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'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DORMANT AND FOREIGN COMMERCE CLAUSE CLAIMS

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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

Statutes

Regulations

Other Authorities

Earthjustice
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Seattle, WA 98104
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INTRODUCTION

This case concerns whether the Washington Department of Ecology violated constitutional limits on state action when it denied a Clean Water Act ("CWA") § 401 certification for the Millennium coal terminal. It does *not* concern whether the denial was consistent with the CWA or state laws, whether the final environmental impact statement ("FEIS") complied with appropriate procedures, or whether the FEIS findings are correct. And it certainly does *not* concern whether Ecology's decision to deny certification was wise in light of the project's claimed benefits. These issue are being addressed in other lawsuits, or are political questions. The issues presented in this commerce clause case are narrow.

Plaintiffs Lighthouse and BNSF seek to avoid summary judgment with a blizzard of alleged factual disputes. This tactic should fail because these disputes are not material. Most of the evidence submitted by plaintiffs addresses: a) speculation that the real reason for § 401 denial was the Governor's "hostility" to coal; b) arguments that the project was treated differently than other projects undergoing state permitting; and c) direct challenges to the factual findings in the FEIS. While defendant-intervenors Washington Environmental Council *et al.* ("WEC") disagree with plaintiffs' version of the facts, none of these disagreements matter for purposes of summary judgment. Under any version of the facts, plaintiffs cannot show that Ecology "discriminated" against out-of-state commerce within the meaning of the commerce clause. Nor can they show that the denial creates a "burden" to an interstate market—as opposed to adverse impacts to particular players operating in that market. Finally, while plaintiffs dispute the state's evaluation of the "benefits" of rejecting the project, there is no set of facts under which the benefits of rejecting a massive industrial project on one of the nation's most important waterways, with several unavoidable adverse impacts, are "illusory." Summary judgment should be granted to WEC.

STANDARD OF REVIEW

Plaintiffs argue that commerce clause claims can only be resolved at trial due to their fact-intensive nature. Plaintiffs' Opposition to Motion for Summary Judgment ("Opp.") at 17-19 (ECF

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262). That is wrong. The rejection of commerce clause challenges on dispositive motions is routine. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) (dismissing *Pike* claim because plaintiffs "cannot establish a significant burden on interstate commerce"); *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012) (summary judgment on *Pike* claim: plaintiffs "have failed to raise a material issue of fact concerning whether there is a significant burden on interstate commerce"); *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1045 (9th Cir. 2014) (same); *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 471-72 (9th Cir. 2001) (same); *Valley Bank of Nev. v. Plus System*, 914 F.2d 1186, 1197 (9th Cir. 1990) (same). Lighthouse's commerce clause challenge to Oregon's denial of a smaller coal terminal on the Columbia was rejected on summary judgment. ECF 213-9.

Plaintiffs also falsely claim that challenges to individual permit decisions, disconnected from any challenge to the underlying statute or ordinance, are commonplace. Opp. at 21 n. 40. In fact, such cases are all but unheard of. Plaintiffs list examples of permit challenges, but literally every one is an "as applied" challenge to a statute or ordinance. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545 (U.S. 1949) ("the statute as applied violates the Commerce Clause"); *Fla. Transp. Services, Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1256–57 (11th Cir. 2012) ("We now turn to whether the County's stevedore permit ordinance, as applied by the Port Director, violated the dormant Commerce Clause"); *Walgreen Co. v. Rullan*, 405 F.3d 50, 52 (1st Cir. 2005) (challenging constitutionality of statute); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2nd Cir. 2003) (challenging constitutionality of statute); *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric*., 650 F. Supp. 939 (E.D.N.Y. 1987) (challenge to Agriculture and Markets Law); *Safeway Stores, Inc. v. Bd. of Ag. of State of Hawaii*, 590 F. Supp. 778 (D. Haw. 1984) (challenging state Milk Control Act).[1] Plaintiffs' effort to invalidate a single regulatory permit decision, untethered to a challenge to any statute or ordinance, would take the federal courts into uncharted territory.

[1] Plaintiffs go so far as to misleadingly cite a case involving laws enacted by ballot initiative to claim that scrutiny is higher for "non-legislative" actions like the § 401 denial. Opp. at 21. There is no elevated scrutiny for individual permit challenges because such cases barely have ever been brought.

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ARGUMENT

I. THE DISCRIMINATION PROHIBITED BY THE COMMERCE CLAUSE IS IN-STATE PROTECTIONISM, NOT "HOSTILITY" TO A PARTICULAR PRODUCT.

All parties agree that the first prong of the commerce clause protects against the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Plaintiffs don't even try to anchor their case within this well-established framework. Instead, they seek to invent a new one, claiming a factual dispute as to whether Millennium was held to a higher standard than other § 401 applicants, based on the Governor's statements about the harms of coal. This effort must fail.

As a threshold matter, even if it was true that Millennium was held to a different standard than other § 401 applicants, the state had many good reasons for it. The size and scale of the proposal were simply unlike anything the state had seen before, with dramatic increases in rail and vessel traffic and a number of serious community impacts. FEIS, at S-41 (ECF 130-1); ECF 262-15 (project would trigger 44% increase in Columbia River vessel traffic). The project generated unprecedented opposition from community members, elected officials, and other stakeholders. *See, e.g.*, ECF 1-3 at 44 (Cowlitz Hearing Examiner decision) (listing multiple cities in four states formally opposed to terminal). Additionally, Millennium lied to Ecology in its first permit application about the size of the terminal, a misdirection so egregious that it was covered by the New York Times.[2] An atmosphere of distrust pervaded the subsequent proceedings. Robisch Decl., Ex. 37 (ECF 263) (Ecology staff complaining of "unethical" behavior by Millennium). If this unprecedented, highly controversial project got closer scrutiny than other § 401 applicants, like grain silos or shopping malls, it was neither surprising nor evidence of any constitutional concern.

Regardless, the dispute over whether the terminal got "special treatment" is irrelevant to the commerce clause claims presented here. Ecology violates the commerce clause if it discriminates

[2] W. Yardley, *In Northwest, A Clash Over a Coal Operation*, New York Times (Feb. 14, 2011) (available at https://www.nytimes.com/2011/02/15/us/15coal.html) (Millennium applied for permits for 5 million ton/year terminal despite secret plans to expand to up to 60 million tons).

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against out-of-state businesses to protect in-state ones, or if the burdens on commerce outweigh the benefits so completely as to be irrational. It is not a violation of the commerce clause to hold one applicant to a higher standard than another. Nor is it a commerce clause problem to be opposed to a particular product without regard to whether it is produced or used in-state or out-of-state. *Pharm. Research*, 768 F.3d at 1041 (discrimination exists if statute "discriminates against an article of commerce b*y reason of its origin or destination out of state*") (emphasis added); WEC Motion for Summary Judgment (ECF 211) ("WEC Mot.") at 7-8. Even under plaintiffs' theory of the case, the Governor's alleged "hostility" to coal has nothing to do with where coal is mined or where it is going. Even if plaintiffs could prove that Ecology was motivated by hostility to coal, rather than the stated reasons in the § 401 denial, it would not constitute unlawful discrimination.[3]

Next, Lighthouse cite to a single document—an Ecology draft "Q&A"-style memo—to argue that the state was concerned that the massive increase in rail traffic to and from the terminal could affect in-state agricultural commodities, like apples. Opp. at 10, 24. After the production of millions of documents and many days in depositions, this single draft document is evidently the best plaintiffs can muster to support a claim of state protectionism. It utterly fails to fulfill that role. The document does not offer any evidence of protectionist intent, but simply responds to incorrect beliefs that operation of the terminal would provide benefits for the state's agricultural producers. Robisch Decl., Ex. 34-35; Bellon Dep. at 141 (state farm lobby believed that terminal would benefit Washington agriculture). State law affirmatively *requires* Ecology to consider the indirect effects of

[3] Of course, WEC makes no such concession. Plaintiffs have the burden of proving discriminatory purpose. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). They cannot meet that burden by relying on declarations filled with hearsay, improper opinion testimony, and unsupported speculation about Ecology's motives. *See, e.g.*, Rivers Decl., ¶ 5 (ECF 276) (hearsay about what Governor's staff person told her); Placido Decl., § 10 (ECF 275) ("I can only conclude" state's decision is a "pretext"). This material should be stricken. Plaintiffs also egregiously mischaracterize what the declarations actually say. *Compare* Opp. at 22 (state's purpose was "to prevent out-of-state coal from entering Washington") *with* Placido Decl., § 10 (state's purpose was to "further unstated policy preferences"). Plaintiffs also fixate on the Governor's public statements about coal but offer zero evidence that the Governor had anything to do with the decision. To the contrary, Ecology made the § 401 decision without any direction from the Governor except to be "fair and impartial." Bellon Dep. at 28-29 (ECF 229-13).

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permitting a project. WAC 197-11-792(c)(ii). Moreover, there is no indication that Ecology was solely concerned about protecting *in-state* agricultural interests, as the FEIS examined other rail system users without regard to origin. *See* Robisch Decl., Ex. 14 at 3, 22 (examining rail impacts outside Washington).[4] The same is true of the state's study of vessel traffic impacts—analysis of the adverse impacts of vessel accidents did not stop at the state's borders. *Id*., Ex. 61 at 4.

Plaintiffs also cannot make a showing of "discrimination" because this requires a "comparison of substantially similar entities." *Gen. Motors Corps v. Tracy*, 519 U.S. 278, 298 (1997). To invite comparison, not only do the in-state and out-of-state entities need to be similar, they need to "compete against each other in a single market." *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1088 (9th Cir. 2013). In *Tracy*, the U.S. Supreme Court upheld Ohio statutes that taxed purchasers of both in-state and out-of-state natural gas, but did not tax gas suppliers that met the definition of local distribution companies. *Id.* at 282-86. In its commerce clause analysis, the Court explained that "there is a threshold question whether the companies are indeed similarly situated for constitutional purposes. This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed." *Id.* at 298. Although both types of companies sold natural gas, the Court concluded that they did not compete in the same market and "should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause." *Id.* at 310; *see also Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (salmon frozen at sea for transport and canning served a different market for commerce clause purposes than salmon frozen on shore for later sale); *Nat'l Ass'n of Optometrists*, 567 F.3d at 525-27 (opticians are not "similarly situated" to optometrists and ophthalmologists). Of course, coal and agricultural products like apples are neither "substantially similar" not competing with each other "in the same

[4] In any event, the vast scale of the project made it unique compared to other products. For example, *all* of the wheat and grain moving through the state constitutes 36 million tons per year, compared to 44 million tons for a single coal project. Robisch Decl., Ex. 22 ("what makes the coal export scenario unique is it large scale").

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market." Robisch Decl., Ex. 56 (explaining why coal is different from other Washington commodities).

Finally, plaintiffs argue that even if the state did not intend to discriminate, it has that practical effect since all of the claimed harm falls on coal companies operating out-of-state. This argument fails as well. In *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978), the Court upheld a facially neutral prohibition on gasoline producers or refiners operating retail gas stations even though, as a practical matter, its limitations were only felt by out-of-state businesses. The Court found that the challenged statute didn't effect interstate independent businesses, prohibit the flow of interstate goods, or "distinguish between in-state and out-of-state companies in the retail market." *Id*. at 126-27. The fact that only out-of-state companies in the market would bear the burden of the law was of no moment because no in-state companies would be advantaged. *Id*.; *Colon Health Ctr. of Am. v. Hazel*, 733 F.3d 535, 543 (4th Cir. 2013) ("in conducting the discrimination inquiry, a court should focus on discrimination against interstate commerce—not merely discrimination against the specific parties before it"). A nearly identical situation is presented here. Ecology has taken no action that prohibits the flow of coal into, out of, or through the state. Even under plaintiffs' factual theory, Ecology's § 401 decision had nothing to do with where the coal is from or where it is going. Indeed, as WEC has pointed out, many of the "burdens" of denying the permit fall *in* the state. WEC Mot. at 7; *Kassel v. Cons. Freightways Corp.*, 450 U.S. 662, 675–76 (1981) (lower scrutiny where state bears some of the harm). Plaintiffs offer no answer to this critical fact.

In sum, even if the Court were to resolve every factual dispute claimed by plaintiffs in their favor, they still would not show "discrimination" against commerce. Even Lighthouse's own expert agrees that there is no protectionism at play. Berkman Dep. at 126 (ECF-213-3). No case has ever found that the hostility to a particular product, disconnected to where it is from or where it is going, is grounds for a commerce clause violation. *See Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981) (no commerce clause violation where prohibition applied to all milk retailers "without regard to whether the milk, containers, or the sellers are from outside the State"). All plaintiffs can

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show is that out-of-state coal mines would benefit from having an export terminal in Longview. This is not enough to show discrimination under the first prong of the commerce clause analysis.

II. PLAINTIFFS' *PIKE* CLAIM SHOULD BE REJECTED AS A MATTER OF LAW.

Because Ecology regulated "evenhandedly" with only an "incidental" effect on commerce, the only question is whether it survives *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Pike* articulates a narrow doctrine under which non-discriminatory state actions impacting commerce are subject to the most deferential standard of review in the judicial arsenal. *Alaska Airlines v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991). While plaintiffs and WEC plainly view the burdens and benefits of the coal terminal differently, these varying perspectives cannot be used to avoid summary judgment. Plaintiffs still fundamentally misunderstand the *Pike* test. They must show burdens on interstate *markets*—not individual companies. Even where there is a significant burden on commerce, state action will be upheld as long as the benefits are not "illusory," with an even greater thumb on the scale in areas of health, safety, and the environment. Plaintiffs fail under all of these showings. There are no material factual disputes warranting a trial.

A. This Court Should Give Preclusive Effect to the FEIS.

WEC's opening brief explained why, in assessing plaintiffs' *Pike* challenge, this Court should give preclusive effect to three state administrative decisions finding that the facts of the FEIS are "final" and "binding" in light of plaintiffs' failure to appeal it. WEC Mot. at 8; *see also Friends of the Earth v. Hintz*, 800 F.2d 822, 834 (9th Cir. 1986) (failure to challenge Ecology § 401 decision in state proceeding foreclosed appellants from raising the water quality issue in later challenge to Corps' permit). By doing so, the Court would conduct the *Pike* analysis on the basis of the FEIS—which examined both the project's benefits and its harms in great detail—rather than on the basis of new evidence offered by plaintiffs that contradicts the FEIS.

Plaintiffs first argue that they are not actually disputing the FEIS, but only the state's "mischaracterization and misuse" of the FEIS in the §401 decision. Opp. at 49. Even cursory review of their brief and supporting materials reveals the argument to be false. Plaintiffs submit a

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(206) 343-7340

declaration from the County staff co-lead, Elaine Placido, complaining about having been "ignored" and "sidelined" by Ecology during the FEIS process—even though she signed the FEIS on behalf of the County. ECF 275, ¶ 11. She makes factual claims that are directly contradicted by the FEIS that she signed, such as the claim that the FEIS does not support a finding of significant unmitigatable impacts caused by vessel transportation. *Compare Id.* ¶ 21 with FEIS at 4.7-37 (describing disruption to recreational and commercial fishing vessels); *see also* Placido Decl., ¶ 23 (alleging no significant tribal resource impact) *with* FEIS at S-16 (describing significant impacts to tribal fishing).[5] Lighthouse seeks to introduce expert testimony modeling the impacts of the terminal on the coal market without even trying to explain why the FEIS' own detailed (and unchallenged) market analysis will not do. Berkman Decl., ¶ 2 (ECF 265); Schwartz Expert Rep. (ECF 213-5). BNSF officials complain that Ecology never "contacted" BNSF, and specifically challenge the FEIS findings on rail. Hutchings Decl., ¶ 19 (ECF 270) (challenging FEIS findings on capacity); ¶ 22 (challenging FEIS conclusions about air quality).[6] Indeed, plaintiffs' entire brief reads as a compilation of factual disputes with the FEIS. *Compare* Opp. at 7 (claiming vessel traffic would "create no impacts") *with* FEIS at S-33 ("vessel traffic would increase the frequency of collusions, groundings, and fires by approximately 2.8 incidents per year"); Opp. at 8 (claiming all nine impacts could be mitigated) *with* FEIS at S-41 (all nine impacts are "unavoidable"). Plainly, plaintiffs seek to challenge the FEIS findings here, even though they never appealed it.

Next, plaintiffs falsely assert that WEC asks this Court to preclude them from litigating the *merits* of their commerce clause challenge—which, of course, the administrative tribunals did not reach. Opp. at 47. WEC argues no such thing. Rather, WEC argues that because the Hearing Examiner, Pollution Control Hearings Board, and Shorelines Hearings Board all found that the

[5] Dr. Placido omits the fact that the Cowlitz County Hearing Examiner, who held a multi-day hearing on the project, rejected her recommendation to approve the project. ECF 1-3. Her view that the project is "fully permittable" is not shared by many.

[6] The allegations about not being contacted are particularly inscrutable. BNSF had every opportunity to participate in the FEIS process and repeatedly did so, just as it participated in the County hearing process, including offering mitigation. ECF 1-3 at 25 (finding 22% likelihood if increased rail accidents from project operations, despite BNSF "track improvements").

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FEIS was final and binding under state law, plaintiffs should be precluded from relitigating the factual findings of the FEIS in this case. Plaintiffs are free to make arguments about whether Ecology's decision violated the commerce clause. They are even free to try to argue that Ecology misrepresented the FEIS in its § 401 decision. What they should not be allowed to do is avoid summary judgment by raising factual disputes with the FEIS itself, which closely examined the market impacts as well as a number of significant harms of operating the terminal and which has been deemed final and binding. *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1032 (9th Cir. 1994) ("federal courts give preclusive effect to the findings of state administrative tribunals"). The question of the FEIS's finality was fully resolved by the three administrative tribunals in a way that meets every criteria for estoppel. *See* Opp. at 47 (listing estoppel factors).[7] Plaintiffs made a tactical decision not to appeal the FEIS and are foreclosed from doing so here.

B. The Burden of the State's Decision Falls on Individual Coal Companies, not the Market as a Whole.

Plaintiffs kick off their opposition with a grandiose claim: that this case will determine the "fate of coal mining in the Western United States." Opp. at 1, 27 ("defendants' actions will decimate the entire western U.S. coal industry"). This overwrought rhetoric is not even supported by the their own evidence. Ecology's decision does not prohibit the export, import, use, or movement of coal in Washington. It is a single permitting decision finding that a particular project fails to meet federal and state regulatory standards. While presumably harmful to Lighthouse and other companies, its effects on the coal market are modest.

As a threshold matter, plaintiffs cannot avoid summary judgment by wildly exaggerating the evidence. They cite $18 billion in economic damages and nearly 4000 lost jobs by relying on an expert report *that their own expert disavowed* in a corrected report. Opp. at 6; ECF 265 at 33 (citing

[7] *Friends of the Earth v. Hall*, 693 F. Supp. 904, 920-21 (W.D. Wash. 1988) is not on point. Op. at 48. There, the district court refused to give preclusive effect to factual findings made by the Shorelines Hearings Board because the Board "issued an evenly split (3-3) decision," and no state administrative body addressed claims challenging the Army Corps' decisions under federal law. *Id.* In this situation, the unchallenged FEIS was part of the record and considered in each state administrative proceeding on the shorelines and § 401 permit denials.

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$6 billion in damages and 1,500 jobs). The FEIS, which extensively studied the impacts (of operating the terminal) to both coal production and consumption, found only modest change in U.S. production from current levels if the terminal is not built. Market Rep. (ECF 213-2) at 6-10. Conversely, operation of the terminal could increase U.S. coal production by around 40 million tons/year, offset by production declines elsewhere.[8] *Id*. at 2-1; 6-5. Plaintiffs' own expert puts the figure lower, estimating that the terminal would increase Western coal exports by 27 million tons/year. Schwartz Expert Rep. at 32-34. This is a tiny fraction of U.S. production of close to a billion tons a year. *Id.*; WEC Mot. at 14. The fate of the industry does not hang on this modest uptick in production, as their own expert concedes. Berkman Dep. at 40 (lack of Western port access does not harm coal industry as a whole). Nobody disputes that coal production in the U.S. has been declining for years for reasons that have nothing to do with Ecology. Coal exports from the U.S. rise and fall depending on various market conditions, and exports from the Powder River Basin ("PRB") are constrained my multiple factors unrelated to port access. Market Study, at 1-6; 2-9 (low heat content of PRB coal increases the transportation cost). At the current time, coal exports are growing: they expanded 61% in 2017, and export volume to Asia doubled. Young Reply Decl., Ex. 4. Plaintiffs seek to hang more "burden" on a single permit decision than even their own facts can bear.

Plaintiffs also concede that operating the terminal would have no impact on the amount of coal consumed in the market; instead, it would simply substitute some coal suppliers for others. Schwartz Decl., ¶ 11 (ECF 277); Market Rep., at 6-5 (increase in U.S. coal production would be offset by decreases elsewhere); Berkman Dep. at 111-12; 118 (terminal will determine "winners and losers" in the market). This concession is fatal to their *Pike* challenge. It is axiomatic that the commerce clause is not concerned with state actions that advantage or disadvantage individual competitors in the marketplace. WEC Mot. at 15. Even under the most generous interpretation of

[8] Plaintiffs falsely claim that the Market Report estimated the figure to go as high as 90 million tons. Opp. at 28. That figure represents the report's estimate if *all* of the Western proposed coal terminals were built, not just Lighthouse's. Market Report at 6-5.

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the facts, plaintiffs have shown only the potential for harm to individual companies, not the "substantial burden on interstate commerce" itself that the law requires. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1148. Plaintiffs seek to avoid this precedent with a novel argument, asserting that because operation of the terminal would advantage U.S. coal companies at the expense of foreign ones, such a standard no longer applies. Opp. at 28. No commerce clause case, anywhere, has ever reached this conclusion. Nor does overheated rhetoric about promoting American commerce undercut the core principles of the doctrine that the goal is to protect markets rather than individual players, wherever they are from. The commerce clause protects domestic and foreign commerce from state isolationism; it is not a mandate that states take action to promote the interests of domestic companies at the expense of foreign ones. Indeed, such state favoritism on the basis of origin might itself lead to constitutional and other legal challenges.

Equally hyperbolic is plaintiffs' claim that, outside of this one potential location on the Columbia River, there is no conceivable alternative site, anywhere in North America, that will prevent the collapse of the coal industry. Opp. at 4-5. This claim too is belied by plaintiffs' own evidence. U.S.-mined coal has been exported from many different places in the U.S., Canada, and Mexico for a long time. The federal draft EIS identified dozens of other potential locations with the physical parameters needed to export coal. Robisch Decl., Ex. 13.[9] Moreover, there is no dispute that there is abundant *physical* capacity at Gulf and East Coast terminals to export coal; indeed, the majority of the U.S. coal exported today to the Asian market moves through Eastern terminals. Young Reply Decl., Ex. 4. It may be true that Lighthouse and other coal suppliers would struggle to compete with foreign coal under current market conditions using a more distant terminal.[10] *But see*

[9] While the federal EIS rejected most alternative sites, it did so because they didn't meet Lighthouse's preferences for shorter rail and marine transportation routes. The FEIS did not find that all of these sites lacked the requisite physical capacity to export coal.

[10] This is not necessarily so. Plaintiffs put a great deal of emphasis on Japan's allegedly strong desire to diversify its coal sources by accessing U.S. coal. Plaintiffs never explain why Japan appears unwilling to pay a premium by buying coal shipped through more distant terminals. Western coal already is available to Asian customers—it would just be more expensive than existing sources of coal due to the longer shipping distances involved.

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WEC Mot. at 16 n. 5 (major Texas coal terminal is only 8% farther away from nation's largest coal mine than Millennium terminal); Berkman Dep. at 123 (Gulf terminals could "certainly" become more viable if price demand increases). But plaintiffs do not identify any case showing that Lighthouse has a constitutional entitlement to their preferred location or the most profitable export site. WEC cannot find one either. The fact that Lighthouse could maximize its potential profit from the Millennium site compared to other existing or potential sites is not material for *Pike* balancing.

In sum, the decline of the U.S. coal industry is because people are not burning as much coal as they used to. Plaintiffs want to build a terminal that would offer an advantageous location in which to compete in the Asian export market. But the fact that plaintiffs and other coal companies stand to lose potential profits without that terminal does not mean that the state had "burdened" commerce as a whole by rejecting it. Plaintiffs do not have a constitutional right to a preferred location, especially when it collides with other values like environmental protection and community safety. *Nat'l Ass'n of Optometrists*, 567 F.3d at 1154 ("There is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operating in a retail market."). Indeed, the logical consequence of plaintiffs' argument is that no state would have *any* power to regulate projects that are engaged in commerce. The commerce clause has never reached that far.

C. A Decision with "Some Legitimate Justification" Easily Passes the *Pike* Test.

On the other side of the *Pike* equation, courts examine the "benefits" of the state's decision. The threshold under this standard is uniquely low and easily satisfied on summary judgment. "[I]f safety justifications are not *illusory*, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Kassel*, 450 U.S. at 670 (emphasis added). The *Pike* analysis is even more deferential where the state is regulating to protect its interests in health, safety, and the environment. *Clover Leaf Creamery*, 449 U.S. at 473. Here, while the parties clearly disagree on how to quantify the benefits of the state's decision, there is no conceivable set of facts under which the benefits of denying this massive industrial project—with its

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16 mile-and-a-half long coal trains dividing communities every day, its thousands of coal-filled bulk carriers in the Columbia River each year, its cancer-causing pollution in low-income communities—can be found to have been "illusory." There is no need for a trial to resolve non-material factual disputes about the precise extent of these benefits.[11]

Lighthouse tries to backpedal from its own expert's fatal concession that project denial would result in millions of dollars in benefits. WEC Mot. at 17-18 (*citing* Berkman Rebuttal report). This effort is in vain. Mr. Berkman's expert reports, deposition transcript, and litigation declaration do not establish that there are *no* benefits arising from project denial, just that he believes that the state has overstated them. ECF 265 at ¶ 5; Berkman Dep. at 129 (agreeing that the some of the benefits that Ecology relied on were not *de minimus*). It simply does not matter if the parties assign different dollar figures to the value of avoiding increased cancer rates, or traffic delays, or vessel or train accidents. FEIS 5.2-8 (finding additional 11 rail accidents annually from operation of the project). Given that the law in this Circuit is that any "legitimate justification would easily pass" the *Pike* test, the Court's inquiry is at its end. *Alaska Airlines*, 951 F.2d 984.

Plaintiffs next seek to introduce factual disputes as to each of the nine "significant, adverse, unmitigatable" impacts identified in the FEIS, directly challenging the findings of the FEIS. For example, the FEIS identified the increased risk of a vessel collision caused by the massive increase in Columbia River traffic to be a "unavoidable and significant adverse environmental impact." FEIS S-41. Plaintiffs quote snippets of text, taken out of context, to argue that this conclusion was not supported. Opp. at 32 (quoting internal email saying that there would be no impact on transport *capacity*, which is different than accident risk). They make much out of the fact that a vessel accident *could* happen, but is not certain to. Of course, avoiding a contingent low-likelihood event

[11] In fact, the Ninth Circuit has emphasized that courts look only to the *putative* benefits of state action. *Nat'l Ass'n of Optometrists*, 682 F.3d at 1155. Thus, this Court need look no further than the benefits claimed on the face of the § 401 denial and FEIS. Under such an approach, there is no way for plaintiffs to prevail in a *Pike* challenge.

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with significant adverse consequences—like a major vessel accident in the Columbia River—is a perfectly rational "benefit" for the state to weigh. No case has ever held otherwise.

Similarly, with respect to impacts on tribal fishing, plaintiffs complain that the FEIS did not quantify these impacts, as if that renders them illusory. Opp. at 33. The FEIS concluded that tribal impacts—which are uniquely difficult to put a dollar figure on in light of their cultural nature—were among the significant, unavoidable harms of the project. FEIS, at S-42. The State of Oregon and the U.S. Army Corps of Engineers also denied major coal export terminals in the region because of impacts to tribal fishing. ECF 213-9; 213-15. Clearly, there is a non-illusory basis for these findings. On issue after issue, plaintiffs attack the findings of the FEIS, offering to put on evidence that rail transportation impacts are insignificant when the FEIS says they are, Opp. at 35, or that the FEIS says that "social and community resources" would be reduced when the FEIS says the exact opposite. *Id*. at 36; FEIS at S-41 (harm to community resources would be "unavoidable and significant"). They propose to put on evidence that the increase in cancer from train emissions would not be significant, Opp. at 39, even though the FEIS found it was. FEIS at S-41 (project would increase cancer risk "at or above 10 cancers per million"); *see also* FEIS at 3.2-22 (cancer risk modeled up to 50 cancers per million in "a low-income and minority community"). Whether or not plaintiffs deem the FEIS's calculations to be correct, *any* increase in cancer risk is an adequate basis on which to find the state's decision "rational" under *Pike*. WEC Mot. at 17.

Plaintiffs' final tactic is to complain that the FEIS failed to consider mitigation for the nine unavoidable adverse harms it identified. Courts reject the request to consider "alternatives," like mitigation, in *Pike* analyses as "it is not the role of the courts to determine the best legislative solution to a problem." *Nat'l Ass'n of Optometrists*, 567 F.3d at 1156 (rejecting argument that state purpose could be served with "less restrictive alternatives"). Moreover, the entire EIS process is an attempt to mitigate for the project's adverse impacts. FEIS at S-46 to S-60 (listing all the different impacts and related mitigation). Countless adverse impacts are identified in the FEIS, but not included in the list of nine "unavoidable" adverse impacts because mitigation was identified. *Id.;*

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Robisch Decl., Ex. 48 ("Things we thought could be mitigated, we absolutely honored, that could be mitigated. Greenhouse gasses was one of those things. Doing wetland mitigation was one of those things."). It was only with respect to the nine identified harms that no mitigation could be identified. Lighthouse and BNSF had every opportunity to propose mitigation in the FEIS process. The Cowlitz County Hearing Examiner gave them another opportunity to propose mitigation, but they failed to take it—leading to the denial of County permits too. ECF 1-3 at 50-51.

In sum, plaintiffs ask the Court to second-guess the FEIS in an effort to show that the benefits of the project are illusory. Under the uniquely deferential standard for state action that seeks to protect health, safety, and the environment, there is no possibility that plaintiffs can be successful. However the benefits of permit denial are quantified, there is more than enough evidence in the record to show that denying this massive project provided benefits to the state in terms of avoided pollution, reduced traffic, and lessened accident risk, among other things. That is all that is needed for the Court to rule for WEC on summary judgment.[12]

CONCLUSION

No one disputes that plaintiffs will be adversely affected by Ecology's denial of a permit to build the coal terminal in Longview. If the decision was inconsistent with the CWA or any other regulatory standard, plaintiffs will have their day in court in one of the other lawsuits they have filed. If the decision was unwise, the Governor and his appointees are accountable through the political process. But plaintiffs cannot fit their grievances with Ecology within the narrow confines of the commerce clause. This Court should grant WEC's motion for summary judgment on plaintiffs' dormant and foreign commerce clause claims, and dismiss this case.

[12] With respect to the foreign commerce clause, WEC incorporates by reference the arguments it made in opposition to Lighthouse's summary judgment motion. ECF 260. WEC notes that nowhere in plaintiffs' affirmative motion or opposition to WEC's motion did plaintiffs address the fact that a *federal* agency denied a similar coal export terminal in 2016 due to its adverse impacts. The denial shows that there is no uniform federal policy in favor of coal export.

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Respectfully submitted this 15th day of March, 2019.

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CERTIFICATE OF SERVICE

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

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