They have contracted to export coal that
12 they mine in Montana to their Asian customers through a port facility that they control in
13 Washington State. But when they sought state permits for their coal export facility, the
14 Washington Department of Ecology exercised its discretionary powers to permanently block
15 the project. That action both usurps the federal government’s exclusive authority over foreign
16 commerce and, separately, ignores the federal government’s pro-coal export policies.
17

18 Because the undisputed facts show that Defendants’ actions contravene the U.S.
19 Constitution’s dormant foreign Commerce Clause, Lighthouse and BNSF are entitled to
20 summary judgment in their favor on those claims.
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22 **II. STATEMENT OF MATERIAL FACTS**

23 **A. The Millennium Bulk Terminal Coal Export Facility**

24 Lighthouse Resources and its affiliate companies (collectively, “Lighthouse”) seek to
25 move coal over BNSF Railway Company (“BNSF”)’s rail system for export through the
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1 Millennium Bulk Terminal in Longview, Washington (the “Terminal”).¹ The Terminal would
 2 export coal from the United States, including from Lighthouse’s mines in the Powder River
 3 Basin, to countries in Asia, including Japan and South Korea.² Indeed, Lighthouse already has
 4 coal export contracts with two South Korean government-controlled public utilities,³ but it is
 5 unable to fulfill them due to a lack of terminal capacity.⁴ Given the declining domestic demand
 6 for coal, greater access to Asian markets is essential to the long-term health of both
 7 Lighthouse’s mining operations⁵ and the economies of coal-producing states.⁶

9 Lighthouse acquired the Terminal—previously operated as an aluminum smelter,
 10 among other things—in 2011.⁷ It began the Washington State permitting process for its
 11 proposed coal export facility in February 2012.⁸ As part of that process, the Washington State
 12 Department of Ecology (“Ecology”) and Cowlitz County prepared an Environmental Impact
 13 Statement (“EIS”) pursuant to Washington’s State Environmental Policy Act (“SEPA”). After
 14 more than four years of environmental review, the Final EIS was published in April 2017.⁹

17 ¹ ECY.USDC-00670885 at S-1 (Final Environmental Impact Statement for Millennium Bulk Terminals
 18 Longview); Dkt. 22-1, BNSF Compl. ¶ 12; Dkt. 119, BNSF Answer ¶ 12.

19 ² Declaration of Jordan Sweeney in Support of Plaintiffs Lighthouse Resources, Inc., *et al.*’s Mtn. for Summ. J.
 20 (“Sweeney Decl.”) ¶¶ 6-7.

21 ³ Sweeney Decl. ¶¶ 8-9; LH00334097 (Master Coal Sale and Purchase Agreement Between Korea South-East
 22 Power Co. Ltd. and Ambre Energy Ltd., Agreement No. KOSEP-2012-1); LH00334168 (Master Coal Sale and
 23 Purchase Agreement Between Korea Southern Power Co. Ltd and Ambre Energy Ltd., Agreement No. KOSPO-
 24 2012-1).

25 ⁴ Sweeney Decl. ¶¶ 11-13. Lighthouse currently exports a relatively small amount of coal through a Canadian port,
 26 but it is unable to expand its presence there. *Id.* ¶¶ 12-13. As a result, it cannot provide the volumes specified in
 the contracts with its South Korean customers. *Id.* ¶ 10-13. There is substantial interest in additional coal volumes
 from other potential Asian customers, which Lighthouse cannot provide without the Terminal. *Id.* ¶¶ 13-16.

⁵ *Id.* ¶ 19.

⁶ See Dkt 78-1, Mem. in Supp. of Mtn. for Leave to file Amicus Br. at 8-10 (describing Wyoming’s and Montana’s
 interests in “access to foreign markets” for coal mined in those states).

⁷ Dkt. 1, Lighthouse Compl. ¶¶ 61, 65; Dkt. 118, Lighthouse Answer ¶ 65.

⁸ Dkt. 1, Lighthouse Compl. ¶ 70; Dkt. 118, Lighthouse Answer ¶ 70.

⁹ See ECY.USDC-00670885 (Final Environmental Impact Statement for Millennium Bulk Terminals Longview).

1 On September 26, 2017, Ecology denied Lighthouse’s request for a water quality
 2 certification under Section 401 of the Clean Water Act.¹⁰ In multiple respects, that denial was
 3 unprecedented. Most materially, the denial was an exercise of Ecology’s never-before-used
 4 “substantive” SEPA authority.¹¹ In addition, the entire denial was—for the first time—issued
 5 “with prejudice,” meaning that Lighthouse can never reapply for Section 401 water quality
 6 certification.¹² Following its Section 401 certification decision, on October 23, 2017, Ecology
 7 informed Lighthouse that it would no longer process any of Lighthouse’s permit applications
 8 for the Terminal.¹³

10 1. Federal Coal Export Policy

11 The federal government’s policy toward coal exports is well-known. After promising
 12 throughout his campaign that he would make American “energy dominance” a foreign and
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 16 ¹⁰ Dkt. 1, Lighthouse Compl. ¶¶ 161-162; Dkt. 118, Lighthouse Answer ¶¶ 161-162.

17 ¹¹ Def. Bellon’s Answers to Plaintiff Intervenor BNSF Railway Company’s First Set of Interrogatories, Requests
 18 for Admission, and Requests for Production, Response to Request for Admission 2 (“Ecology admits that, as of
 19 this date, it has not been able to identify another instance in which it denied a permit based on SEPA substantive
 20 authority.”); Ecology 30(b)(6) Dep. Tr. 108:24-109:4 (“Q How many times has Ecology used SEPA substantive
 21 authority to deny a permit license or application? A So far, Ecology has been able to identify one denial using
 22 SEPA substantive authority. Q And which one is that? A For the Millennium proposal.”); *see also* K. Phillips
 23 Dep. Tr. 207:23-208:8 (unable to recall any other instance in which a Washington state agency exercised its
 24 substantive SEPA authority to deny a project permit); T. Sturdevant Dep. Tr. 73:18-21 (unable to recall any other
 25 instance in which the Department of Ecology exercised its substantive SEPA authority to deny a permit application
 26 with prejudice).

¹² Def. Bellon’s Answers to Plaintiff Intervenor BNSF Railway Company’s First Set of Interrogatories, Requests
 for Admission, and Requests for Production, Response to Request for Admission 1 (“Ecology admits that, as to
 those section 401 decisions for which it has been able to obtain records so far, there are no other decisions denying
 the section 401 certificate expressly ‘with prejudice.’”); Ecology 30(b)(6) Dep. Tr. 113:8-11 (“Q This is the
 singular example of all of the 401 water quality certifications Ecology has ever done where it has denied a water
 quality certification with prejudice? A Yes. That’s correct.”); *see also* T. Sturdevant Dep. Tr. 73:15-17 (unable
 to recall any other instance in which the Department of Ecology ever denied with prejudice a 401 water quality
 certification).

¹³ Dkt 1-4, Letter from M. Bellon, Director, Department of Ecology, to K. Gaines, Lighthouse (“Although Ecology
 cannot prevent Millennium from filing future permit applications for the proposed coal export terminal, these EIS
 findings likely preclude Ecology from approving such applications. Therefore, at this time, Ecology staff will not
 be spending time on permit preparation related to Millennium’s additional applications for the coal export
 terminal.”).

1 economic policy priority of the United States,¹⁴ President Trump issued an Executive Order in
 2 March 2017 stating his administration’s policy to promote natural resource development as a
 3 means of “ensuring the Nation’s geopolitical security.”¹⁵ Since then, he has consistently
 4 articulated the federal government’s intention to “export American energy all over the world,”
 5 citing as one example Ukraine’s desire to buy U.S. thermal coal.¹⁶

6
 7 The federal government has also emphasized that the United States’ role as a “growing
 8 supplier of energy resources . . . around the world” is essential to “help our allies and partners
 9 become more resilient against those that use energy to coerce.”¹⁷ To that end, the United States
 10 National Security Strategy explicitly endorses a policy of “expand[ing] our port export capacity
 11 through the continued support of private sector development of coastal terminals, allowing
 12 increased market access and a greater competitive edge for U.S. industries.”¹⁸

13
 14 Free trade with Asian allies, including coal export, has been the long-standing policy of
 15 the United States stretching back to presidential administrations well before the current one.¹⁹
 16 The Obama Administration, for example, negotiated the U.S.-Korea Free Trade Agreement as
 17 a means of facilitating trade between the two countries.²⁰ Coal exports, including exports to
 18 Asia, continued during the Obama Administration, peaking at a total of over 125 million short
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 21 _____
 22 ¹⁴ Donald J. Trump, America First Energy Policy Address (May 26, 2016).

¹⁵ Executive Order 13783 (Mar. 28, 2017).

¹⁶ Remarks by President Trump at Unleashing American Energy Event (June 29, 2017),
 23 <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/>.

¹⁷ UNITED STATES NATIONAL SECURITY STRATEGY 23 (2017).

¹⁸ *Id.*

¹⁹ *See* Declaration of Kenji Ushimaru (“Ushimaru Decl.”) ¶ 25 (“[T]he Japanese government and many Japanese
 25 energy companies view U.S. federal policy as . . . pro-coal export.”).

²⁰ Free Trade Agreement, S. Kor.-U.S, Dec. 3, 2010, 125 Stat. 428 (*entered into force* Mar. 15, 2012).

1 tons in 2012—substantially more than was exported during the first year of the Trump
 2 Administration.²¹ As President Obama succinctly put it, the United States is “the Saudi Arabia
 3 of coal.”²²

4 To synthesize this information, Lighthouse has produced an expert, economist G. David
 5 Banks, who served in both the Donald Trump and George W. Bush Administrations. Based on
 6 the evidence, his expertise, and his direct experience crafting and articulating federal coal
 7 export policy, he is prepared to testify that “the United States’ foreign policy has long endorsed
 8 improving the energy security of our allies through expanded access to U.S. energy, including
 9 coal exports.”²³ Specifically, he will say that the United States’ policy “is to expand coal
 10 production and to increase coal export capacity, including through new West Coast terminals
 11 or ports that deliver coal to U.S. allies in Asia.”²⁴ The federal government, in other words,
 12 strongly favors construction of projects exactly like the Terminal to do exactly what the
 13 Terminal is supposed to do—export U.S. coal to Asia.²⁵
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20 ²¹ U.S. Energy Information Administration, Annual Coal Report 2017, Table 36, Coal Exports by Country of
 21 Destination 1960-2017 (available at <https://www.eia.gov/coal/annual/pdf/table36.pdf>). Defendants were well
 22 aware of the Obama Administration’s “all-of-the-above energy strategy,” which is what led coal exports to increase
 “to levels not seen in decades.” ECY.USDC-00534040 (Email from Rohan Patel, Special Assistant to the President
 for Intergovernmental Affairs & Sr. Advisor for Climate/Energy (May 28, 2014)).

23 ²² Farenthold, David A. & Shear, Michael D., *As Obama Visits Coal Country, Many Are Wary of His
 Environmental Policies*, Washington Post (Apr. 25, 2010) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/24/AR2010042402711.html?sid=ST2010042500203>).

24 ²³ Declaration of G. David Banks in Support of Plaintiffs Lighthouse Resources, Inc., *et al.*’s Mtn. for Summ. J.
 (“Banks Decl.”) ¶¶ 1-7, 16.

25 ²⁴ *Id.* ¶ 14.

26 ²⁵ *Id.* ¶¶ 17-21.

1 In the face of this evidence concerning federal coal export policy, Defendants have
2 definitively stated in response to discovery requests that they “make[] no contention regarding
3 the policy of the United States with respect to American coal export to Asia.”²⁶

4 III. ARGUMENT

5 A moving party is entitled to summary judgment if it can show “that there is no genuine
6 dispute as to any material fact” and that it “is entitled to judgment as a matter of law.”²⁷ An
7 issue of material fact is genuine if the evidence would allow a reasonable fact finder to return a
8 verdict for the nonmoving party.²⁸ Once the moving party has met this burden, the opposing
9 party must offer specific evidence that reestablishes a genuine, material fact issue before the
10 case can proceed to trial.²⁹

12 A. The Constitution grants the federal government exclusive power over foreign 13 commerce.

14 “One of the major defects of the Articles of Confederation, and a compelling reason for
15 the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially
16 left the individual States free to burden commerce both among themselves and with foreign
17 countries very much as they pleased.”³⁰ The Framers were especially concerned about “the
18 peculiar situation of some of the States, which having no convenient ports for foreign
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21 ²⁶ Def. Bellon’s Answers to Plaintiffs’ Third Set of Interrogatories and Requests for Production, Response to
22 Interrogatory 15; Def. Inslee’s Answers to Plaintiffs’ Third Set of Interrogatories and Requests for Production,
23 Response to Interrogatory 11. Consistent with the fact that they make no contention concerning U.S. coal export
24 policy, Defendants have not offered an expert on that issue. Mr. Banks’ testimony will thus be unrefuted.

25 ²⁷ Fed. R. Civ. P. 56(a).

26 ²⁸ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1985); *Pavoni v. Chrysler Group, LLC*, 789 F.3d 1095, 1098 (9th Cir.
2015).

27 ²⁹ *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass’n*, 809 F. 2d 626, 630 (9th Cir. 1987); *Miller v. Glen
Miller Productions, Inc.*, 454 F.3d 975, 932 (9th Cir. 2006).

28 ³⁰ *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283–86 (1976).

1 commerce, were subject to be taxed by their neighbors.”³¹ The Commerce Clause is meant to
2 resolve this problem.³²

3 Article I, section 8 gives Congress power “[t]o regulate Commerce with foreign Nations,
4 and among the several States, and with the Indian Tribes.”³³ The foreign Commerce Clause,
5 like its Constitutional neighbors, is more than an affirmative grant of power to Congress. It also
6 restricts states’ power to regulate commerce with foreign nations.³⁴ Unlike the interstate
7 Commerce Clause, however, courts have generally found it unnecessary to delimit this
8 “dormant” aspect of the foreign Commerce Clause.³⁵

10 By 1824, when the U.S. Supreme Court offered its earliest significant explication of the
11 foreign Commerce Clause, it was already “universally admitted” that the clause gives the
12 federal government power over “every species of commercial intercourse between the United
13 States and foreign nations,” including foreign commerce “that may commence or terminate at
14 a port within a State.”³⁶ Preventing the states from exercising authority over foreign commerce
15 is the flip side of the same coin. Because the Commerce Clause gives the federal government
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18 ³¹ James Madison’s Preface to Debates in the Convention of 1787, *reprinted in* RECORDS OF THE FEDERAL
19 CONVENTION OF 1787 (M. Farrand ed. 1966).

20 ³² *U.S. v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006) (“Born largely from a desire for uniform rules governing
21 commercial relations with foreign countries, the Supreme Court has read the Foreign Commerce Clause as granting
22 Congress sweeping powers.”) The Framers understood that the “key to economic prosperity was successful
23 international trade” and that international trade required a national government with the ability to “effectuate any
24 agreement uniformly throughout the nation.” Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83
25 *Fordham L. Rev.* 1955, 1964 (2017).

26 ³³ U.S. CONST. art. I, § 8, cl. 3.

³⁴ *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 449 (1979) (“The need for federal uniformity is no less
paramount in ascertaining the negative implications of Congress’ power to ‘regulate Commerce with foreign
Nations’ under the Commerce Clause.”).

³⁵ *See, e.g., Clark*, 435 F.3d at 1113 (“The Court has been unwavering in reading Congress’s power over foreign
commerce broadly.”); *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (“The Supreme
Court has indicated that when state regulations affect foreign commerce, additional scrutiny is necessary . . .”).

³⁶ *Gibbons v. Ogden*, 22 U.S. 1, 193, 195 (1824).

1 “exclusive and plenary” power over foreign commerce, that power “may not be limited,
 2 qualified, or impeded to any extent by state action.”³⁷ Otherwise, the clause would not fulfill
 3 the Framers express goal: providing for “the relief of the States which import and export
 4 through other States”³⁸

5 These fundamental principles continue to animate dormant foreign Commerce Clause
 6 doctrine. “Foreign commerce is preeminently a matter of national concern” and an area in which
 7 “federal uniformity” is frequently “essential.”³⁹ Thus, “the concern in [] Foreign Commerce
 8 Clause cases is not with an actual conflict between state and federal law, but rather with the
 9 policy of uniformity, embodied in the Commerce Clause, which presumptively prevails when
 10 the Federal Government has remained silent.”⁴⁰ The dormant foreign Commerce Clause
 11 accordingly prohibits states from displacing the federal government’s policymaking role in
 12 matters of international trade, even when the federal government has not articulated any specific
 13 policy.⁴¹ In circumstances where the federal government has spoken, its directions must be
 14 followed.⁴²

21 ³⁷ *Bd. of Trustees of Univ. of Ill. v. U.S.*, 289 U.S. 48, 56-57 (1933).

22 ³⁸ THE FEDERALIST NO. 42, at 283–85 (James Madison).

23 ³⁹ *Japan Line*, 441 U.S. at 448.

24 ⁴⁰ *Wardair Canada v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986).

25 ⁴¹ “It is crucial to the efficient execution of the Nation’s foreign policy that the Federal Government speak with
 one voice when regulating commercial regulations with foreign governments.” *South-Central Timber Dev., Inc. v.*
Wunnicke, 467 U.S. 82, 100 (1984) (internal quotation marks and ellipsis omitted).

26 ⁴² See *Odebrecht Const., Inc. v. Prasad*, 876 F. Supp. 2d 1305, 1315 (S.D. Fla. 2012) (invalidating a state law
 “interfere[d] with the President’s directive under the Libertad Act and other federal statutes . . .”).

1 **B. Defendants’ actions unconstitutionally usurp the federal government’s exclusive**
 2 **authority over foreign commerce.**

3 To effectuate the “more extensive constitutional inquiry” that is “required” when state
 4 actions involve foreign commerce, the Supreme Court has held that such actions are
 5 “inconsistent with Congress’ power to ‘regulate Commerce with foreign Nations’” whenever
 6 they “prevent[] the Federal Government from ‘speaking with one voice’ in international
 7 trade.”⁴³ This can occur in at least two ways. A state action runs afoul of the dormant foreign
 8 Commerce Clause if it “*either* implicates foreign policy issues which must be left to the Federal
 9 government *or* violates a clear federal directive.”⁴⁴ Defendants’ undisputed actions in this case
 10 breach both of these legal standards, especially in light of the “more rigorous and searching
 11 scrutiny” that applies in foreign Commerce Clause cases.⁴⁵

13 **1. Defendants’ discretionary decision to block the Terminal implicates and**
 14 **impedes federal policy authority over foreign commerce.**

15 **a. The federal government must remain the only policymaker in**
 16 **matters affecting international trade.**

17 A central lesson of the Supreme Court’s dormant foreign Commerce Clause precedent
 18 is that only the federal government is authorized to make policy decisions concerning
 19 international trade. “[W]ith respect to foreign intercourse and trade, the people of the United
 20 States act through a single government with unified and adequate national power.”⁴⁶ The
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 23 ⁴³ *Japan Line*, 441 U.S. at 446, 453-54. Although this formulation was developed in cases involving state taxation
 of foreign commerce, the underlying principle applies in other cases too. *Antilles Cement Corp. v. Acevedo Vila*,
 408 F.3d 41, 46 (1st Cir. 2005).

24 ⁴⁴ *Container Corp. of Am. v. Franchise Tax Bd.*, 436 U.S. 159, 194 (1983) (emphasis in original).

25 ⁴⁵ *Wunnicke*, 467 U.S. at 101. State actions that burden foreign commerce should also be analyzed under the usual
 framework for addressing claims under the interstate Commerce Clause. *Smitch*, 20 F.3d at 1014.

26 ⁴⁶ *Japan Line*, 441 U.S. at 448 (quoting *Bd. of Trustees*, 289 U.S. at 59).

1 relevant question is not just *what policy* is being articulated, but *whose voice* is speaking.
 2 Separate and apart from any explicit “federal directive,” a state infringes on the federal
 3 government’s constitutional prerogative to speak with “one voice” in international trade
 4 whenever its actions “implicate[] foreign policy issues which must be left to the Federal
 5 Government.”⁴⁷

6
 7 The Supreme Court first articulated its “one voice” test in *Japan Line, Ltd. v. Los*
 8 *Angeles County*, a case in which the county attempted to impose a nondiscriminatory property
 9 tax on foreign-owned cargo containers passing through its jurisdiction.⁴⁸ Analyzing the tax
 10 through the lens of the dormant foreign Commerce Clause, the Court stressed the constitutional
 11 need for “federal uniformity” in questions implicating international trade.⁴⁹ Because “the
 12 Federal Government must speak with one voice when regulating commercial relations with
 13 foreign governments,” the Court explained, states do not have an independent voice in that
 14 arena.⁵⁰ It accordingly concluded that the county’s tax was “inconsistent with Congress’ power
 15 to ‘regulate Commerce with foreign Nations.’”⁵¹

16
 17 Defendants here have permanently prohibited construction of a new coal export terminal
 18 by denying—with prejudice—a certification essential to the project.⁵² To make clear the import
 19 of their decision, they subsequently sent a letter to Lighthouse refusing to process any further
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 22 ⁴⁷ *Container Corp.*, 463 U.S. at 194.

23 ⁴⁸ *Japan Line*, 441 U.S. at 436-37.

24 ⁴⁹ *Id.* at 448-49, 452-53.

25 ⁵⁰ *Id.* at 449 (“The need for federal uniformity is no less paramount in ascertaining the negative implications of
 26 Congress’ power to ‘regulate Commerce with foreign Nations’ under the Commerce Clause.”).

⁵¹ *Id.* at 453-54.

⁵² Dkt 1-1, Order #15417, *In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals Longview-LLC* (“Section 401 Order”).

1 permit applications.⁵³ These actions do more than “implicate[] foreign policy issues which must
 2 be left to the Federal Government.”⁵⁴ As further explained below, they elevate *state* policy
 3 concerns over federal foreign commerce policy, thereby “prevent[ing] the Federal Government
 4 from speaking with one voice in international trade.”⁵⁵

5 **b. Defendants’ discretionary decision to block the Terminal using its**
 6 **substantive SEPA authority violates the “one voice” principle.**

7 Like the federal National Environmental Policy Act (“NEPA”), Washington’s SEPA
 8 requires environmental review before government decision making. NEPA is a purely
 9 procedural statute; its role ends when environmental review is complete.⁵⁶ After an EIS is
 10 published under SEPA, however, a Washington state agency “may” deny a request for
 11 governmental action if it finds that such action “would result in significant adverse impacts”
 12 and that “reasonable mitigation measures are insufficient to mitigate the identified impact.”⁵⁷
 13 This is sometimes known as “substantive SEPA” authority.⁵⁸ Crucially, an agency’s decision
 14 to employ substantive SEPA authority is entirely discretionary.⁵⁹ What is more, Ecology has
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19 ⁵³ Dkt. 1-4, Letter from M. Bellon, Director, Wash. Dep’t of Ecology to K. Gaines, Millennium Bulk Terminals-
 Longview (Oct. 23, 2017).

20 ⁵⁴ *Container Corp.*, 463 U.S. at 194.

21 ⁵⁵ *Id.* at 193. Although the Court in *Container Corp.* found no threat of retaliation sufficient to invalidate a state
 tax scheme, it recognized that state taxes “may . . . have foreign policy implications other than the threat of
 22 retaliation” from other nations—to say nothing of scenarios unrelated to state taxes that might implicate foreign
 policy issues. *Id.* at 194-96. *Cf.* Ushimaru Decl. ¶ 26 (“I see state and local efforts in the U.S. that interfere with
 the development of U.S. West Coast capacity to export coal as creating political tension with the Japanese.”).

23 ⁵⁶ *Hapner v. Tidwell*, 621 F.3d 1239, 1244 (9th Cir. 2010).

24 ⁵⁷ RCW 43.21C.060. Applicable regulations further require that the agency consider whether a proposal is
 inconsistent with certain enumerated state policies. WAC 173-802-110(2)(b).

25 ⁵⁸ *See Indian Trail Property Owner’s Ass’n v. City of Spokane*, 886 P.2d 209, 217 (Wash. Ct. App. 1994).

26 ⁵⁹ *Polygon Corp. v. City of Seattle*, 578 P.2d 1309, 1312-13 (Wash. 1978); *see* Ecology 30(b)(6) Deposition
 108:15-18 (“Q: . . . Is Ecology’s use of SEPA substantive authority mandatory or discretionary? A: SEPA
 substantive authority is supplemental. It’s discretionary.”)

1 conceded that its discretionary decision to block the Terminal in this case is the first instance in
2 which it has used its substantive SEPA authority to deny a proposal.⁶⁰

3 A discretionary decision under SEPA—especially an unprecedented discretionary
4 decision—is inherently a policy choice.⁶¹ Here, Ecology made its policy choices explicit.
5 Throughout its Section 401 Order, Ecology repeatedly invoked “substantive SEPA policies” as
6 reasons for denying Lighthouse’s requested certification with prejudice.⁶² The Section 401
7 Order never mentions federal trade policy or federal authority over foreign commerce, and
8 Ecology has never claimed that it considered those issues. In this way, Ecology decided that its
9 own policy “voice”—not the federal government’s—would determine whether a new port
10 would be opened to foreign commerce. Such a policy decision is outside the State of
11 Washington’s authority under the dormant foreign Commerce Clause.
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13
14 To the extent Defendants contend that their exercise of substantive SEPA authority
15 turned on state policies, as opposed to federal ones, they miss the point. The key question is
16 whether their actions “implicate[] foreign policy issues which must be left to the Federal
17 Government.”⁶³ A state decision that blocks operation of a terminal designed to facilitate
18 foreign commerce necessarily “implicates” foreign policy issues. A discretionary state decision
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22 ⁶⁰ Def. Bellon’s Answers to Plaintiff Intervenor BNSF Railway Company’s First Set of Interrogatories, Requests
23 for Admission, and Requests for Production, Response to Request for Admission 2 (“Ecology admits that, as of
24 this date, it has not been able to identify another instance in which it denied a permit based on SEPA substantive
25 authority.”); Ecology 30(b)(6) Deposition 108:24-109:4 (“Q: How many times has Ecology used SEPA substantive
26 authority to deny a permit license or application? A: So far, Ecology has been able to identify one denial using
SEPA substantive authority. Q: And which one is that? A: For the Millennium proposal.”).

⁶¹ *W. Main Assocs. v. City of Bellevue*, 742 P.2d 1266, 1273 (Wash. Ct. App. 1987) (“SEPA decisions are
discretionary and involve the weighing of various environmental policies.”).

⁶² Section 401 Order at 5, 6, 7, 9 & 10; *see also id.* at 11, 13 (referencing “Ecology SEPA policies”).

⁶³ *Container Corp.*, 463 U.S. at 194.

1 that permanently precludes operation of such a terminal based on state policy considerations
2 improperly shifts policy responsibility from the federal government to the state. Because
3 Defendants’ action in this case thwarts the federal “policy of uniformity” that is “embodied in
4 the Commerce Clause,” it is unconstitutional, even absent a specific policy statement from the
5 federal government.⁶⁴

6
7 **c. Denying Lighthouse’s request for certification with prejudice was
8 also a discretionary decision that violates the “one voice” principle.**

9 In addition to its maiden use of substantive SEPA authority, Ecology broke new ground
10 when it denied Lighthouse’s Section 401 water quality certification “with prejudice.”⁶⁵
11 Defendants now apparently claim that this decision to conclusively refuse Lighthouse’s request
12 rested on both Ecology’s substantive SEPA authority and its determination that Lighthouse had
13 not provided “reasonable assurance” that the Terminal would conform to state water quality
14 standards.⁶⁶ In the past, however, they have conceded that “Ecology did not deny the
15 certification ‘with prejudice’ based on [alleged water quality] deficiencies”⁶⁷ Regardless,
16 the use of agency authority to act “with prejudice” was a discretionary decision that cannot
17 withstand foreign Commerce Clause scrutiny.
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20 ⁶⁴ *Wardair*, 477 U.S. at 8.

21 ⁶⁵ Def. Bellon’s Answers to Plaintiff Intervenor BNSF Railway Company’s First Set of Interrogatories, Requests
22 for Admission, and Requests for Production, Response to Request for Admission 1 (“Ecology admits that, as to
23 those section 401 decisions for which it has been able to obtain records so far, there are no other decisions denying
the section 401 certificate expressly ‘with prejudice.’”); Ecology 30(b)(6) Dep. Tr. 113:8-11 (“Q This is the
singular example of all of the 401 water quality certifications Ecology has ever done where it has denied a water
quality certification with prejudice? A Yes. That’s correct.”).

24 ⁶⁶ See Bellon. Dep. Tr. 60:15-61:4 (stating “there could have been an issue in terms of denying with prejudice on
the water quality side as well and even if you take the SEPA concerns off the table”).

25 ⁶⁷ Pollution Control Hearings Board, No. 17-090, Ecology’s Reply in Support of Motion for Partial Summary
26 Judgment, at 2 (May 2, 2018). See also Pollution Control Hearings Board, No. 17-090, Dec. of Sally Toteff (May
2, 2018) (“If Director Bellon had decided not to use Ecology’s SEPA substantive authority to deny the Section 401
certificate, [] Ecology most likely would have ultimately denied the certification without prejudice.”).

1 Section 401 of the federal Clean Water Act provides that an applicant for certain federal
 2 permits must first seek state certification that discharges into navigable waters will comply with
 3 applicable water quality standards.⁶⁸ In its Section 401 Order, Ecology concluded that
 4 Lighthouse had “fail[ed] to demonstrate reasonable assurance” that the Terminal would “meet
 5 applicable water quality standards and other requirements of state law.”⁶⁹ Defendants have
 6 acknowledged that, under these circumstances, they had the option to deny Lighthouse’s
 7 Section 401 certification request *without* prejudice.⁷⁰ In fact, the evidence shows that Ecology
 8 had prepared—and even signed—a letter that would have allowed Lighthouse to submit
 9 additional water quality information.⁷¹ When Defendants later decided to instead deny
 10 Lighthouse’s water quality certification *with* prejudice, they were exercising policymaking
 11 discretion.⁷²

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 14 Again, because the Terminal is by nature an instrumentality of foreign commerce, this
 15 discretionary decision substituted the state’s policy priorities and judgment for the federal
 16 government’s policy priorities and judgment. Because the federal government’s authority over
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20 ⁶⁸ 33 U.S.C. § 1341(a).

21 ⁶⁹ Section 401 Order at 13.

22 ⁷⁰ Pollution Control Hearings Board, No. 17-090, Dec. of Sally Toteff (May 2, 2018) (“If Director Bellon had
 23 decided not to use Ecology’s SEPA substantive authority to deny the Section 401 certificate, [] Ecology most likely
 would have ultimately denied the certification without prejudice.”); *see also* Toteff Dep. Tr. 203:7-14 (explaining
 that Ecology had worked on different versions of decision documents for “all pathways”).

24 ⁷¹ *See* Toteff Dep. Ex. 299 (signed draft letter from S. Toteff to K. Gaines dated September 6, 2018 denying Section
 401 certification without prejudice); Toteff Dep. Tr. 212:3, 212:24-213:4 (explaining that this draft letter
 “conveyed an interpretation that Ecology was making decision on the 401” to deny without prejudice).

25 ⁷² *See* Bellon Dep. Tr. 249:18-23 (“Quite frankly, in good conscience I didn’t feel in good conscience that simply
 26 issuing a denial without prejudice was fair to the company who had been asking of me that I provide regulatory
 certainty and decision-making in a timely manner so that they could make decisions accordingly.”).

1 international trade is “exclusive and plenary,” the Constitution prohibits states from effecting
 2 foreign commerce policy in this manner.⁷³

3 **1. Blocking the Terminal violates the federal government’s clear directives**
 4 **regarding coal exports.**

5 In addition to substituting their own policies for the federal government’s, Defendants’
 6 actions in this case “violate[] a clear federal directive” regarding coal exports.⁷⁴ That violation
 7 is independent grounds for invalidating their actions under the dormant foreign Commerce
 8 Clause.

9 The substance of federal policy concerning coal exports is not up for serious debate—
 10 especially because Defendants have stated that they “make no contention” concerning that
 11 policy.⁷⁵ The United States has an abundant supply of coal and other energy resources that the
 12 federal government has long sought to export, especially to its allies.⁷⁶ That policy is most
 13 recently and pointedly stated in the 2017 United States National Security Strategy. Under the
 14 heading “Priority Actions,” the National Security Strategy states that “[t]he United States will
 15 *promote exports of our energy resources . . .* , which helps our allies and partners diversify
 16 their energy sources and brings economic gains back home.”⁷⁷ It goes on to promise that the
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21 ⁷³ *Bd. of Trustees*, 289 U.S. at 56.

22 ⁷⁴ *Container Corp.*, 463 U.S. at 194.

23 ⁷⁵ Def. Bellon’s Answers to Plaintiffs’ Third Set of Interrogatories and Requests for Production, Response to
 24 Interrogatory 15; Def. Inslee’s Answers to Plaintiffs’ Third Set of Interrogatories and Requests for Production,
 25 Response to Interrogatory 11.

26 ⁷⁶ Banks Decl. ¶ 9; *see* Letter from Jay Inslee, Gov. of Wash., and John Kitzhaber, Gov. of Or., to Nancy Sutley,
 Chair, Council on Env’tl. Quality (Mar. 25, 2013) (“The recent interest in coal export shipping terminal along the
 west coast, along with decreasing domestic demand, is a clear indication that the U.S. could become a significant
 supplier of coal to Asia.”); ECY.USDC-00326111 (acknowledging that the Terminal represents a “new vital
 transp. link to Asia and their high demand for coal”).

⁷⁷ UNITED STATES NATIONAL SECURITY STRATEGY 23 (2017) (emphasis added).

1 United States “will expand our export capacity through the continued support of *private sector*
 2 *development of coastal terminals*, allowing increased market access and a greater competitive
 3 edge for U.S. industries.”⁷⁸

4 The message of the National Security Strategy is clear. The federal government has
 5 made it a policy priority to export U.S. energy resources—including coal—through private
 6 terminals. That policy is underscored by numerous actions and public statements from current
 7 Administration officials.⁷⁹ Indeed, President Trump himself has stated that the United States
 8 intends to “export American energy all over the world.”⁸⁰ U.S. allies in Asia have praised this
 9 policy, and made several public statements supporting U.S. coal exports generally and
 10 Lighthouse’s plans for the Terminal in particular.⁸¹

11 Drawing on all of these statements and actions, as well as his direct experience working
 12 in the Trump Administration, Lighthouse’s expert witness, G. David Banks, will testify to the
 13
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15 _____
 16 ⁷⁸ *Id.* (emphasis added).

17 ⁷⁹ See, e.g., *Secretary Ross and Secretary Perry Hail New Coal Deal with Ukraine*, LH00371060; *U.S. Eyes West*
 18 *Coast Military Bases to Export Coal*, LH00336763 (Secretary Zinke commented that “it’s in our interest for
 19 national security and our allies to make sure that they have access to affordable energy commodities”);
 20 LH00336763 (proposal to export coal from military bases on the West Coast); Press Release, Joint Press Release
 21 from Vice President Mike Pence and Deputy Prime Minister Taro Aso on the Second Round of U.S.-Japan
 22 Economic Dialogue, LH00331257; Secretary Zinke Statement in Support of President Trump’s American Energy
 23 Executive Order, LH00329494 (“President Trump took bold and decisive action to end the War on Coal and put
 24 us on track for American energy independence...[A]chieving American energy independence will strengthen our
 25 national security by reducing our reliance on foreign oil and allowing us to assist our allies with their energy
 26 needs.”).

⁸⁰ Remarks by President Trump at Unleashing American Energy Event (June 29, 2017),
<https://www.whitehouse.gov/briefings-statements/remarks-president-trump-unleashing-american-energy-event/>.

⁸¹ Ushimaru Decl. ¶ 16 (“[B]ecause of its low sulfur content and other physical characteristics, coal from the
 Western U.S., particularly the Powder River Basin, is an ideal fuel for Japan’s new highly-efficient power plants.”);
 Interview with Yoichiro Yamada, Japanese Consul-General to the United States, LH00335826 (“And for [Japan’s
 clean coal] technology, the low sulfur, low temperature, for the melting of ashes, a type of coal which is produced
 in Montana and Wyoming are the best suited. Therefore, we would love to see those coal to be available for
 Japan...[Japan has] great vulnerability in the energy security The supply of energy is a national security issue
”); Interview with Masana Ezawa, Director of the Clean Coal Division, Japan Ministry of Economy, Trade
 and Industry, LH00335823 (“[Japan] import[s] coal from Australia so that diversification of exporting countries
 [is] a crucial policy for [Japan’s] energy supply U.S. coal is a good solution for our high efficient coal-
 powered power plant.”).

1 same federal policies.⁸² “United States policy is to maximize exports of energy resources, which
 2 includes thermal coal that is mined in western U.S. states.”⁸³ The goal of this federal
 3 government policy is “to help provide a reliable global supply of affordable and reliable energy,
 4 particularly for [U.S.] allies and partners.”⁸⁴ In sum, it is the United States’ policy “to expand
 5 coal production and to increase coal export capacity, including through new West Coast
 6 terminals or ports that deliver coal to U.S. allies in Asia.”⁸⁵

7
 8 This federal policy favoring coal export qualifies as a “clear federal directive,” the
 9 violation of which transgresses the dormant foreign Commerce Clause.⁸⁶ And there can be no
 10 doubt that Defendants’ actions with respect to the Terminal violate it. On its face, their decision
 11 to block the Terminal by denying Lighthouse’s request for Section 401 certification with
 12 prejudice prevents the export of U.S. coal to Asian allies through a private port. To make matters
 13 worse, if other states—or even just California and Oregon—were to “follow [Washington’s]
 14 example,” U.S. coal exports to Asia would be completely stymied.⁸⁷ Washington, “by its
 15 unilateral act, cannot be permitted to place these impediments before this Nation’s conduct of
 16 its foreign relations and its foreign trade.”⁸⁸ When it does, its actions harm both companies like

21 ⁸² Banks Decl. ¶¶ 2-16.

22 ⁸³ *Id.* ¶ 18.

23 ⁸⁴ *Id.* ¶ 10.

24 ⁸⁵ *Id.* ¶ 14.

25 ⁸⁶ *See Container Corp.*, 463 U.S. at 194; *Odebrecht Const.*, 876 F. Supp. 2d at 1315-16.

26 ⁸⁷ *See Japan Line*, 441 U.S. at 453; *cf.* Dkt. 136, States of Cal., Md., N.J., N.Y. and Ore., and the Commonwealth of Mass.’s Corrected Amicus Br. in Support of Defendants’ Mtn. for Summ. J. on Preemption Issues (arguing in support of Defendants’ decisions in this case).

⁸⁸ *See Japan Line*, 441 U.S. at 453.

1 Lighthouse and BNSF that are engaged in foreign trade, and states like Wyoming and Montana
2 whose economies depend on that foreign trade.

3 **IV. CONCLUSION**

4 Defendants cannot dispute that their with-prejudice denial of the Terminal's Section 401
5 certification was a discretionary policy decision. By nature, that decision impermissibly
6 elevated state policies over federal foreign trade policy. It also ignored clear federal directives
7 concerning coal exports. For each of those reasons, Defendants' actions violated the dormant
8 foreign Commerce Clause, and Lighthouse and BNSF are entitled to summary judgment.
9

10 Dated this 12th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 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 the filing to all counsel of record.

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