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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COMMERCE CLAUSE ISSUES

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I. INTRODUCTION

The Court's narrow task in this case is to determine whether the Department of Ecology's section 401 denial comports with constitutional standards under the dormant Commerce Clause. The Court need not, as Plaintiffs claim, decide "the fate of coal mining in the western United States." Dkt. 262 at 11. Nor is this Court the appropriate forum to decide state law claims such as whether Ecology properly interpreted the Environmental Impact Statement (EIS), which Plaintiffs invite the Court to do (Dkt. 262 at 59). Rather, this Court must apply the well-established framework for evaluating claims under the Commerce Clause. On summary judgment, the court must determine whether there are any material questions of fact and whether Defendants are entitled to judgment as a matter of law.

Here, despite a blizzard of declarations, Plaintiffs fail to establish any material factual issues because the declarations address irrelevant issues and offer nothing more than speculation and hearsay that would not be admissible at trial. On top of that, Plaintiffs frequently misrepresent the record as well as the cases they cite. Plaintiffs have no evidence to show that Ecology's section 401 decision was motivated by economic protectionism. Their exaggerated claims of "massive" economic impact (Dkt. 262 at 36) fail to establish any basis for relief because they amount to nothing more than a claim that they are entitled to evade state and federal environmental laws based solely on an alleged business need. No court has ever adopted such a broad view of the Commerce Clause. Summary judgment should be granted in favor of Defendants.

II. REPLY TO PLAINTIFFS' STATEMENT OF FACTS

Plaintiffs frequently misrepresent the record in an effort to create factual issues. Many of their factual assertions have no evidence to support them or are actually undermined by the sources they cite. The following are a few examples:

- Plaintiffs repeatedly recite erroneous numbers from Dr. Berkman's initial expert report regarding job and GDP losses allegedly resulting from the section 401 denial. *E.g.* Dkt. 262

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at 16 (claiming job losses of 3900 and GDP losses of $18 billion). Dr. Berkman revised his numbers downward substantially in a "corrected" report dated December 3, 2018. The revised numbers are less than half of his original numbers. Dkt. 265 at 33 (1500 job losses and $6 billion of GDP). Plaintiffs fail to cite the revised numbers. The fact that the numbers have fluctuated so substantially indicates their inherently speculative and uncertain nature. *See* Dkt. 256-2 at 3 (forecasts are inherently uncertain).

- Plaintiffs claim that Governor Inslee's policy advisor Rob Duff "called Ecology, suggesting the agency kill the Terminal then and there." Dkt. 262 at 23 (citing Ecology's 30(b)(6) deposition witness). In fact, the cited deposition pages say nothing of the kind. Dkt. 262-44 at 6:11–15 ("Q: Did Rob Duff tell you not to send the letter? A: No. Rob Duff did not say that. Q: Did he express an opinion as to whether the letter should be sent? A: Rob Duff did not express an opinion."). Nothing in this exchange suggests that Rob Duff gave any direction to Ecology at all, much less direction to "kill" the terminal.
- Plaintiffs claim that the Governor learned from his policy advisor "that Director Bellon could apply substantive SEPA discretion . . . to kill the Terminal." Dkt. 262 at 19–20 (citing Robisch Decl. Ex. 25). Again, the cited reference does not say this or even refer to Lighthouse's project. The document addresses the Gateway Pacific Terminal and the Governor's options regarding that project. It mentions SEPA substantive authority but says nothing about "killing" the Terminal. Dkt. 262-25.
- Plaintiffs claim that "[t]hroughout the EIS process" Ecology "waged an anti-Terminal public relations campaign against Lighthouse's 'coal trains' . . . ." Dkt. 262 at 20 (citing Robisch Decl. Exs. 34, 35). In fact, the cited documents say nothing "anti-Terminal"—they simply point out the obvious fact that the terminal would not ship apples or other agricultural products. The documents reflect that they were created in response to questions from the media, which had erroneously reported that the facility would ship agricultural products as well as coal. Dkt. 262-35 at 2. Neither document establishes a "public relations

campaign" nor do the documents reflect Ecology's reasons for its decision. *See* Dkt. 229-13 at 9–11.

- In this same vein, Plaintiffs cite a 2017 Washington Freight System Plan from the Department of Transportation, claiming that it describes coal as a "threat to 'the ongoing vitality of major freight intensive industries in Washington.' " Dkt. 262 at 34 n.44 (citing Robisch Decl. Ex. 54 at 80[1]). In fact, the document does not say that. What the document actually says at page 80 is that "uncertain and rapidly changing industries (e.g., coal, crude oil, agricultural products) can have extreme peaks that can create challenges for the rail network." Because it mentions agricultural products along with coal and crude oil, the document belies rather than supports Plaintiffs' protectionist theory.
- Plaintiffs claim that Ecology's project manager said in an email that the project's vessel traffic would have "no impacts" because "the infrastructure and pilots would be able to manage the increase . . . ." Dkt. 262 at 17 (citing Robisch Decl. Ex. 15). Read in context, however, it is clear that the project manager was responding only as to whether the traffic generated by the facility would be within historic volumes on the Columbia River. The question she answered was "[h]ow would the increase in ship traffic from the proposal impact the Columbia River capacity?" Dkt. 262-15 at 2. She was not saying anything about impacts arising from accidents, as Plaintiffs imply, and which the EIS subsequently found was a significant, adverse, unavoidable impact. Dkt. 229-9 at 49.

As these examples demonstrate, Plaintiffs lack evidence to support their claims and must resort to exaggeration and misrepresentation in an effort to avoid summary judgment. The Court should look askance at all of the Plaintiffs' factual arguments.

III. ARGUMENT

A. Summary Judgment Standard

[1] Plaintiffs fail to include page 80 in the Exhibit. However, the document is available online at www.wsdot.wa.gov/freight/systemplan.htm.

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To avoid summary judgment, Plaintiffs must come forward with sufficient evidence to support a jury verdict in their favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249–50 (1986). Summary judgment is appropriate "[i]f the evidence is merely colorable, or is not significantly probative. . . ." *Id.* (citations omitted). "[The non-movant] must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Contrary to Plaintiffs' claims, the mere fact that Commerce Clause analysis can be "fact intensive," does not mean that disputed facts exits here or that summary judgment is inappropriate. *See, e.g.*, *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (granting summary judgment); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008 (9th Cir. 1994) (same); *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018) (granting dismissal for failure to state a claim).

B. Ecology's Section 401 Decision Was Not Discriminatory in Either Purpose or Effect

Lighthouse's first argument is that there are questions of fact regarding whether Ecology's section 401 decision had either a discriminatory purpose or effect. Dkt. 262 at 32–36. This argument fails, however, because Plaintiffs have insufficient evidence to establish any discriminatory purpose. Even making all reasonable inferences in Plaintiffs' favor, it is impossible to conclude here that Ecology acted with intent to protect in-state businesses from out-of-state competition, or that Ecology's decision has that effect.

To determine the purpose and intent of Ecology's section 401 decision, the Court must look first to the document's text and to competent evidence of intent from its authors. *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1267 (W.D. Wash. 2015) ("[t]he words of the legislative body itself, written contemporaneously with the passage of the law in question, are the most persuasive source of legislative purpose") *aff'd by* 803 F.3d 389, 400

(9th Cir. 2015). The court must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the court] to conclude that they could not have been a goal of the legislation." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097–98 (9th Cir. 2013). When "a party presents circumstantial evidence of an allegedly discriminatory purpose in support of a dormant Commerce Clause argument, it is that party's responsibility to show the relationship between the proffered evidence and the challenged statute." *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 39 (1st Cir. 2005).

Statements by individual lobbyists or legislators have little if any probative value in demonstrating intent. *Gwadosky*, 430 F.3d at 39; *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 161 (5th Cir. 2007) ("[s]tray protectionist remarks" of certain legislators insufficient). "[F]ervent remarks and lobbying efforts by interest groups" cannot be imputed to the decision-makers. *Int'l Franchise Ass'n*, 97 F. Supp. 3d at 1271 (citing *W. Lynn Creamery v. Healy*, 512 U.S. 186, 215 (1994)) ("[a]nalysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them") (Rehnquist, C.J., dissenting).

Here, Plaintiffs argue two inconsistent theories of discrimination. On the one hand, they claim Ecology acted with "anti-coal" bias. Dkt. 262 at 32. On the other, they claim that Ecology acted with the intent to protect in-state agricultural interests. Dkt. 262 at 34. Neither of these theories is supported by any competent evidence. The decision itself, which is the most persuasive evidence of Ecology's intent, makes no reference to either alleged purpose. Dkt. 1-1. The author of the decision, Director Maia Bellon, testified that she harbors no "anti-coal bias" and had no thought of trying to protect agricultural interests. Dkt. 229-13 at 11–12, 15. In fact, she had been criticized by agricultural representatives for denying the permit because they believed it would benefit them. *Id.* at 6–7. The decision was based on the project's impacts and

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failure to comply with water quality standards, not on the commodity involved or a desire to protect agricultural interests. *See* Dkt. 261.

Plaintiffs cite no direct evidence from anyone at Ecology indicating "anti-coal" bias. *See* Dkt. 229-14 at 6–7. Their evidence consists entirely of "stray remarks" by various individuals who had no role in the decision. For example, they cite several remarks by the Governor reflecting his concerns about climate change. Dkt. 262 at 33–34. These remarks are not specific to the terminal and in any case are irrelevant because the Governor did not make the decision or direct the outcome in any way. *See* Dkt. 261 ¶3; Dkt. 229-16 at 9:6–8 ("He [the Governor] did not direct the outcome. We [his advisors] told him he couldn't without consequences, stepping across that line, and he did not."). Far from influencing the decision, the Governor made a conscious decision *not* to get involved and instead decided to focus his efforts on legislation and other policy initiatives to address climate change. Dkt. 229-16 at 7–8. Plaintiffs have no evidence whatsoever to show that the Governor directed or influenced the decision in any way.[2] Without such evidence, summary judgment is warranted. *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060–61 (9th Cir. 2011) (absent "non-speculative evidence of specific facts" that official influenced or was involved in the challenged decision, summary judgment is appropriate).

Similarly, Plaintiffs cite the opinions of ICF staff to the effect that Ecology subjected the project to "increased scrutiny" and made an "unprecedented" decision in denying the section 401 certification. Dkt. 262 at 32–33. From this, they leap to the conclusion that Ecology must have harbored an improper motive in making the decision. In fact, what ICF testified is that Ecology "wanted to make sure they got it right" and gave the project a hard look because it was the subject of intense *public* scrutiny. Dkt. 229-14 at 3–5. Thorough

[2] The declaration of State Senator Ann Rivers, upon which Plaintiffs rely, does not help them in this regard. Ms. Rivers merely reports her own opinions about the 401 decision, and then attempts to attribute those opinions to the Governor because Mr. Shirk, a staff person, "admitted that he personally agreed with me." Dkt. 276 ¶5. Neither Ms. River's opinions, nor Mr. Shirk's, have any bearing on Ecology's intent.

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analysis of a project's impacts is no more than what the law requires. *See Stempel v. Dep't of Water Res.*, 82 Wn.2d 109, 117–18 (1973) (discussing purposes of SEPA).

Plaintiffs also rely on the speculative assertion by Cowlitz County employee Elaine Placido—who was not involved in the section 401 decision—that "those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit denial is to further unstated State policy preferences." Dkt. 275 at 3. Because it is obviously speculative, this statement would likely not be admissible at trial and it does not suffice to avoid summary judgment. *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) (speculation as to motive without any basis in fact is not sufficient to avoid summary judgment). Indeed, this entire line of argument by Plaintiffs is speculative—Plaintiffs and Ms. Placido leap to the conclusion that Ecology must have had "unstated State policy preferences" simply because Ecology engaged in a rigorous SEPA review of the project and ultimately denied the section 401 certification.[3] Speculative assertions are not facts and do not create a factual issue for trial. *Id.*; *see also Nat'l Indus., Inc. v. Republic Nat. Life Ins. Co.*, 677 F.2d 1258, 1267 (9th Cir. 1982) ("the trier of fact is not permitted to resort to speculation and surmise"). Stripped of speculation and hyperbole, these claims amount to nothing more than that Ecology applied the law to the project.[4]

In any case, even if Plaintiffs' claims are taken at face value, they fail to establish any relevant discriminatory purpose. Neither Ms. Placido nor any other witness contends that Ecology acted with the intent of protecting in-state business from out-of-state competition. Several of Plaintiffs' witnesses, as well as Ecology, testified that no such motive existed.

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[3] Notably, Ms. Placido's opinion that the FEIS does not support the section 401 denial is not shared by either the Pollution Control Hearings Board or the Shoreline Hearings Board, nor even by her own County Hearing Examiner, all of whom concluded the FEIS does support permit denial. *See* Dkts. 130-6; 229-23; 1-3. Nor is it shared by the majority authors of the County's Health Impact Assessment. Young Decl. Ex. 3 at 21.

[4] Use of substantive SEPA authority to condition or deny projects is firmly established in Washington law—not "unprecedented." *See* Dkt. 130-6 at 13–14. The fact that the project had more significant, adverse, unavoidable impacts than any in recent memory explains why Ecology used the authority as one ground to deny the section 401 certificate. Dkt. 261 at 4.

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Dkt. 229-18 at 3-4; Dkt. 229-13 at 11–12; Young Decl. Ex. 1. Washington has no relevant coal export business to protect and gains no business advantage from the permit denial. Arguably, the impact of the denial is felt hardest in Washington itself, due to the lost jobs and other benefits that Plaintiffs themselves identify. *See* Dkts. 268, 278.[5] In such circumstances, deference is due to the decision-makers. *Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264, 313 (D. Me. 2018).

The type of discrimination that is relevant under the Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). There is no evidence of such differential treatment here. Plaintiffs argue that Ecology "assured in-state industries and in-state companies that they would *not* receive . . . heightened scrutiny for their projects" (Dkt. 262 at 33), but this is another point on which Plaintiffs misrepresent the record. The documents in the record simply discuss SEPA's potential applicability to various projects and make the obvious point that projects involving wheat, apples, or airplane wings would not likely require extensive analysis of greenhouse gases. Dkts. 262-28; 262-56. The documents do not establish any differential treatment. The concern that the project would increase rail traffic, and thereby negatively affect existing traffic, was one raised by stakeholders and the media, not by Ecology. *See* Dkt. 262-22 at 3-4 (discussing concerns raised in scoping hearings). These interest group comments and concerns cannot be imputed to Ecology. *Int'l Franchise Ass'n*, 97 F. Supp. 3d at 1271; *see also Maine v. Taylor*, 477 U.S. 131, 149 (1986) (comments responsive to outside concerns not probative of intent).

In short, Plaintiffs' evidence of discrimination fails to establish any genuine issue of material fact.[6] Plaintiffs' claims of alleged bias are based either on speculation by persons with

[5] These declarations, along with the declaration of Jason Begger, Dkt. 264, contain improper opinion testimony that would not be admissible at trial. As such, they do not preclude summary judgment.

[6] With respect to discriminatory effect, Plaintiffs argue that the decision has the effect of discriminating against out-of-state rail traffic, simply because such traffic will not occur due to the decision. Dkt. 262 at 35–36. Ecology, however, did not rely on the state of origin of the trains in making its decision, nor did it rely on any

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no actual knowledge of the decision, or on general statements by the Governor that cannot be attributed to Ecology. Plaintiffs have nothing to say at all about the water quality bases for the decision. In the end, Plaintiffs cannot establish any motive by Ecology to protect instate industry because no such motive existed. Ecology denied certification to protect the health, safety, and welfare of state citizens and state water quality. Dkt. 261 ¶4.

C. Ecology's Decision Passes the Deferential *Pike* Test As a Matter of Law

Next, Plaintiffs contend that there are material questions of fact regarding whether the burden imposed on commerce by the decision outweighs its putative benefits under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). These claims fail because (1) the "burden" Plaintiffs identify is not a relevant burden under the Commerce Clause—it is merely the lost business opportunity that the permit denial represents; and (2) Plaintiffs may not collaterally attack the EIS findings here, which conclusively establish that the project would have significant, adverse, unavoidable environmental impacts if it were approved. In addition, Plaintiffs have no evidence to rebut Ecology's conclusion that Lighthouse failed to demonstrate compliance with state water quality standards.

1. Plaintiffs Fail to Identify a Relevant Burden on Commerce

Neither loss of profit, nor even "devastating economic consequences," on a particular firm are sufficient to demonstrate a substantial burden on commerce. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1152 n.11 (9th Cir. 2012) (argument that mere loss of profits constitutes a burden on commerce "has no merit"); *Ford Motor Co. v. Ins. Comm'r of Pa.*, 874 F.2d 926, 943 (3d Cir. 1989) ("devastating economic consequences" not sufficient); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001) (same). In *Ford Motor Company*, 874 F.2d at 944, the court noted that, while the impact of the regulation at issue could be substantial, the plaintiffs' business strategy was a matter of their own choosing and they "must expect that they will be required to comply with all applicable

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out-of-state effects. The fact that the burden of the decision falls on an out-of-state entity does not itself establish discrimination. *Exxon v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

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state as well as federal regulations." The court continued: "They [the companies] cannot hope to invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion and protection of their opportunity to obtain the greatest margin of profit." *Id.*

Here, Plaintiffs contend that the section 401 denial has "massive" impact because it allegedly prevents them and potentially other companies from shipping the amount of coal to Asia that they would like. Dkt. 262 at 37. For one thing, these contentions are greatly exaggerated.[7] As noted above, Plaintiffs rely on predictions of economic impact that their own expert subsequently revised downward substantially. Dkt. 265 at 33 (revised numbers are 1500 jobs and $6 billion in GDP). The numbers are based on a forecast of the amount of coal that might be shipped through the terminal if it were built—as a result, they are inherently speculative. Dkt. 256-2 at 3 "([f]orecasts are by definition uncertain"). The amount of coal that would actually be shipped through the terminal is unknown, and depends on a host of unpredictable factors such as demand in Asia, currency exchange rates, world disasters, and policy decisions by foreign governments. *See id.* Even assuming the numbers are accurate, they are not particularly large in the context of the U.S. economy or even the state economies of the states involved. Dkt. 213-3 at 17–19.

In addition, Plaintiffs' contention of "massive" impact depends entirely on their unsupported assertion that there is no other suitable location for a coal export terminal on the West Coast. *See* Dkt. 262 at 15. Clearly, if a terminal is built at another location, or existing terminals are expanded, at least some if not all of the impact Plaintiffs' claim would be eliminated. Many other potential locations exist for a coal terminal on the West Coast. *See* Dkt. 262-13 at 5 (identifying 37 potential West Coast terminal sites); Dkt. 213-15 at 6 (discussing Gateway Pacific Terminal site in Whatcom County). There are also terminals on the East Coast

[7] It is noteworthy that, despite Plaintiffs claim that the terminal is "essential to the continued survival of coal mining in the western U.S." (Dkt. 262 at 37), no other coal company has elected to participate in this case. In fact, Arch Coal, one of the largest western coal producers, pulled out of the project in 2016, suggesting that it is not as "essential" as Plaintiffs claim. *See* Young Decl. Ex. 2.

and the Gulf Coast. While some of these locations may not be optimal in Lighthouse's eyes, there is no factual dispute that they exist, and no debate that the Constitution does not protect Plaintiffs' preferred "methods of operation in a retail market." *Exxon Corp*., 437 U.S. at 127; *see also Nat'l Ass'n of Optometrists*, 682 F.3d at 1154 (no significant burden on commerce merely because non-discriminatory regulation "precludes a preferred, more profitable method of operating in a retail market"); *see also* Dkt. 213-4 at 49 (Millennium site is Lighthouse's "preferred" location out of the ones examined).

Even assuming for the sake of argument that Plaintiffs' exaggerated claims of impact are true, they establish only that Lighthouse and potentially a few other companies would lose the profit they would otherwise gain if the terminal were built. This is not a relevant burden sufficient to demonstrate a violation of the Commerce Clause. Ecology's decision does not prohibit construction of another terminal at another location and does not prohibit Lighthouse or any other company from shipping coal to Asia. Ecology's decision simply enforces state and federal law with respect to a specific proposal at a specific site.[8] As the court stated in *Ford Motor Company*, 874 F.2d at 944, Plaintiffs choice of business strategy is their own, but they cannot expect to "invoke the Constitution at every turn to circumvent state regulation and insure unrestricted expansion." Plaintiffs cannot evade state and federal law based on an alleged business need—if they could, every large company would do the same.

2. The Benefits of the Section 401 Decision Have Been Conclusively Determined and Are Not Illusory

Plaintiffs engage in a lengthy and irrelevant discussion attempting to show that the EIS for the project does not support the section 401 decision. Dkt. 262 at 39–49. Based on this argument, they contend the benefits of the decision are "illusory." *Id.* at 39. Plaintiffs'

[8] Plaintiffs cite a number of cases that they contend establish that denial of a single permit application can violate the Commerce Clause. Dkt. 262 at 31. These cases are inapposite, however, because they involved permit decisions that were based on statutes expressly intended to favor in state businesses. *E.g., H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949). *Hood* recognizes that decisions intended to protect the health and safety of state residents are different. *Id.* at 533.

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arguments in this regard must be rejected. They are state law arguments that Plaintiffs could have raised in state court, but failed to do so. As such, they cannot be raised here. This Court should reject Plaintiffs' invitation to undertake a sweeping rewrite of the EIS and the section 401decision.

As discussed above, Plaintiffs have not identified a relevant burden on commerce arising from the section 401 decision. As a result, this Court need not even reach the question of whether the benefits of the decision are illusory. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1155; *see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013) ("plaintiff must first show . . . a substantial burden before the court will 'determine whether the benefits of the challenged law are illusory'"). Similarly, the courts generally do not consider alleged alternatives to the challenged action unless there is first shown to be improper discrimination. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1156–57 ("it is not the role of the courts to determine the best legislative solution to a problem"). This concern is especially heightened here, where Plaintiffs invite the Court to engage in determinations as to the likelihood and significance of environmental impacts, and the availability of mitigation measures, which depend on technical and scientific judgments. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 355 (2008) (courts are "ill-equipped" to make economic decisions).

This Court must give preclusive effect to the state administrative proceedings. *Kleenwell*, 48 F.3d at 394. Plaintiffs appealed the section 401 decision to the state Pollution Control Hearings Board and could have argued there that the EIS was inadequate or did not support the 401 decision. *See* Dkt. 130-6. By failing to raise their state law claims regarding the EIS in those proceedings, they are now precluded from doing so here. This Court must give the same preclusive effect to the Board's decision that the state courts would give it. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986); *Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999). This includes the Board's legal determinations and claims that Plaintiffs could have, but did not, raise. *Olson*, 188 F.3d at 1086–87. The state courts would not permit Plaintiffs to raise

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the claims they raise here, because (1) they did not appeal the EIS, and thus cannot challenge it (*see* RCW 43.21C.080(2)(a)); and (2) by failing to raise their claims to the Board, they have failed to exhaust administrative remedies, which would bar their claims in state court. *See Evergreen Wash. Healthcare Frontier LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 446–48 (2012). Plaintiffs are not entitled to a second bite at the apple.[9]

In making their arguments on this point, Plaintiffs invite the Court to consider a host of mitigation measures which they contend are alternatives to the section 401 decision. Dkt 262 at 50. Plaintiffs make these arguments despite disclaiming any intent to challenge the EIS. Dkt. 262 at 59 ("[t]his case does not challenge the FEIS"). Since the EIS concluded that there were no mitigation measures that could address the identified impacts (*see* Dkt. 229-1 at 42), these two contentions are not consistent. In reality, Plaintiffs are challenging the EIS despite not having appealed it below and despite the fact that two administrative Boards, Ecology, and the County have all relied on it. It is simply too late for these claims. In the absence of a protectionist, discriminatory decision, and in light of Plaintiffs' failure to appeal the EIS, this Court must decline to undertake the sweeping review of the EIS that Plaintiffs propose. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1156–57.

In any event, Plaintiffs' argument on this point pertains only to the SEPA grounds for the section 401 decision, not the water quality grounds. Plaintiffs submit no evidence whatever to demonstrate compliance with water quality standards or to address the deficiencies identified in the section 401 decision, even though they claim to have that information. *See* Dkt. 266 at 3. The factual issues they identify on this point (Dkt. 262 at 49–50) are not material

[9] Plaintiffs cite *Sprague v. Spokane Valley Fire Department*, 189 Wn.2d 858 (2018), for the proposition that the state courts would not give preclusive effect to the Board decision here. Dkt. 262 at 58. The *Sprague* case, however, is not comparable because it involved a constitutional issue. *See Sprague*, 189 Wn.2d at 901–02. Plaintiffs' claim here that the EIS does not support the section 401 decision, although framed in a constitutional guise, do not actually require analysis of any constitutional issues.

to any of the grounds set forth in the decision.[10] Because these grounds are an independent basis for the decision, Plaintiffs' arguments must be rejected.

D. Plaintiffs' Claims Under the Foreign Commerce Clause Lack Merit

Plaintiffs argue that there are questions of fact regarding whether the section 401 denial violates the foreign Commerce Clause. Dkt. 262 at 54–56. In fact, Plaintiffs' foreign Commerce Clause claims lack merit for the reasons already stated in prior briefing. Dkt. 227 at 23–24; Dkt. 271. Plaintiffs' contention that there are factual issues on this point is belied by the fact that Plaintiffs moved for summary judgment themselves on this issue. Dkt. 212.

E. Congress Expressly and Unambiguously Authorized Ecology to Deny Certification in Section 401 of the Clean Water Act

As set forth in the State Defendants' Motion for Summary Judgment (Dkt. 227 at 13–14), Plaintiffs' Commerce Clause claims fail at the outset because Ecology's section 401 denial was specifically and unambiguously authorized by Congress. In response to this point, Plaintiffs erroneously argue that the decision was not authorized because Congress did not specifically approve it. Dkt. 262 at 59–61. In fact, Congress unambiguously authorized the state to deny 401 certification based on failure to comply with state water quality standards. *PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994). Since that is what Ecology did here, Congress authorized the decision even if they did not expressly vote on it. Congress need not actually "state that it intends to override the dormant Commerce Clause." *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996).

Cases that have declined to find Congressional authorization, such as those discussed by Plaintiffs (Dkt. 262 at 60), involved situations where the Congressional delegation of authority to the state was far more ambiguous than is the case in section 401. For example, in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 959 (1982), the state attempted to rely on

[10] Plaintiffs' admitted in the state administrative proceedings that the information Ecology sought was needed to demonstrate compliance with state water quality standards. Dkt. 198-1 at 4 n.1. Thus, there is no relevant factual dispute as to these grounds. The factual disputes Plaintiffs assert relate to procedural issues that could have been raised to the Pollution Control Hearings Board.

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general savings clauses expressing Congressional deference to state water law. Unlike section 401, the statutes at issue contained no express authorization to the states to do anything in particular—they certainly did not contain express authorization (as 401 does) to allow states to "block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). Similarly, in *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the state argued not that its action was expressly authorized by a specific federal statute, but rather that its action was consistent with a "parallel federal policy." *Wunnicke*, 467 U.S. at 88. The court held that this was not adequate.

By contrast, the Ninth Circuit found sufficient Congressional authorization in a federal statute regarding California's milk standards that included language stating that "[n]othing in this Act or *any other provision of law* shall be construed to preempt, prohibit, or otherwise limit the authority of the [s]tate . . . [to set milk content standards]." *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998). The court held that the language referring to "any other provision of law" was sufficiently specific to include the dormant Commerce Clause and allowed California to set higher milk content standards than other states. *Id.*

Here, there is no question that Congress expressly authorized the state to deny a section 401 certification. 33 U.S.C. §1341(a). It is hard to imagine a more specific or clear delegation of authority to the state. Although section 401 does not expressly mention the Commerce Clause, Congress fully intended that states have the ability to block certain federal projects using that authority. Congress could not have intended that, by invoking the Commerce Clause, a company could evade compliance with section 401.

IV. CONCLUSION

For the reasons stated above, Plaintiffs fail to identify any material factual issues that preclude summary judgment. State Defendants' motion should be granted.

DATED this 15th day of March 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 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 15th day of March 2019.

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