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, WASHINGTON ENVIRONMENTAL COUNCIL, et al., Defendant-Intervenors.	NO. 3:18-cv-05005-RJB **PLAINTIFFS LIGHTHOUSE RESOURCES, *ET AL.* AND PLAINTIFF-INTERVENOR BNSF'S COMBINED OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT** NOTE FOR MOTION CALENDAR: April 5, 2019 ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

CASES

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STATUTES

STATE STATUTES

STATE REGULATIONS

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I. INTRODUCTION

This case will likely determine the fate of coal mining in the western United States. As domestic thermal coal demand declines in this country, Asian countries are poised to continue increasing their coal consumption. The only way coal mines in Wyoming, Montana, South Dakota, and Utah can realistically export their product to those countries is through Lighthouse Resources, Inc.'s proposed Millennium Bulk Terminal in Longview, Washington. Without it, those states will lose thousands of jobs a year and billions in economic value.

Defendants do not want U.S. coal to be exported to Asia. They never had any intention of granting the state approvals that Lighthouse[1] sought for the Terminal. In this case, however, they say that they decided not to permit the Terminal because "it will violate state water quality standards and state environmental policies." Dkt. 227, State Defendants' Motion for Summary Judgment on Commerce Clause Issues (State Defs.' Mot.) at 1. They argue in support of their motion for summary judgment that those violations were documented in a Final Environmental Impact Statement (FEIS). State Defs.' Mot. at 15-17. But Lighthouse and BNSF are prepared to present factual evidence that Defendants' denial of a Clean Water Act Section 401 water quality certification[2] (the 401 Denial) is far from the rote application of the FEIS that they make it out to be. Rather, the evidence will show that Defendants' actions had the purpose and effect of discriminating against interstate and foreign commerce; that therefore there is no legitimate purpose for those actions; that there exist multiple non-discriminatory alternatives to protect against any potential environmental issues; and that, in any event, the commercial harm flowing from those actions so far outweighs the alleged local benefits that they transgress the U.S. Constitution's dormant Commerce Clause.

[1] As used herein, "Lighthouse" refers to Lighthouse Resources, Inc. and all of its affiliated companies that are co-plaintiffs in this case, including Millennium Bulk Terminals-Longview, LLC.

[2] *See* 33 U.S.C. § 1341(a).

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Neither Cowlitz County, the Co-Lead agency during preparation of the FEIS, nor ICF International (ICF), the independent experts who prepared the FEIS, agree that their environmental study supports the 401 Denial. In Cowlitz County's view, the FEIS "describes a fully permittable project." Decl. of Elaine Placido, Dir. of Cmty. Serv., Cowlitz Cty. (Placido Decl.) ¶ 13.[3] The County's FEIS lead avers that Defendants "distorted the FEIS findings" to such a degree that "those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the certification denial is to further unstated State policy preferences." *Id.* ¶¶ 10, 14. ICF has similarly testified that it did not see any "obstacles or reasons that the project shouldn't be permitted," that it "didn't find any significant adverse impacts," and that it "believe[d] that the project was subject to heightened or increased scrutiny because fossil fuels was the commodity that was being exported." Amato Dep. 73:25-74:5, 93:8-15, 114:10-17 (Robisch Decl., Ex. 1); Muldoon Dep. 170:2-8 (Robisch Decl., Ex. 2). The County's and ICF's testimony fits with the recollection of a Washington State Senator, who heard directly from Governor Inslee's Executive Director of Legislative Affairs that Defendants' decision was "political," not "science-based," and that because Governor Inslee "is adamantly opposed" to the Terminal, it "had to be stopped." Decl. of Ann Rivers. Wash. State Senator, 18th Legislative Dist. (Rivers Decl.) ¶ 5. These and numerous other facts—such as Defendants' intentional, unwarranted changing of FEIS conclusions to state that certain environmental impacts "would" occur instead "could" occur—show that Defendants' decision was motivated not by devotion to the FEIS, but by discrimination against coal and coal trains that Defendants believed would displace other in-state products shipped by rail.

The record is replete with factual issues concerning Defendants' discriminatory actions and shows that there is no legitimate basis for the 401 Denial. Furthermore, Lighthouse and BNSF have demonstrated that multiple non-discriminatory alternatives could protect against

[3] A courtesy copy of Plaintiffs Lighthouse Resources, *et al.* and Plaintiff-Intervenor BNSF's Combined Opposition to Defendants' and Defendant-Intervenors' Motions for Summary Judgment with supporting declarations and exhibits will be delivered to chambers the week of March 11, 2019.

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any potential environmental issues, but Defendants refused to consider less burdensome and discriminatory regulatory alternatives that Cowlitz County, ICF, and Plaintiffs' experts agree would mitigate the potential environmental issues that are identified in the FEIS.

Even apart from any evidence of discrimination, the 401 Denial is unconstitutional because it places massive burdens on interstate and foreign commerce that dwarf any putative benefits. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); Decl. of Dr. Bark Berkman in Support of Pls.' and Plaintiff-Intervenors' Combined Opposition to Defs.' and Defendant-Intervenors' Mots. for Summ. J. (Berkman Decl.) ¶ 10. Lighthouse and BNSF's experts will explain that Defendants' decision is economically disastrous for western coal-producing states, who stand to lose $18 billion in gross domestic product (GDP), including thousands of jobs annually. At the same time, Plaintiffs' experts will testify, the benefits that Defendants identify in the 401 Denial are negligible or completely illusory. Berkman Decl. ¶¶ 4-7, 10.

Defendants will surely try to dispute some of these facts, as they have the right to do—at trial. Summary judgment is simply not the time to answer the "fact-intensive" questions of whether a state has "discriminate[d] in purpose or practical effect," *Colon Health Ctrs. of Am. v. Hazel*, 733 F.3d 535, 544-45 (4th Cir. 2013), and whether a state action "pass[es] constitutional muster under the *Pike* balancing test," *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 264 (2d Cir. 2001). Likewise, "[w]here there is a material dispute as to the credibility and weight that should be afforded to conflicting expert reports, summary judgment is usually inappropriate." *Crown Packaging Tech., Inc. v. Ball Metal Beverage Container Corp.*, 635 F.3d 1373, 1384 (Fed. Cir. 2011); *see Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037-38 (9th Cir. 2000) (same). Even the case on which Defendants base many of their summary judgment arguments, *Portland Pipe Line Corp. v. City of South Portland*, 288 F. Supp. 3d 321 (D. Me. 2017), held that summary judgment was inappropriate and went to trial. For all of these reasons, the Court should deny Defendants' motions.

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II. STATEMENT OF MATERIAL FACTS

A. The U.S. Coal Export Market and the Terminal

Thermal coal is a vital international energy commodity that the U.S. possesses in abundance. Over the past decade, thermal coal demand has declined in the U.S. and Europe, but grown dramatically in Asia and Africa. Decl. of Mr. Seth Schwartz in Supp. of Pls.' and Plaintiff-Intervenors' Combined Opposition to Defs.' and Defendant-Intervenors' Mots. for Summ. J. (Schwartz Decl.), App. B at 10-11 (Schwartz Expert Rep.). The evidence indicates that those trends will continue. Asian countries are currently building or planning hundreds of new coal-fired power plants. These plants represent a huge market opportunity for the U.S. coal industry. *Id.* at 15-16.

Japan and South Korea in particular are currently building high-efficiency, low-emission power plants, and each of these countries will need over 40 million tons of imported coal a year. *Id.*;[4] *see also* Robisch Decl., Ex. 4 (U.S. Energy Info. Admin., *Japan*); *id.*, Ex. 5 (U.S. Energy Info. Admin., *Country Analysis Brief: South Korea*). Not surprisingly, these countries are "deeply interested in building a robust coal import-export relationship" with the United States. Dkt. 215 ¶ 27 (Ushimaru Decl.). Powder River Basin (PRB) coal mined in the western U.S. offers certainty, quality, and diversity that other coal does not, *id.* ¶¶ 16, 18, 23; *see also* Schwartz Expert Rep. at 15-19, providing security for America's geopolitically vulnerable allies. Dkt. 215 ¶¶ 21, 27, 31 (Ushimaru Decl.).

This Asian export market is critical to the future of the U.S. coal industry. "[T]he only question is whether western U.S. mines will close due to the declining [U.S.] demand, or will [be able] to shift their sales to the export markets." Schwartz Decl., App. C at 14 (Schwartz Rebuttal). Right now, lack of West Coast coal export capacity makes such a shift impossible. According to the Executive Director of the Wyoming Infrastructure Authority, "the Terminal represents the only realistic avenue for tens of millions of tons of Wyoming coal to reach the

[4] Each megawatt equates to about 3,500 tons of coal consumption a year. Schwartz Expert Rep. at 15-16.

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Asian export market." Decl. of Jason Begger, Executive Dir., Wyoming Infrastructure Auth. (Begger Decl.) ¶ 12; *see also* Schwartz Rebuttal at 8-15; Schwartz Decl. ¶¶ 6-13. "No other terminals are proposed, let alone close to being permitted or constructed." Begger Decl. ¶ 14; *see also* Schwartz Decl. ¶¶ 7-9. And every existing site is already either "at capacity" (meaning that it has no room for coal exports), lacks sufficient infrastructure to export coal, or is located in a place that cannot realistically ship coal to Asia. Robisch Decl., Ex. 6 at 2 (Governor Inslee briefing memo); Schwartz Decl. ¶¶ 7-9, 12; Berkman Decl. ¶ 9; *see also* Robisch Decl., Ex. 7 (Sierra Club article noting that "every single coal export terminal in the Northwest [is] denied or abandoned"). Consequently, "the development of new terminal capacity on the West Coast at [the Terminal] is ***essential*** to the ***continued survival of coal mining*** in the western U.S." Schwartz Rebuttal at 15 (emphasis added); Schwartz Decl. ¶ 11. "[W]ithout the Terminal . . . Washington State . . . will have effectively locked Wyoming out of the Asian coal market, leaving Wyoming's coal industry to face slow and inevitable decline." Begger Decl. ¶ 14.[5]

Construction of the Terminal "eliminate[s] the chief obstacle to western U.S. mines satisfying Asian demand." Schwartz Rebuttal at 2. If permitted, the Terminal will ship up to 44 million tons of coal per year, on average almost doubling the amount of U.S. thermal coal exports. Schwartz Decl. ¶ 10; Schwartz Expert Rep. at 34.[6] This additional export capacity will help Lighthouse fulfill its contracts with its South Korean customers and satisfy market demand, which it cannot do without the Terminal. Schwartz Expert Rep. at 17; *see also* Decl. of Michael Klein, Vice President of Legal and Bus. Dev. and Gen. Counsel for Lighthouse Resources (Klein Decl.) ¶ 3. And given the extent of unmet Asian demand for PRB coal, numerous non-Lighthouse coal producers also stand ready and willing to use the Terminal. Klein Decl. ¶ 5. For example, Arch Coal and Cloud Peak Energy already have Terminal throughput options,

[5] As the Defendant-Intervenors put it, "[b]arring a successful appeal, [the 401 Denial] means the end of . . . the coal industry's larger scheme to ship vast amounts of U.S. coal to Asian markets." *See* Robisch Decl., Ex. 8 (Sierra Club article: "Last Pacific Coast Coal Terminal Nixed").

[6] "American coal export to Asia" here means coal export from American export terminals. *See also* Schwartz Decl. ¶ 10.

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Robisch Decl., Ex. 9 (Pls.' Ans. to Req. for Production 34), the Crow Tribe is interested in Terminal capacity, Sweeney Dep. 185:9-18 (Robisch Decl., Ex. 53); Klein Decl. ¶ 5, and many other western U.S. coal producers would use the Terminal to get their coal to market. Schwartz Rebuttal at 14-15; Klein Decl. ¶ 5. In short, the Terminal would be a lifeline for the entire western coal industry. Schwartz Rebuttal at 15-16; Berkman Decl., App. B at 8 (Berkman Expert Rep.) ("The proposed Terminal would support coal exports from multiple mines owned by different companies—the burden of the certification denial is not limited to a single firm."); Schwartz Decl. ¶¶ 10-11. More than that, the Terminal means billions in GDP, thousands of jobs, and critical revenue for landlocked states who are "largely at the mercy" of their coastal cousins. Begger Decl. ¶ 16; *see id.* ¶¶ 6, 8; Berkman Expert Rep. at 15-16 ("western states will lose over 3,900 jobs ***annually*** and over ***$18 billion*** of GDP") (emphasis added).

B. The Environmental Review Process and Findings

After an extensive search that involved close scrutiny of over 40 locations, Lighthouse identified the Terminal as the only suitable location on the West Coast for its proposed coal export facility. Klein Decl. ¶ 4; Schwartz Decl. ¶¶ 7-9, 12-13.[7] The U.S. Army Corps of Engineers (the Corps) agreed, finding that the Terminal site and Barlow Point—which is no longer being considered for coal exports—are the only suitable locations for a coal export terminal. Robisch Decl., Ex. 13 at 3-2 to 3-4 (excerpt of NEPA Draft Environmental Impact Statement (DEIS)). Other sites, the Corps determined, lack foundational requirements, including sufficient rail and vessel linkages or economic proximity to western U.S. mines. *Id.* The Terminal is a brownfield in an industrially zoned area.[8] And despite Defendants' contrary claims in this case, existing and planned transportation corridors are well-equipped to handle

[7] *See also* Robisch Decl., Ex. 12 (K. Robisch letter to State Defendants' counsel, dated Sept. 24, 2018); *see also* Robisch Decl., Ex. 10 at ROG 1 (Pls.' Ans. to Def.-Intervenors' Second Set of Interrogs. and Reqs. for Production); Robisch Decl., Ex. 11 at ROGs 1,2 (Pls.' Supp. Ans. to State Defs.' First Set of Interrogs. and Reqs. For Production).

[8] Cowlitz County Ord. 94-005, § 19, 1-3-94 ("The purpose of this zoning classification is to allow heavy industrial uses or structures where the primary use involves . . . distribution of raw materials, primarily serving nonlocal wholesale and retail markets."); *see* Sprague Decl. ¶ 10 (The "proposed site for the Terminal . . . has historically been used as an industrial site.").

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additional train and vessel traffic. By 2028, the first time there could be potential rail transportation impacts, the FEIS found that "expected" investments and operating changes would prevent any significant impacts. *See* Robisch Decl., Ex. 14 at 5.1-24. Similarly, vessel traffic to the Terminal would create "no impacts," because "the infrastructure and pilots would be able to manage the increase in vessel traffic." Robisch Decl., Ex. 15 (Email from Ecology project manager to Ecology SEPA responsible official); *see also* Decl. of Edward Sprague, President, Cowlitz Economic Development Council (Sprague Decl.) ¶ 17.

Lighthouse submitted its first permit applications for the Terminal in February 2012. Toteff SHB Dep. 73:16-24 (Robisch Decl., Ex. 16). Those applications triggered an environmental review under Washington's State Environmental Policy Act (SEPA)[9], which was conducted by Cowlitz County and the Department of Ecology as Co-Lead agencies. *Id.*[10] Preparing an Environmental Impact Statement (EIS) under SEPA requires an independent consultant. Cowlitz County and Ecology retained ICF as their consultant in early 2013. *Id.* 73:25-74:5. ICF won the contract because of its "experience and expertise under the State Environmental Policy Act and [] the National Environmental Policy Act," *id.* 88:6-89:3, highlighted by project managers Linda Amato's and Darren Muldoon's 45 years of environmental review experience.[11]

According to the County's Director of Building and Planning, Elaine Placido—who served as County lead for the EIS—Ecology "dominated" the EIS process. Placido Decl. ¶ 11. For example, Ecology insisted that the DEIS and the FEIS constitute conservative, worst-case scenario-type analyses. *Id.* ¶¶ 8, 11, 16, 20. In addition, "Ecology routinely sidelined the County during meetings and decision-making, including on significance findings." *Id.* ¶ 11. And when the County, in its role as Co-Lead agency, raised concerns about Ecology's overly critical

[9] Wash. Rev. Code 43.21.101 *et seq.*

[10] Because Lighthouse also applied for a Clean Water Act Section 404 permit, the U.S. Army Corps of Engineers has its own federal environmental review responsibilities. *See* 33 U.S.C. § 1344.

[11] Amato Dep. 38:12-25 (Robisch Decl., Ex. 1) (Amato, ICF Project Manager for the DEIS, has over 30 years of experience working with DEISs and FEISs); Muldoon Dep. 32:16-24 (Robisch Decl., Ex. 2) (Muldoon, ICF Project Manager for the FEIS, has approximately 15 years of experience working with DEISs and FEISs).

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review and ex parte meetings with Terminal opponents, Ecology largely ignored it. *Id.* Ecology also regularly ignored or overrode ICF's environmental professionals, who were hired to perform the highly technical DEIS and FEIS analyses, including by forcing ICF's lead reviewer out of her role[12] when ICF disagreed with Ecology's suggestions that the Terminal could cause certain impacts (like vehicle delays at railroad crossings or rail capacity issues). Amato Dep. 120:5-15 (Robisch Decl., Ex. 1); *see also* Muldoon Dep. 78:11-81:8 (Robisch Decl., Ex. 2).

On April 29, 2016, the Co-Leads released the DEIS. Robisch Decl., Ex. 19 at FS-6. Even employing a worst-case scenario approach, the DEIS concluded that there were only nine "***potential***" environmental impacts that "***could***" result from construction and operation of the Terminal. *See* Amato Dep. 38:4-15, 63:4-25 (Robisch Decl., Ex. 1). Because each of these potential impacts could be mitigated, Placido Decl. ¶ 7; Amato Dep. 38:11-25, 93:8-15, 115:24-116:5 (Robisch Decl., Ex. 1),[13] ICF concluded that nothing in the DEIS analysis would prevent the Terminal from being permitted. Amato Dep. 93:8-15 (Robisch Decl., Ex. 1). Critically, the DEIS found that construction and operation of the Terminal would not cause any significant impacts to water quality. *See* Robisch Decl., Ex. 17 at 4.5-32 (excerpt of DEIS); *see also id.*, Ex. 18 at 4.5-34 (excerpt of FEIS).

On April 28, 2017, the Co-Leads released the FEIS. Robisch Decl., Ex. 19 at FS-6. The FEIS similarly concluded that there were nine "***potential***" environmental impacts that "***could***" result from construction and operation of the Terminal. Placido Decl. ¶¶ 7-9. Again, Ecology drove the FEIS to a "very conservative" end, which "do[es] ***not*** describe reasonably likely impacts" or impacts that "would" be caused by the Terminal. *Id.* ¶¶ 11, 15-16 (emphasis added); *see also* Amato Dep. 63:4-25 (Robisch Decl., Ex. 1) (FEIS does ***not*** describe impacts that "would likely or reasonably likely occur"). Instead, the FEIS depicts contingent, uncertain,

[12] Since ICF's reviewer, Ms. Linda Amato, was forced out of her role before completion of the FEIS, her deposition testimony, referenced *infra*, focuses largely on the DEIS. Because the findings of the DEIS were largely similar to the findings of the FEIS, her testimony is relevant to the FEIS as well. To the extent the findings of the DEIS and FEIS diverge, any differences will be noted below.

[13] While the DEIS found greenhouse gas emissions (GHG) to be a potentially significant impact, the FEIS found it could be fully mitigated, meaning it was not potentially significant.

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potential impacts that are capable of mitigation or elimination. Placido Decl. ¶¶ 7-9, 14-20, 22, 25-26. In every instance but one, the FEIS concluded that expected, planned, or likely mitigation or infrastructure improvements would resolve any potential impacts. *See id.* ¶¶ 7, 14. The one exception—air quality—was a last-minute addition to the FEIS for which Ecology gave Lighthouse no "legitimate opportunity" to demonstrate mitigation. *Id.* ¶ 16. In the words of Director Placido, "the FEIS describes a ***fully permittable project***." *Id.* ¶ 13 (emphasis added); *see also* Amato Dep. 115:24-116:5 (Robisch Decl., Ex. 1); Muldoon Dep. 84:25-85:7 (Robisch Decl., Ex. 2).

Lighthouse agreed with Director Placido. In light of the FEIS findings, including the finding that the Terminal did not create any water quality issues, Robisch Decl., Ex. 18 at 4.5-34 ("no unavoidable and significant . . . impacts on water quality"), and confident that the Terminal met all SEPA requirements, Placido Decl. ¶¶ 13-14, Lighthouse did not appeal.

While Ecology, under the hand of Director Maia Bellon, directly influenced the FEIS, Governor Inslee tracked the Terminal from behind the scenes. Robisch Decl., Ex. 20 (Governor's briefing on Millennium's permitting process); *id.* Ex. 21 (Governor's briefing paper on coal scoping decisions).[14] At the outset of his administration, Governor Inslee identified the Terminal as "the largest decision we will be making as a state . . . during my lifetime, and ***nothing even comes close to it.***" *Id.* Ex. 23 at 1 (Email from Defendant-Intervenors to Governor Inslee's policy advisors quoting Inslee press conference) (emphasis added). He then privately debated between "stay[ing] out—let[ing] others carry the fight" against the Terminal and "[t]aking a public position opposing the project, including asking the director to . . . apply all available legal tools" while working with "shipping principals on how to support the ***rest*** of their business." Robisch Decl., Ex. 25 (emphasis added). He asked his staff "[h]ow [much] discretion" his administration had to deny coal export permits, *see* Robisch Decl., Exs. 26-27 (Emails from Inslee policy advisor regarding coal exports), and learned that

[14] *See also* Robisch Decl., Ex. 22 (Governor's informational brief on coal export terminals).

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Director Bellon could apply substantive SEPA discretion (albeit not legally under the facts) to kill the Terminal.[15] At the same time, behind closed doors, his staff assured non-coal businesses, including other ports and Washington-based Boeing, that their projects would not face the same heavy scrutiny as the Terminal. *See, e.g.*, Robisch Decl., Ex. 28 ("Let me be clear that the next generation of 777x wings is a very different commodity than coal.").[16] Governor Inslee's heavy engagement in the Terminal review and permitting process comes as no surprise, given that he openly styles himself "not a fan of coal" who would scrutinize it "[no] matter where it's burned." *See, e.g.*, Robisch Decl., Ex. 31 (Rule 37 Conf. Tr.); *id.* Ex. 24.[17]

Throughout the EIS process, Ecology also took a protectionist stance. It waged an anti-Terminal public relations campaign against Lighthouse's "coal trains," which the agency argued "would ***compete with rail shipments of other goods***, including Washington's important agricultural products." Robisch Decl., Ex. 34 at 1 (Department of Ecology "Key Messages") (emphasis added). Apparently frustrated by the agricultural community's support for the Terminal, Ecology's FEIS lead, Sally Toteff, convened a high-level meeting around Ecology's "key message: coal and apples don't mix." Robisch Decl., Ex. 35. In this campaign, agency public relations staff pushed two lines of attack. First, "[n]o agricultural products from Washington would be handled at the site." Robisch Decl., Ex. 34 at 1. Second, Ecology insisted that far from "boosting Washington's Ag exports," "[t]he opposite is probably true" because, in the agency's telling, Lighthouse's "coal proposal could harm farmers' ability to get their commodities to market by increasing Washington's rail traffic on a line that would already be over capacity." *Id.* at 2. Governor Inslee echoed this position, explaining that he feels "no" sympathy for Wyoming and Montana because unlike Washington "apple[s] which [are] healthy, eating coal smoke [] is not." Robisch Decl., Ex. 36 (Governor Inslee press conference).

[15] Robisch Decl., Ex. 25 (As early as 2013, the Governor's Office considered several options including: "oppose now" or "[w]ait [to use] SEPA substantive authority" later.).
[16] *See also* Robisch Decl., Ex. 29 ("Aerospace bring thousands of jobs with those emissions; coal export doesn't."); Robisch Decl., Ex. 30 (Governor Inslee briefing memo).
[17] *See also* Robisch Decl., Ex. 32 at 4-6 (describing WEC as Director Bellon's "left flank" on coal export issues); Robisch Decl., Ex. 33 (Governor Inslee describing federal pro-coal policy as "reckless [and] harebrained").

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In this way, the State Defendants framed the 401 Denial as a way to protect in-state agricultural interests—"an important economic driver in the state"—from "competing" for freight capacity with out-of-state coal. Robisch Decl., Ex. 34.

C. The 401 Denial

"Ecology treat[ed] Millennium more like an adversary than a permit applicant throughout the environmental review process," Placido Decl. ¶ 12, but things got worse as the project moved into the permitting and certification process, Peck Dep. 180:12-182:14 (Robisch Decl., Ex. 38). After the April 2017 release of the FEIS, Ecology undertook an unprecedented and inexplicable public relations effort to "go[] after [Lighthouse's] credibility—the company and their firm." Robisch Decl., Ex. 37. In particular, Ecology worked to "refute" Lighthouse's public statements that the FEIS demonstrated that the project was permittable. *See* Peck Dep. 140:2-141:16 (Robisch Decl., Ex. 38); Robisch Decl., Ex. 37 at 1 ("Maia [Bellon] clearly feels very strongly" about countering Lighthouse's efforts to contextualize the FEIS).

During this same window, Ecology finally started working on Lighthouse's timely submitted Joint Aquatic Resources Permit Application (JARPA), which included a request for Section 401 water quality certification. Decl. of Glenn Grette, Principal, Grette Assocs. Envtl. Consultants (Grette Decl.) ¶ 8; Randall Dep. 89:23-90:4 (Robisch Decl., Ex. 39). Late in the summer of 2017, facing a September 30 regulatory deadline,[18] Ecology set Lighthouse up to fail by bombarding it with constantly changing informational requests, which Ecology refused to reduce to writing, and other requests for substantial water quality engineering information that Lighthouse could not possibly produce in the available time. *See* Decl. of Nicole LaFranchise, Principal Scientist, Anchor QEA (LaFranchise Decl.) ¶ 15 ("[T]he Terminal marks the first time, in my experience, that Ecology refused to provide a written articulation of

[18] Randall Dep. 114:16-118:21 (Robisch Decl., Ex. 39). States generally have a year from public notice of CWA section 401 and 404 applications to issue a certification. That means there are two deadlines: one tied to the state agency's notice of the 401 request and another tied to the Corps' public notice of the 404 request. *See id.* While withdrawing the JARPA reset the state regulatory deadline, it did not reset the federal regulatory deadline of September 30, 2017. *Id.*

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the specific information that it contended it needed . . . ."), ¶¶ 12, 13 ("Ecology request[ed] information that clearly would be impossible" for Millennium to provide in time); *see also* Grette Decl. ¶¶ 10, 15. In addition, the agency never approached Lighthouse to discuss how any environmental concerns Ecology supposedly had could be mitigated to Ecology's satisfaction. Placido Decl. ¶ 26; *see also* Toteff Dep. 82:12-83:9 (Robisch Decl., Ex. 40) (describing Ecology's mitigation "presentations" as one-sided, take-it-or-leave-it meetings). Lighthouse's consultants, who have over 45 years of experience with permitting reviews in Washington State, regarded this treatment as "adversarial[]," "unprecedented," and even "shock[ing]." Grette Decl. ¶¶ 18-19; LaFranchise Decl. ¶¶ 13, 17, 21. Still, Lighthouse and its consultants spent hundreds of hours and tens of thousands of dollars in August and September to prepare the materials Ecology asked for and twice submitted substantial "reasonable assurance plans" to the agency. LaFranchise Decl. ¶ 12.

By September 6, 2017, Ecology's career staff concluded that the agency would deny the 401 certification in the usual form—a denial ***without prejudice*** that would have allowed Lighthouse to reapply for Section 401 certification. *See* Robisch Decl., Ex. 41 (signed letter from Ecology stating that it would deny the 401 certification without prejudice).[19] Denial without prejudice was Ecology's practice when dealing with information that had not been received or analyzed before an impending deadline. *Id.*[20] In fact, Ecology staff prepared, signed,[21] and affixed a certified mail number to a letter informing Lighthouse that Ecology decided to "deny without prejudice the WQC [water quality certification]." *Id.* at 2. That letter, as drafted, assured Lighthouse that "receipt of a denial without prejudice ***would not in any way preclude Millennium from resubmitting a request for a WQC at a later date.***" *Id.* at 2-3 (emphasis added).[22]

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[19] *See also* Randall Dep. 139:14-140:1 (Robisch Decl., Ex. 39) (Ecology 401 lead and Ecology's SEPA Responsible Official for the Terminal "worked to get to this letter," coordinating with agency SEPA experts and legal team).

[20] *See also* LaFranchise Decl. ¶ 10; Grette Decl. ¶ 16; Randall Dep. 131:25-132:9 (Robisch Decl., Ex. 39).

[21] FEIS SEPA Responsible Official Sally Toteff signed this letter.

[22] In fact, the letter admits that this practice—denial without prejudice to allow additional time—is not unusual."

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But Ecology never sent that letter. When Ecology staff sent it to the Governor's Office, saying "[t]he goal is to send today, Wednesday Sept. 6," Robisch Decl., Ex. 42, the Governor's Office told Ecology to "***hold[] off***" until they could run the decision past the Governor, Robisch Decl., Ex. 43 (emphasis added). The next day, Governor Inslee's environmental policy advisor called Ecology, suggesting the agency kill the Terminal then and there. Ecology 30(b)(6) Dep. 40:13-41:7, 45:4-9 (Robisch Decl., Ex. 44). Immediately after this phone call, Director Bellon—who is a political appointee, not an environmental scientist—stepped in. Overruling career staff, Director Bellon decided to take the unprecedented step of employing SEPA discretionary authority to deny the permit. Randall Dep. 145:10-146:19 (Robisch Decl., Ex. 39).

Director Bellon's decision was announced two weeks later. In a 180-degree change from her staff's recommendation, she personally signed a letter denying "the project"—not just the 401 certification—***with prejudice***, denying Lighthouse any opportunity to re-submit a certification application in the future.[23] This has never before occurred in the history of the state, as far as Lighthouse is aware. Director Bellon broke the 401 Denial into two pieces: (i) nine brand new, SEPA-related impacts purportedly grounded in the FEIS (the "with prejudice" reasons) and (ii) "inadequate" water quality information (the "without prejudice" reasons).[24]

Nearly every aspect of Bellon's 401 Denial is unprecedented. Ecology had never before, and has never since:

Robisch Decl., Ex. 41 (Signed letter from Ecology stating that it would deny the 401 certification without prejudice).

[23] None of the SEPA-related justifications (i.e., "impacts" from trains, vessels, and redevelopment of the Reynolds site) appear in the September 6 letter. When Director Bellon announced the certification decision, she repeatedly described her actions as denying "the project," not just the permit. Peck Dep. 173:2-174:8 (Robisch Decl., Ex. 38). Her communications director said it was "important" for her to frame her decision this way. *Id.*

[24] *See* Dkt. 1-1, Order #15417, *In the Matter of Denying Section 401 Water Quality Certification to Millennium Bulk Terminals Longview-LLC* (401 Denial). Ecology has explained that it "did not deny certification 'with prejudice' based on the [water quality deficiencies] set forth in Section III of the Order." Dkt. 228-18 at 3 (Ecology's Reply in Supp. of Mot. for Partial Summ. J. before Pollution Control Hearings Board); *see also* Robisch Decl., Ex. 45 at RFA 8 (Director Bellon Ans. to Pls.' Req. for Admission) ("[E]ven if Millennium had demonstrated reasonable assurance . . . the findings of significant, adverse, unavoidable impacts in the EIS would have remained.").

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- denied a Section 401 certification with prejudice;[25]
- denied any permit or certification of any kind based on substantive SEPA authority;[26]
- denied a 401 water quality certification for ***non-water quality*** reasons, including anything resembling those cited in the 401 Denial;[27]
- issued a denial signed by the Director herself;[28] or
- required this volume or type of water quality information for a 401 certification.[29]

The 401 Denial did not derive from—or even accurately reflect—the conclusions in the FEIS. Instead, it repeatedly changed FEIS findings that "potential" impacts "could" occur into definitive conclusions that they "would" occur. Placido Decl. ¶¶ 7-9, 15, 17, 20. It entirely ignored "[e]xpected," "planned," or "likely" mitigation and infrastructure improvements discussed in the FEIS. *Id.* ¶ 14. And it even ignored the FEIS's conservative, worst-case scenario assumptions, instead describing "potential" impacts as certain. *Id.* ¶¶ 14-15. In short, as FEIS Co-Lead Cowlitz County puts it, the 401 Denial is "inconsistent" with the FEIS. *See* Placido Decl. ¶ 15 (the 401 Denial reaches "material[ly]" different conclusions from the FEIS). ICF essentially agrees. Amato Dep. 113:9-17 (Robisch Decl., Ex. 1) (Amato "surprised" Ecology denied the 401 certification); *id.* 115:24-116:5 (the EIS does not "identif[y] any significant adverse impacts which would lead to a [certification] denial.").[30] The 401 Denial "is an after-the-fact re-write of the FEIS" that "distorts" its conclusions. Placido Decl. ¶¶ 14-15.

Neither Director Bellon nor Ecology's 30(b)(6) deponent could explain how or why Ecology altered the FEIS findings in the 401 Denial, casting the differences as semantics. *See,*

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[25] Dkt. 228-4 at 3-4 (Dir. Bellon Ans. to BNSF's Req. for Admission 1); Ecology 30(b)(6) Dep. 113:8-11 (Robisch Decl., Ex. 44).
[26] Robisch Decl., Ex. 45 at RFA 2 (Def. Bellon Answer to Lighthouse's Req. for Admission); Ecology 30(b)(6) Dep. 108:24-109:4 (Robisch Decl., Ex. 44).
[27] *See, e.g.*, Randall Dep. 64:11-66:21, 83:18-84:12, 111:17-20 (Robisch Decl., Ex. 39) (Ecology 401 lead unaware of these non-water quality impacts ever being considered in other 401 certification decisions); *see also* Robisch Decl., Ex. 45 at RFA 7 (Dir. Bellon Ans. to Lighthouse's Req. for Admission).
[28] Bellon Dep. 18:9-11 (Robisch Decl., Ex. 48).
[29] *See* Grette Decl. ¶ 9; LaFranchise Decl. ¶ 13.
[30] *See also* Muldoon Dep. 84:25-85:8 (Robisch Decl., Ex. 2) (ICF project lead doesn't think rail issues should prevent permitting).

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e.g., Ecology 30(b)(6) Dep. 162:1-14 (Robisch Decl., Ex. 44) (Ecology "do[esn't] know why there's a difference" between FEIS and 401 Denial findings).[31] But Cowlitz County and ICF are unequivocal: when describing the potential impacts of the Terminal, the FEIS says "could" on purpose "because Ecology, the County, and ICF deliberately decided that language—and not something else—appropriately describes the uncertainty of the described impacts." Placido Decl. ¶ 9.[32] In sum, everyone else involved in the Terminal's environmental review flatly contradicts Defendants and agrees that the 401 Denial reaches "wholly different conclusion[s] than the FEIS." *Id.* ¶ 17.

After the 401 Denial, Lighthouse appealed Ecology's decisions in state courts (and all of those appeals remain pending). Gaines Decl. ¶ 7. Lighthouse also continued working with local, state, and federal agencies on other permits for the Terminal, confident that it would secure the 401 certification on appeal. *Id.* ¶ 4. But when Lighthouse's consultants engaged Ecology staff, asking for technical assistance and for Ecology's cooperation with other regulatory agencies that continue to process Lighthouse's permit applications, Ecology told Lighthouse that its "staff will not be spending time on permit preparation related to Millennium's additional applications for the [Terminal]." Dkt. 1-4 at 2 (Dir. Bellon letter to Lighthouse).[33] This action, too, was unprecedented. DeMay Dep. 142:2-14 (Robisch Decl., Ex. 47). Director Bellon's letter undermined Lighthouse's permitting efforts across the board because much of the requested technical assistance relates to permits from ***other*** agencies. *See* Dkt. 1-4 at 1-2 (Dir. Bellon letter to Lighthouse). Ecology refused to provide assistance to these

[31] *See also* Ecology 30(b)(6) Dep. 167:9-168:13 (Robisch Decl., Ex. 44) (Ecology's FEIS SEPA responsible official—who directed and signed the FEIS— "can't say if the 'could' [in the FEIS] was intentional or not."); *id.* 170:22-172:22 (Ecology agrees FEIS and 401 vessel findings are different but cannot explain why); Bellon Dep. 125:14-126:12 (Robisch Decl., Ex. 48) (Dir. Bellon, who signed the 401 Denial, could not tell Lighthouse "anything" about why Ecology re-wrote the FEIS findings in the 401 Denial); *id.* 126:1-2 (Dir. Bellon doesn't "know if we were in a detailed engagement over the word 'could' or 'would'" when reviewing the FEIS and writing the 401 Denial).

[32] *See also* Muldoon Dep. 77:1-78:23 (Robisch Decl., Ex. 2); *id.* 89:20-25; *id.* 93:11-94:1 (there was "a lot of discussion regarding" the wording of the FEIS); *id.* 107:8-18 ("[The FEIS] says 'could' on purpose here.").

[33] Director Bellon told Lighthouse to direct "questions regarding future permit applications" to the Attorney General's Office, effectively slamming the agency door on Lighthouse. Dkt. 1-4 at 2 (Dir. Bellon letter to Lighthouse).

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agencies in an effort to ensure that the Terminal died, a position wholly at odds with Defendants' litigation position that because of supposed environmental impacts the Terminal had to be denied. Still not content, Director Bellon continues to work against Lighthouse's broader permitting efforts: in September 2018, she asked the Corps to shut down its separate federal environmental review process. *See* Robisch Decl., Ex. 49 (Dir. Bellon letter expressing "deep concern" over the Corps' decision to "work on the federal permitting process . . . .").

Also after the 401 Denial, Governor Inslee dispatched his Executive Team to quell statewide and national uproar. While the U.S. Senate held hearings about state abuse of the Section 401 process,[34] angry letters poured in from around the state. One, sent by State Senator Ann Rivers of Washington's 18th Legislative District, led Governor Inslee to send his Executive Director of Legislative Affairs, Drew Shirk, to confront Senator Rivers in person. *See* Rivers Decl. ¶¶ 3-4.[35] During that "heated" meeting, Shirk admitted that while he "personally agreed" that Director Bellon was "unreasonable and did not make a science-based decision," Senator Rivers should understand that the decision was "***political***" because Governor Inslee is "***adamantly opposed***" to the Terminal on climate change grounds. *Id.* ¶¶ 5, 8 (emphasis added). In short, "the Terminal had to be stopped." *Id.* ¶ 5. Now, that Governor Inslee has announced his run for President, he's no longer hiding his opposition to the Terminal. For example, in a recent television appearance he "like[d]" Rachel Maddow's summary of his accomplishments, including her statement that he "blocked construction of a huge terminal on the Columbia River to export coal to Asia." Robisch Decl., Ex. 85 (video of interview with Governor Inslee; *see also id.* Ex. 52 at 4 (transcript of the same).

[34] *See* Robisch Decl., Ex. 83 (Senate Committee on Environment and Public Works, Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018 (Aug. 16, 2018)).

[35] Senator Rivers' letter described the 401 Denial as "contradict[ing] the key findings of the EIS," leading her to question Director Bellon's "fair[ness] and impartial[ity]." Rivers Decl., Ex. A at 1.

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III. ARGUMENT

The party moving for summary judgment "bears the burden of proving the absence of a genuine issue of a material fact for trial." *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004). In considering a motion for summary judgment, courts "view[] the evidence in the light most favorable to the nonmoving party . . . and draw[] all reasonable inferences in its favor." *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). At summary judgment, the court "does not weigh conflicting evidence." *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988). Where, as here, there is conflicting evidence, a court must instead "assume the truth of the evidence set forth by the nonmoving party with respect to [a] fact." *Id.* "Nor does the judge make credibility determinations" when evaluating declarations, depositions, expert reports, and other evidence. *Id.* Competing declarations and expert reports, such as those found here, frequently preclude entry of summary judgment. *Chevron*, 224 F.3d at 1037-39 (summary judgment inappropriate where the parties had submitted conflicting expert opinions and it was "necessary for the court to evaluate the witnesses' credibility in order to evaluate their expert opinions."); *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 861 (9th Cir. 2011) (holding that, by choosing to credit one declaration over another, conflicting declaration, the district court "improperly resolved an evidentiary conflict at the summary judgment stage.").

A. Dormant Commerce Clause claims such as this one are fact-intensive and inappropriate for summary judgment.

The Constitution expressly authorizes Congress "[t]o regulate Commerce with foreign Nations"—the foreign Commerce Clause—"and among the several States"—the interstate Commerce Clause. U.S. Const. art. I, § 8, cl. 3. This language not only grants the federal government affirmative power "to regulate interstate and foreign commerce," it also serves as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015). This implicit restriction on state authority, often called the "dormant" Commerce Clause, sits at the center of the Constitutional structure. "By prohibiting States from

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discriminating against or imposing excessive burdens on interstate commerce without congressional approval, it strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015).

Courts have developed a fact-intensive, two-tiered framework for analyzing state actions alleged to create a "substantial burden on interstate commerce."[36] *Int'l Franchise Ass'n*, 803 F.3d at 399 (quoting *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012)); *see Colon Health Ctrs. of Am. v. Hazel*, 733 F.3d 535, 544-45 (4th Cir. 2013) (a "host of precedents . . . have repeatedly emphasized the factual nature of the dormant Commerce Clause inquiry"). Within this framework, the U.S. Supreme Court calls for "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).

First, if a state action "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect, it is unconstitutional unless it serves a legitimate local purpose, and this purpose could not be served as well by available and nondiscriminatory means." *Int'l Franchise Ass'n*, 803 F.3d at 399 (quoting *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013)).[37] Determining whether a state has discriminated in purpose or practical effect is a "fact-intensive" inquiry. *Colon Health Ctrs.*, 733 F.3d at 544-45; *see Portland Pipe Line*, 288 F. Supp. 3d at 450 ("There are genuine disputes of material fact as to primary effect and primary purpose of the Ordinance."); *City of Los Angeles v. Cty. of Kern*, 2006 WL 3073172, at *8 (C.D. Cal. Oct. 24, 2006) ("discrimination against commerce is a question of fact").

[36] As discussed further below, the same basic framework also applies to state actions that burden foreign commerce, although the dormant foreign Commerce Clause imposes additional, more scrutinizing requirements on states.

[37] Proof of discrimination means that the state's actions are "virtually *per se* invalid," as State Defendants acknowledge at page 6 of their motion.

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Second, even in cases where the plaintiff does not provide evidence of discrimination, a state's action may still be invalid if "the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the putative local benefits." *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d at 1012. This test, known as "*Pike* balancing," is also "fact-bound." *Colon Health Ctrs.*, 733 F.3d at 546. Indeed, the "fact-intensive," *id.*, nature of the *Pike* balancing inquiry, (*see, e.g., United Haulers*, 261 F.3d at 263-64); *Colon Health Ctrs.*, 733 F.3d at 546, frequently precludes summary judgment in dormant Commerce Clause cases. *See, e.g., Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241, 250-52 (3d Cir. 2008); *Ass'n of Int'l Auto. Mfrs., Inc. v. Abrams*, 84 F.3d 602, 612-13 (2d Cir. 1996); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793-95 (8th Cir. 1995); *see also Portland Pipe Line*, 288 F. Supp. 3d at 450 (denying summary judgment and proceeding to trial on *Pike* balancing issues); *Berman v. City of New York*, No. 09CV3017ENVCLP, 2012 WL 13041996, at *28 (E.D.N.Y. Oct. 3, 2012) (same). Defendants ignore that a many of the cases that they cite in their motions, including *Portland Pipe Line*, were decided at trial, not summary judgment.[38]

Most plaintiffs who lose on *Pike*'s fact-based balancing do so because they, unlike Lighthouse and BNSF here, present no evidence of ***any*** burden on commerce. *See, e.g., Indep. Training & Apprenticeship Program v. Cal. Dept. of Indus. Relations*, 730 F.3d 1024, 1038-39 (9th Cir. 2013); *Chinatown Neighborhood Ass'n v. Harris*, 33 F.Supp.3d 1085, 1099-1100 (N.D. Cal. 2014); *Zephyr v. Saxon Mortg. Servs. Inc.*, 873 F.Supp.2d 1223, 1230-32 (E.D. Cal. 2012). Indeed, courts have found that considerably smaller impacts than those here can "substantial[ly] [a]ffect" interstate and foreign commerce. *See, e.g., Young v. Coloma-Agaran*, No. CIV-00-00774HG-BMK, 2001 WL 1677259, at *10-11 (D. Haw. Dec. 27, 2001) (finding

[38] Defendants curiously suggest that because they don't discriminate against other coal, they ***couldn't*** have discriminated here. State Defs.' Mot. at 13. That is, of course, irrelevant. *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't Nat. Res.*, 504 U.S. 353, 361 (1992) (discrimination against some commerce "merely reduce[s] the scope of the discrimination"). Coal currently bound for the Terminal site isn't exported—it's used in-state for non-combustion purposes. And while Lighthouse coal does go through Washington, on its way to ***Canada*** to be exported to ***Asia***, all that proves is the State lacks an adequate permitting hook to stop those trains. Whatever the coal the State can block, it has.

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that a ban on operation of certain types of tour boats in a single bay had an undue burden on interstate commerce), *aff'd Young v. Coloma-Agaran*, 340 F.3d 1053 (9th Cir. 2003)). And because disruption of shipping, impacts beyond the borders of the defendant state, and impacts that fall more heavily on out-of-state interests are all of "special importance" in the *Pike* weighing, the burdens here are especially heavy. *See, e.g.*, *Pac. Nw. Venison Producers*, 20 F.3d at 1015; *see Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005) ("[T]he *Pike* test requires closer examination" of burdens "when the burdens fall predominantly on out-of-state interests."). As far as Lighthouse and BNSF are aware, the burdens imposed on commerce by the 401 Denial dwarf those found in ***every*** *Pike* balancing case.[39]

The two-tiered framework for analyzing dormant Commerce Clause cases—one test for state actions that discriminate facially, in purpose, or in practical effect, and a separate balancing test for nondiscriminatory actions—applies equally to interstate and foreign commerce. *Pac. N.W. Venison Producers*, 20 F.3d at 1012. But cases like this one, in which a state action affects foreign commerce, also require "additional scrutiny." *Id.* at 1014. As Lighthouse and BNSF explained in their affirmative summary judgment motions, "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 449 (1979) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)); *see* Dkt. 212 at 11. State action "will violate" this requirement "if it ***either*** implicates foreign policy issues which must be left to the Federal Government ***or*** violates a clear federal directive." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). Lighthouse and BNSF contend that they are entitled to

[39] *See, e.g.*, *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970) ($200,000); *All. of Auto. Mfrs. v. Kirkpatrick*, No. CIV 02-149-B-W, 2003 WL 21684464, at *13 (D. Me. July 17, 2003) (annual costs of $120,000); *VIZIO, Inc. v. Klee*, 886 F.3d 249, 253 (2d Cir. 2018) ("$2.5 million . . . over three years"); *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, (9th Cir. 2014) ("annual cost . . . between $5,300 and $12,000"); *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) (under $5 million); *Pac. Nw. Venison Producers Ass'n v. Smitch*, 20 F.3d 1008, 1015 (9th Cir. 1994) ("minimal economic impact" and "no evidence [of] any economic effect . . . in other states or countries").

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summary judgment under this "one voice" rule. At a minimum, any material facts that the Court finds to be disputed by Defendants must be resolved in favor of Lighthouse with respect to Defendants' summary judgment motion.

Separate and apart from the basic dormant Commerce Clause tests, Defendant-Intervenors claim to be "unaware of any case where a court struck down an ***individual permit decision*** under a Commerce Clause analysis." Dkt. 211, WEC's Motion for Summary Judgment on Plaintiffs' Dormant and Foreign Commerce Clause Issues (WEC Mot.) at 3 (emphasis in original). Defendants similarly emphasize that their decision "regulates only a single company and only a single proposal." State Defs.' Mot. at 14. They mean to imply that permit decisions should not receive the same level of dormant Commerce Clause scrutiny as laws or regulations. That is incorrect. There are numerous examples of courts invalidating specific state actions—as opposed to more general state laws or regulations—under the usual dormant Commerce Clause tests, including *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 526-28 (1949), where the Supreme Court rejected the same argument Defendants raise here.[40] Non-legislative state actions, whatever their basis, do not carry any extra presumption of validity. "[M]ere incantation of 'a purpose to promote the public health or safety does not insulate a law from Commerce Clause attack' . . . particularly [] where, as here, the state law is . . . not a product of the more detailed and deliberate approach normally associated with state legislature." *Wash. St. Bldg. & Constr. Trades Council AFL-CIO v. Spellman*, 518 F.Supp. 928, 934 (E.D. Wash. 1981) *aff'd* 684 F.2d 627 (9th Cir. 1982) (quoting *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, ——, 101 S.Ct. 1309, 1316 (1981)). Indeed, courts are ***more*** willing to strike non-legislative actions—like the 401 Denial—for that exact reason. *Id. at* 935.

[40] *See, e.g., Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1257-60 (11th Cir. 2012) (invalidating permitting practices); *Walgreen Co. v. Rullan*, 405 F.3d 50, 57 (1st Cir. 2005) (state certificate of need); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104-05 (2d Cir. 2003) (as-applied challenge); *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric.*, 650 F. Supp. 939, 942-48 (E.D.N.Y. 1987) (license denial); *Safeway Stores, Inc. v. Bd. of Agric. of Hawai'i*, 590 F. Supp. 778, 784-86 (D. Hawai'i 1984) (license denial).

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B. Lighthouse has raised disputes of material fact concerning the discriminatory purpose and effect of Defendants' actions.

"Discrimination" in dormant interstate Commerce Clause cases refers to "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 of State of Or.*, 511 U.S. 93, 99 (1994) (citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344, n. 6 (1992)). Defendants argue that they did not discriminate because the 401 Denial "had nothing to do with protecting in-state businesses from out-of-state competition." State Defs.' Mot. at 9. But the evidence creates genuine issues of material fact regarding Defendants' discrimination against interstate commerce in both purpose and effect.

1. The evidence of Defendants' anti-coal bias precludes summary judgment on discriminatory purpose.

To begin with, the unfair and unprecedented nature of Defendants' actions towards the Terminal demonstrates that they discriminated in purpose against the specific type of interstate commerce—coal—that Lighthouse and BNSF intend to bring through the Terminal. For Ecology's entire existence, the agency had never used substantive SEPA to deny a permit or certification, denied a Section 401 water quality certification with prejudice, or used ***any*** of the reasons listed in the 401 Denial to deny a water quality certification. *See supra* at 13. After making this unprecedented, "death penalty" decision, Defendants doubled-down and, in another unprecedented move, informed Lighthouse that they would no longer process any of its permit applications. Dkt. 1-4; Ecology 30(b)(6) Dep. 128:19-129:23 (Robisch Decl., Ex. 44).

The first-hand witnesses to this series of unprecedented actions "can only conclude" that Defendants' purpose was to prevent out-of-state coal from entering Washington. *See* Placido Decl. ¶ 10. Ecology's County Co-Lead, who worked with Ecology on the Project since 2013, will testify that "if Millennium proposed to ship ***anything other than coal***, Ecology would have granted the Section 401 water quality certification." *Id.* ¶ 13 (emphasis added). ICF's project managers agreed in deposition testimony that the Terminal "was subject to

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heightened or increased scrutiny because it had fossil fuels as the commodity" being exported. Amato Dep. 73:25-5, 116:20-117:3 (Robisch Decl., Ex. 1); *see also* Muldoon Dep. 170:2-8 (project subject to "heightened or increased scrutiny because fossil fuels was the commodity . . . being exported"); *id.* 170:24-171:7 (the FEIS included "commodity based" analyses, i.e., analyses that would not have been included if Millennium had proposed to export a different commodity). At the same time, Defendants initiated anti-Terminal public relations campaigns and assured in-state industries and in-state companies that they would ***not*** receive such heightened scrutiny for their projects. *See supra* at 9 n.11 and accompanying text. Then, after Ecology career staff had signed and sealed a certification denial without prejudice—telling Lighthouse it could reapply—Governor Inslee's political appointees reversed course at the eleventh hour, overruled Ecology's technical staff's recommendation, and ordered that the project be permanently terminated. *See supra* at 11-13.

Those political appointees are opposed to and have publicly staked their political fortunes on opposing coal, coal exports, and this project in particular. Director Bellon has aligned herself with the Defendant-Intervenors, describing them in a fundraising speech as her political "left flank." *See supra* at 9 n.11. Governor Inslee has built his political reputation on opposing fossil fuels, Jay Inslee & Bracken Hendricks, Apollo's Fire: Igniting America's Clean Energy Economy (2007), often discusses his opposition to coal "[no] matter where it's burned," *see supra* at 9-10, and has staked his political future on opposition to projects like the Terminal, *see, e.g.*, Robisch Decl., Exs. 51-52. Now that he's running for President, Governor Inslee has even made public what he previously kept private: that he "led opposition to" the Terminal.[41] This all fits with the Governor's Office ***admitting*** to State Senator Rivers that the 401 Denial was a "political" decision borne of Governor Inslee's "adamant" opposition to the Terminal.

[41] *See* Robisch Decl., Ex. 50 (E&E News Article regarding Governor Inslee's opposition to fossil fuels). While Mr. Raad now claims he didn't use those exact words, he admits he raised the Terminal decision as an example of a political victory for Governor Inslee. It's clear that E&E News stands by its description of Mr. Raad's commentary, because the article remains uncorrected and un-retracted. *See also* Raad Decl. ¶ 2 (admitting he mentioned the "coal export terminal in Longview" as an example of Governor Inslee's political successes).

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Rivers Decl. ¶ 5. In short, as Defendants' counsel put it, "the Governor is not a fan of coal." *See supra* at 9.

Defendants argue that they are entitled to summary judgment because their actions were not meant to benefit any in-state businesses. State Defs.' Mot at 10; *see* WEC Mot. at 6. But as alluded to above, Lighthouse and BNSF have raised genuine issues of material fact for trial on this score too. A number of documents that Defendants produced during discovery indicate that they opposed the Terminal at least in part[42] because they were concerned that the out-of-state "coal trains . . . would ***compete*** with rail shipments of other goods, ***including Washington's important agricultural products***." Robisch Decl., Ex. 34 (Lighthouse's "coal proposal could harm farmers' ability to get their commodities to market.") (emphasis added). Ecology leadership even developed and publicly pushed a protectionist talking point: "coal and apples don't mix." *See supra* at 9. When asked if he has "any sympathy for Montana and Wyoming, who are trying to get an important product, coal, to market," Governor Inslee candidly summed up his administration's position: "no." Robisch Decl., Ex. 36 (Governor Inslee press conference).[43] Defendants even cited rail transportation, i.e., in-state capacity, effects in the 401 Denial. *See* Dkt. 1-1 at 9.[44] This is exactly the kind of "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" that the dormant interstate Commerce Clause prohibits. *Or. Waste Sys. Inc.*, 511 U.S. at 99.

Finally, Defendants' in-state versus out-of-state discrimination does not apply at all with respect to Lighthouse's and BSNF's dormant foreign Commerce Clause claims. As the First

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[42] Even if Defendants' decision was partly motivated by legitimate environmental or safety concerns, it still violates the Commerce Clause if it was also motivated in part by a discriminatory purpose. *See, e.g., S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 597 (8th Cir. 2003); *Gov. Suppliers Consol. Servs. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992).

[43] *See also* Robisch Decl., Ex. 22 ("How do the actions we take in the environmental review of these coal export proposals affect the export from Washington of grain, apples, airplanes and other products?"); Robisch Decl., Ex 21 (briefing paper for Governor Inslee on coal scoping decision discusses "implications for other Washington export projects" and "impacts to Washington exports if the coal terminals are approved").

[44] And the FEIS bases its rail capacity analysis on the Washington State Rail Plan and Freight Plans, which describe coal as a threat "to the ongoing vitality of major freight intensive industries in Washington." *See* Robisch Decl., Ex. 54 at 80 (2017 Washington Freight Plan).

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Circuit has explained, "[a] law need not be designed to further local economic interests in order to run afoul of the [foreign] Commerce Clause." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 67 (1st Cir. 1999). This is because "the absence of local benefit does not eliminate the international implications of the discrimination . . . ." *Id.* at 67. It is enough, in the dormant foreign Commerce Clause context, that, as here, state actions burden international trade. A corresponding benefit to "local economic interests" is unnecessary.

2. Defendants' decision to block the Terminal has the practical effect of discriminating against commerce.

Lighthouse and BNSF have shown above significant evidence of discriminatory intent, but discrimination under the dormant Commerce Clause is not limited to actions motivated by such intent. It is also unconstitutional for a state to act in a way that has the "practical effect" of discriminating against interstate or foreign commerce. *Int'l Franchise Ass'n,* 803 F.3d at 399. State actions can unconstitutionally discriminate in effect in several ways, including by putting out-of-state commerce at a "competitive disadvantage," "creat[ing] barriers to entry," or "generally affect[ing] interstate commerce." *Id.* at 405.

The most obvious and explicit way in which the 401 Denial affects interstate and foreign commerce is its discriminatory treatment of rail traffic carrying coal from other states, which, in effect, is prohibited. "Railroads . . . are direct instrumentalities of interstate commerce." *State of Cal. v. Taylor,* 353 U.S. 553, 567 n.15 (1957). Yet the 401 Denial explicitly rejects the Terminal based on the effects of out-of-state rail traffic. Almost all of Defendants' rail-related justifications—diesel emissions, vehicle delays, train noise and vibration, rail capacity and safety questions, and tribal fishing access—are the potential effects of out-of-state commerce. Dkt. 1-1 at 4-11. The 401 Denial's "practical effect," then, is to prevent additional coal trains from moving into Washington because of the characteristics of those trains, and because it would threaten in-state industries. *See e.g.*, Robisch Decl., Ex. 34 ("debunking the myth that coal proposal would directly boost ag exports"); *id.* Ex. 55 ("The significant increases in rail and shipping movement attributable to this project raise important questions about the

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movement of goods and services."); *id.* Ex. 56 (Director Bellon's testimony on "other commodities" that discusses why coal is different from wheat, apples, and timber).

The discriminatory effects of Defendants' decision to block the Terminal are so significant that they are felt by ***the states themselves***, as they have explained in an amicus brief filed in this case. Dkt. 78-2, Amicus Curiae Brief by Wyoming, Kansas, Montana, Nebraska, South Dakota And Utah. When Wyoming installed its new governor in January, he spoke plainly about how his state's "access to these Asian [coal] markets remains restricted" as a result of Defendants' actions. Robisch Decl., Ex. 57. Indeed, "Wyoming depends entirely on other states to export the commodities it produces," such that the 401 Denial "effectively locked Wyoming out of the Asian coal market." Begger Decl. ¶¶ 14-15. The Montana House of Representatives passed a resolution in February 2019 similarly complaining that Defendants' actions—naming the 401 Denial specifically—prevent Montana from "engaging in foreign and interstate commerce." Robisch Decl., Ex. 58 (Montana Coal Resolution). And Lighthouse's and BNSF's experts describe, in detail, the practical effect of Defendants' discrimination: thousands of lost jobs, $18 billion in lost GDP, and effectively the death of critical industry. Berkman Expert Rep. at 15-17; Schwartz Rebuttal at 14-15; Schwartz Decl. ¶ 11.

C. The massive burden on commerce and made-up local benefits preclude summary judgment on *Pike* balancing.

Under *Pike* balancing analysis, a state action is unconstitutional if the burdens on interstate or foreign commerce are clearly excessive in relation to the action's putative local benefits. *Pike*, 397 U.S. at 142; *Pac. Nw. Venison Producers*, 20 F.3d at 1012. The fact-intensive nature of this balancing exercise means that summary judgment is generally inappropriate. *See supra* at 17-19, 23. Nor is summary judgment appropriate where, as here, there are genuine issues of material fact regarding whether less burdensome, less discriminatory alternatives to the 401 Denial are available. *Pac. Nw. Venison Producers*, 20 F.3d at 1016 (evidence that the "state's interest 'could be promoted as well with a lesser impact on interstate

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activities' . . . may create a material dispute as to whether the burden on commerce outweighs the state's interest.").

1. The 401 Denial massively burdens the U.S. coal production and coal export markets.

Defendants argue that "the impacts of the decision on commerce are minimal or non-existent" because the 401 Denial "regulates only a single company and a single proposal." State Defs.' Mot. at 14-16; *see also* WEC Mot. at 13-17. But the facts tell a far different story. Case law is clear that "while the burden on a single firm may have but a negligible impact on interstate commerce, the effect . . . in the aggregate may be substantial." *Colon Health Ctrs.*, 733 F.3d at 543. Here, because the Terminal represents "the only viable project" to export meaningful volumes of U.S. coal to Asia, it is "***essential to the continued survival of coal mining in the western U.S.***" Schwartz Rebuttal at 14-15 (emphasis added); Schwartz Decl. ¶¶ 7-13.

The Terminal represents the western U.S. coal industry's only shot at accessing a lifesaving market. *See supra* at 4-6; Schwartz Decl. ¶ 11. By all but locking interior states out of the Asian coal market, J. Begger Decl. ¶¶ 12, 14-16, Defendants' actions conservatively wreak ***$18 billion*** of havoc on Montana, Wyoming, Colorado, and Utah, costing "***over 3,900 jobs annually***." Berkman Rep. at 15-17 (emphasis added). Multiple companies will go out of business, mines will close, and state-funded schools, hospitals, and social programs will suffer. Schwartz Rebuttal at 14-15; Begger Decl. ¶¶ 9-11. BNSF will alone suffer almost a ***billion dollars a year*** of damage from the 401 Denial. Decl. of Dr. William Huneke in Support of Pls.' and Plaintiff-Intervenors' Combined Opposition to Defs.' and Defendant-Intervenors' Mots. for Summ. J., App. A at 15 (Huneke Expert Rep.) ("[t]he Terminal . . . would mean an annual potential revenue of $771 million, or more than three quarters of a billion dollars."). Far from affecting only the "narrow interests of a particular company," State Defs.' Mot. at 2, Defendants' actions here will decimate the entire western U.S. coal industry. *See* Schwartz Rebuttal at 14-15; Schwartz Decl. ¶ 11.

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Faced with these facts, Defendants ask an immaterial question: how does the Terminal affect the ***Asian*** coal ***import*** market? WEC Mot. at 2-3 ("operation of the terminal would increase the ***amount of coal consumed in Asia*** by less than one-tenth of one percent") (emphasis added). This is not the right way to frame a dormant Commerce Clause inquiry. The ***federal*** Commerce Clause is concerned with burdens on ***federal***—i.e., American—commerce. "[C]ommerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations." *In re Trade-Mark Cases*, 100 U.S. 82, 96 (1879). And in this case, the burden on "commerce between citizens of the United States and citizens and subjects of foreign nations" is unequivocally enormous. The Terminal represents a tenfold increase in U.S.-to-Asia coal exports, "open[ing] up a massive new market for Wyoming's [and its sister states'] coal industry." Begger Decl. ¶ 12; *see supra* at 4-6. Even the ICF Report on coal markets attached to the FEIS,[45] on which Defendants rely, recognizes the Terminal's significant impact on U.S. coal production. *See* Dkt. 213-2 at 6-5 (ICF Technical Report) (showing that the average increase annual ***American*** coal production if the Terminal were permitted would likely range from approximately 40 to 90 million metric tons).[46] So even assuming for the sake of argument that the Terminal moderately impacts ***global*** commerce,[47] it massively impacts ***national*** commerce, which is all that matters for purposes of the dormant Commerce Clause. *See In re Trade-Mark Cases*, 100 U.S. at 96; *cf. United States v. Durham*, 902 F.3d 1180, 1201 (10th Cir. 2018) ("[f]or the Founders, expansive congressional control over foreign commerce was imperative [because] [t]hey wanted the federal government to have enough authority to promote ***foreign commerce***, which comprised most of the early ***American*** economy.") (emphasis added); Schwartz Decl. ¶ 10.

[45] The ICF Report was not signed, prepared, or co-authored by Defendants, like the actual FEIS chapters were. And it didn't analyze, or purport to analyze, the burdens relevant here.

[46] *See also* Dkt. 213-2 at 2-2 (ICF Technical Report) (showing that this is approximately 10-25% of ***total*** Powder River Basin coal produced in 2015). Defendant-Intervenors also cite to page 5.8-17 of the FEIS itself, misleadingly arguing that the impacts on the coal export market would be "negligible or nonexistent." *See* WEC Mot. at 14. But page 5.8-17 of the FEIS analyzes ***greenhouse gas emissions***, not market effects. Robisch Decl., Ex. 60.

[47] The record shows otherwise. *See, e.g.*, Schwartz Expert Rep. at 18-19; *see also* Begger Decl. ¶¶ 17-18; Dkt. 215 ¶¶ 10-15 (Ushimaru Decl.).

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Defendant-Intervenors also wrongly assert that "[b]ecause there is no significant burden on interstate commerce, there is little need to reach the benefits side of *Pike* balancing at all." WEC Mot. at 17. Not only do Defendant-Intervenors get the strictures of *Pike* balancing wrong, *see supra* at 18-21, 29-31, the burdens on commerce here are literally unparalleled, *see supra* at 4-5, 27-28. By blocking the Terminal, Defendants undermine a uniform regulatory system crucial to allowing landlocked states to ship and export their products in interstate and foreign commerce. Begger Decl. ¶ 16 ("Wyoming depend[s] on uniform national shipping and export policies [because] [w]ithout uniform policies, states like Washington can take advantage of, and do harm to, the economies of vulnerable, landlocked states like Wyoming."); *see also* Schwartz Rebuttal at 14-15. At the same time, Defendants impair the free flow of product—coal—across state borders because "the Terminal represents the only realistic avenue for tens of millions of tons of [interior state] coal to reach the Asian export market." Begger Decl. ¶ 12; *see also* Schwartz Rebuttal at 14-15.

2. Far from being supported by the FEIS, as Defendants claim, the 401 Denial's alleged "local benefits" are illusory.

Defendants and Defendant-Intervenors aggressively argue that the 401 Denial cannot be questioned because it is somehow an extension of the unchallenged FEIS. *See* WEC Mot. at 8-11; State Defs.' Mot. at 14-16. The evidence shows, however, that the 401 Denial materially diverges from the FEIS on which it purports to rely, creating core fact issues that should be resolved at trial. *See supra* at 14. As Cowlitz County's FEIS lead puts it, Ecology's 401 Denial "is inconsistent with the FEIS" because it reaches "materially" different conclusions. Placido Decl. ¶¶ 9, 15.

State action is invalid under the dormant Commerce Clause where the State can only point to illusory or pretextual regulatory benefits. *See, e.g.*, *Kassel*, 450 U.S. at 670-71 (invalidating Iowa state law where the "State's safety interest [was] illusory"). The record here is replete with such evidence. A State Senator attests that the Governor's Office described the 401 Denial as a "political" decision, divorced from science-based reasoning. Rivers Decl. ¶ 5.

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Cowlitz County, co-author of the FEIS, "can only conclude that those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the [certification] denial is to further ***unstated*** State policy preferences." Placido Decl. ¶ 10 (emphasis added). ICF's project leads share the same view. *See, e.g.*, Amato Dep. 114:10-17 (Robisch Decl., Ex. 1) (expressing "surprise" at the 401 Denial and explaining that the FEIS does not describe impacts that would lead to certification denial); Muldoon Dep. 84:25-85:7 (Robisch Decl., Ex. 2) (explaining that he didn't think the FEIS impacts would prevent permitting). And Plaintiffs' expert, Dr. Mark Berkman, will testify that the alleged benefits "of Defendants' 401 Denial . . . are in many instances de minimis and are highly uncertain as to be potentially zero when likely mitigation, high uncertainty, and appropriate baselines are taken into account." Berkman Decl. ¶ 11. In short, Defendants' divergence from the FEIS in the 401 Denial, combined with the evidence of anti-coal animus, strongly suggest that the 401 Denial's stated "benefits" are illusory.[48]

Defendants attempt to stand this argument on its head, contending that they are entitled to summary judgment unless Lighthouse and BNSF can prove at trial that the local benefits described in the 401 Denial are entirely illusory or that the State's decision "involve[d] hidden discrimination." WEC Mot. at 12; *see* State Defs.' Mot. at 16.[49] But illusoriness, i.e., the lack of any real benefits, is just one way the Court may set aside the 401 Denial. Even where state action has a valid, non-illusory purpose, it "may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel*, 450 U.S. at 670. Neither are Lighthouse and BNSF required to prove any sort of discrimination in the *Pike* balancing context. The fundamental premise of *Pike* balancing is a consideration of burdens and benefits "***[a]bsent discrimination***." *Int'l Franchise Ass'n*, 803 F.3d at 399 (emphasis added). In *Pike* itself, the statute at issue had a legitimate benefit and "no hint" of discriminatory purpose, but the Court set it aside after weighing the burdens and benefits. *Pike*,

[48] *See* Placido Decl. ¶ 10 ("I am unaware of any other instance in which Ecology or another state agency denied a permit based on potential impacts similar to those outlined in the FEIS.").
[49] Even the cases cited by Defendant-Intervenors still applied the *Pike* test. *See Raymond Motor Transp. v. Rice*, 434 U.S. 429, 441 (1978); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977).

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397 U.S. at 145-46.[50] "The State cannot avoid the second stage of the inquiry [i.e., *Pike* balancing] simply by invoking the legitimate state interest underlying the Act." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 178 (S.D.N.Y. 1997).

3. At a minimum, genuine issues of material fact regarding the supposed local benefits of Defendants' decision preclude summary judgment.

A sea of record evidence—expert testimony, declarations, deposition testimony, and documents—injects material fact questions into every aspect of the 401 Denial. As Defendants concede, the nine impact areas identified in the 401 Denial contain ***all*** of the putative benefits of their decision. Bellon Dep. 41:25-42:12 (Robisch Decl., Ex. 48); Robisch Decl., Ex. 59 at ROG 3 (Dir. Bellon Answers to BNSF First Set of Interrogs.). Defendants dispute that the 401 Denial articulates any benefits. *See, e.g., supra* at 29-30. But even assuming that Defendants' alleged benefits are not illusory, Lighthouse and BNSF dispute that the 401 Denial impacts are likely to occur and argue that, even if certain impacts could occur, they also could be mitigated. *See, e.g.,* Placido Decl. ¶¶ 7-8, 14 16-26. Set against the evidence of an unprecedented and overwhelming burden on interstate and foreign commerce, Berkman Decl. ¶ 10, there is a genuine issue of material fact as to whether the 401 Denial's burdens on commerce are excessive in relation to its stated benefits.

a. There are genuine issues of material fact as to the likelihood and scope of potential vessel collisions and other accidents.

There are no FEIS findings that vessel accidents "would" or even "could" be likely to result in significant and unavoidable impacts. Robisch Decl., Ex. 61 at 5.4-48. The FEIS found, and ICF confirms, that the risk of vessel impacts is "***very low***." Placido Decl. ¶ 21 (emphasis added); Amato Dep. 84:24-85-19 (Robisch Decl., Ex. 1) (ICF did not identify vessel impacts

[50] And *Pike* is far from the only case to invalidate non-discriminatory state actions with allegedly legitimate purposes. *See, e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (Illinois statute regulating mud-flaps, though a non-discriminatory local safety measure, placed an unconstitutional burden on interstate commerce); *Yamaha Motor Corp.*, 401 F.3d at 568-69 (applying the *Pike* balancing test where the challenged state action was non-discriminatory and had a legitimate local purpose); *Am. Libraries Ass'n v. Pataki* 969 F.Supp. 160, 178-81 (S.D.N.Y. 1997) (invalidating a statute with legitimate purpose that put "heavy burdens predominately on out-of-state interests" when the state's interests could have been furthered with a "less restrictive alternative"); *Hirst v. Skywest, Inc.*, No. 15-C-02036, 2016 WL 2986978, at *10 (N.D. Ill. May 24, 2016).

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that could result in a significant adverse impact); Muldoon Dep. 111:21-112:9 (Robisch Decl., Ex. 2) (FEIS did ***not*** find that the project would have a significant adverse effect on vessel transportation). Internal Ecology emails candidly went even further, admitting that the Terminal creates "***[n]o impacts***, [because] the infrastructure and pilots would be able to manage the increase in vessel traffic." Robisch Decl., Ex. 15 (emphasis added). Ecology has also conceded it ignored a host of mitigation—response drills, incident preplanning, requiring a funding provision for incident response equipment—to alleviate whatever miniscule impact it purports to worry about. ECY 30(b)(6) Dep. 188:18-191:10 (Robisch Decl., Ex. 44). Dr. Placido put it best: the Terminal may increase the risk of vessel accidents by a very small amount, but so would "any and every vessel-related project in Washington State." Placido Decl. ¶ 21. Accordingly, there is no benefit to be gained by denying the Terminal its water quality certification.

b. There are genuine issues of material fact as to the likelihood and scope of potential impacts to the Reynolds Plant.

Lighthouse proposes to build the Terminal at the former Reynolds Metals Reduction Plant site—an underutilized brownfield site in a heavily industrialized area. *See, e.g.*, Robisch Decl., Ex. 62 at Slides 7, 17-23 (photographs of Terminal site). Because "the vast majority of County residents are unaware of the site's existence, let alone any perceived historic value," Sprague Decl. ¶ 19, and because the site is "an underutilized brownfield area more than a historic district," Placido Decl. ¶ 22, there are no genuine cultural resource impacts from Terminal construction. "The Reynolds site, simply put, has zero cultural or historic value to the County and its residents. Whatever value it once had, is gone." Sprague Decl. ¶ 19.[51] Even if there were any impact, that potential issue is regulated through the National Historical Preservation Act (NHPA)[52] Section 106 process. As the FEIS found, all the parties expected a Memorandum of Agreement (MOA) under Section 106 to be signed, fully resolving any NHPA

[51] *See also* Placido Decl. ¶ 22; Haeck Decl. ¶ 16 (Terminal site has "little to no historic significance.").
[52] *See* 54 U.S.C. § 306109.

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impacts. Robisch Decl., Ex. 64 at 3.4-7.; Placido Decl. ¶ 22; Amato Dep. 43:19-21 (Robisch Decl., Ex. 1); *see also* Muldoon Dep. 55:21-56:1 (Robisch Decl., Ex. 2); Amato Dep. 41:23-42:1 (Robisch Decl., Ex. 1) (confirming that the "entire purpose of that memorandum was to prevent or resolve the impact caused by this project"). In fact, ICF leadership testified that they have never seen a Section 106 issue prevent project permitting, have never seen the Corps fail to finalize a Section 106 agreement, and were "confident" the Section 106 agreement would be signed here. Amato Dep. 42:10-43:21, 44:19-23, 46:4-17 (Robisch Decl., Ex. 1). Finally, in the exceedingly unlikely event that an "impact" did occur, expert testimony confirms that the value of avoiding that impact by denying the certification would be "negligible at best." Berkman Expert Rep. at 56.

c. There are genuine issues of material fact as to the likelihood and scope of potential impacts to tribes reaching their fishing grounds.

The FEIS explicitly declined to find that the Terminal could interfere with tribes reaching their treaty-protected fishing grounds, concluding that most impacts were too "difficult to quantify." Robisch Decl., Ex. 63 at 3.5-20. BNSF's Cary Hutchings confirms that BNSF actively works with tribes to ensure that tribal access to fishing grounds is not impacted, and that Defendants did not discuss with BNSF whether tribal members would in fact be impacted here. Decl. of Cary Hutchings, Director, Economic Development at BNSF Railway Co. (Hutchings Decl.) ¶ 17, Ex. B at 10-11; *see also id.*, Ex. A at 15-16; *id.* Ex. B at Ex. D. Had Defendants contacted BNSF, BSNF could have informed Defendants of the specific access program that BNSF has established that provides tribal members access to such fishing grounds. *Id.* And although the 401 Denial paints the picture that the Terminal would affect fish important to the tribes, the FEIS specifically found that fish would not be significantly or adversely impacted by the Terminal. Robisch Decl., Ex 65 at 4.7-41. To get around this FEIS finding, the 401 Denial cherry-picked pieces from non-tribal resource FEIS chapters, cobbling together a grab-bag of non-significant impacts into something scary sounding but ultimately unsupported by the record. For example, the 401 Denial says that "fugitive coal dust would increase

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suspended solids in the Columbia River," Dkt. 1-1 at 12, but left out the conclusion that coal dust "***is not expected to affect behavior or survival of fish.***" Robisch Decl., Ex. 63 at 3.5-16 (emphasis added). Ecology also ignored mitigation measures that could reduce or eliminate these made-up impacts. Berkman Expert Rep. at 57; Ecology 30(b)(6) Dep. 192:3-193:7 (Robisch Decl., Ex. 44). In any event, Dr. Berkman concludes that "it [is] unlikely [] damages will arise" to tribal resources. Berkman Expert Rep. at 57.

d. There are genuine issues of material fact as to the likelihood and scope of potential impacts to vehicle transportation.

Under the FEIS's likeliest impact analysis in terms of cars delayed at railroad crossings, no public crossings would experience significant adverse impacts. Robisch Decl., Ex. 66 at 5.3-32 to 5.3-33. Only cars awaiting access to the ***Terminal*** at the private railroad crossing could experience any meaningful delay. *Id.* (emphasis added). Indeed, the FEIS ultimately concluded that while ***potential delays could*** occur, "planned track infrastructure" improvements would eliminate significant impacts. *Id.* at 5.3-30, 5.3-46 (emphasis added). BNSF has testified to numerous measures it takes to ensure that cars are not significantly delayed at railroad crossings, including via planned improvements, *see, e.g.*, Hutchings Decl., Ex. A at 12-13, and that Defendants did not seek out BNSF's input during the FEIS or 401 Denial process, Hutchings Decl., ¶ 15. Had Defendants done so, BNSF would have disagreed that the Terminal will or would result in unique or unusual new periods of vehicle delays during the peak traffic hour. Hutchings Decl., Ex. A at 12-13.

As the County echoes, only "[b]y ignoring these 'planned,' reasonably likely improvements [does] Ecology's 401 Denial reach[] a wholly different conclusion than the FEIS." Placido Decl. ¶ 17. Lighthouse also "committed" to funding a range of mitigation at railroad crossings, including purchasing new crossing gates, active warning devices and a train storage area. Robisch Decl., Ex. 66 at 5.3-44; Chapman Dep. 91:24-93:4 (Robisch Decl., Ex. 67) (Lighthouse offered to build an area for trains to wait on site, so that trains would not block traffic). Even assuming that there would be no such infrastructure improvements, and even

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assuming no mitigation would occur, Dr. Berkman and the Corps (which ran a similar analysis) both find that even without planned improvements, there would be ***no*** significant adverse impacts caused by the Terminal and therefore no benefits created by denying the Terminal's certification. Berkman Expert Rep. at 37; Robisch Decl., Ex. 68 at 6.3-20 (excerpt of NEPA DEIS).

e. There are genuine issues of material fact as to the likelihood and scope of potential rail transportation impacts.

The FEIS identifies "***potential***" rail impacts that "***could***" occur only "***if*** improvements to capacity were not made." Robisch Decl., Ex. 14 at 5.1-24 (emphasis added). But the FEIS ultimately concluded that "[i]t is ***expected*** that BNSF would make necessary improvements or operating changes to accommodate the rail traffic growth," eliminating any impacts. *Id.* (emphasis added). Neither the County nor ICF uncovered facts suggesting these "expected" improvements—i.e., mitigation—would not occur,[53] and both agree that the 401 Denial "misrepresents" the FEIS rail transportation findings. *See* Placido Decl. ¶ 19; *see also* Muldoon Dep. 84:25-85:7 (Robisch Decl., Ex. 2). Dr. Berkman, the County, ICF, and BNSF reach the same conclusion: "'there is [n]o credible evidence'" that the Terminal would cause any negative impacts on railroads or rail capacity and thus there would be no benefit to denying its permit. Berkman Expert Rep. at 39-40 (quoting BNSF); *see also* Placido Decl. ¶ 19 ("The Terminal is not reasonably likely to result in significant and adverse rail transportation impacts that cannot be mitigated."); Hutchings Decl. ¶ 19 (recently completed projects near the proposed Millennium project "alone could mitigate purported rail transportation impacts"), ¶ 20 (BNSF makes daily adjustments network-wide to address and mitigate any capacity issues); ¶ 21 (Defendants did not contact BNSF to learn about any possible mitigation for purported rail transportation impacts before issuing the 401 Denial).

[53] *See e.g.*, Placido Decl. ¶¶ 18, 19, 22; *see also* Muldoon Dep. 72:16-20, 73:6-10 (Robisch Decl., Ex. 2). And in fact, ICF spoke to Longview Switching Company, which confirmed it was "ready and willing" to fund necessary infrastructure improvements once the Terminal is approved. *See* Amato Dep. 58:24-61:11 (Robisch Decl., Ex. 1).

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f. There are genuine issues of material fact as to the likelihood and scope of potential rail safety impacts.

As with every other impact area, the 401 Denial's rail safety conclusion "fully discounts FEIS mitigation findings and recasts key [FEIS] language." Placido Decl. ¶ 20; *see also* Muldoon Dep. 84:25-85:7 (Robisch Decl., Ex. 2). FEIS analysis suggests "***potential***" rail safety impacts "***could***" occur, but determined that "planned improvements" would avoid significant impacts. Robisch Decl., Ex. 69 at 5.2-4, 5.2-8, 5.2-10 (emphasis added). Even under the FEIS's "worst-case scenario" analysis, the Co-Leads "learned that BNSF, Union Pacific, and Longview Switching Company (LVSW) ***planned on making track improvements to accommodate Terminal-related rail traffic, which would improve rail safety***." Placido Decl. ¶ 20 (emphasis added). Rail safety impacts would occur if, and only if, "BNSF, UP, or LVSW somehow were prevented from completing improvements"—an "unlikely event." *Id.* These impacts are particularly unlikely to occur given BNSF's demonstrated efforts to reduce accident rates, which include annual investments of millions of dollars to improve operations, infrastructure, and safety efforts. Hutchings Decl., ¶¶ 28-29 (the 401 Denial does not correctly analyze rail safety, including BNSF's investment in significant amounts of Class 4 track in Washington, which has "four-fold lower incidence of accidents per million train miles" than what was analyzed by Defendants); *see id.* Ex. A at 7-9. County and ICF leadership concur that Ecology's findings are a "leap since the analysis does not identify a significant and adverse impact" and, therefore, there would be no benefit to denying the Terminal its certification. Amato Dep. 67:16-68:15 (Robisch Decl., Ex. 1); *see also* Berkman Expert Rep. at 43.

g. There are genuine issues of material fact as to the likelihood and scope of potential noise and vibration impacts caused by trains.

Train-related noise and vibration impacts are also not, in the words of Ecology's Co-Lead, "reasonably likely." Placido Decl. ¶ 18. Here too, the 401 Denial departs from the FEIS, which found that impacts would occur ***only*** "*if a Quiet Zone is not implemented*." *Id*. (emphasis in original); *see also* Robisch Decl., Ex. 74 at 5.5-32 to 5.5-33. The FEIS further found that

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Lighthouse "***will*** coordinate with [local government] . . . to implement a Quiet Zone." Robisch Decl., Ex. 70 at 5.5-32 (emphasis added). Lighthouse will even fully fund the required Quiet Zone improvements. *Id.* Throughout the application process, BNSF has "remain[ed] willing to work with stakeholders to establish quiet zones." Hutchings Decl. ¶ 25; *see id.*, Ex. A at 11-12 ("BNSF regulatory works with communities . . . to establish [] quiet zone[s]").

And the County and ICF agree that there is no uncertainty surrounding this mitigation, which would "***eliminate***" any impacts. Robisch Decl., Ex. 74 at 5.5-32 (emphasis added); Placido Decl. ¶ 18 ("I have no reason to believe a quiet zone cannot or will not be implemented, and no facts were developed during the DEIS or FEIS process that would prevent establishment of a quiet zone."); Muldoon Dep. Tr. 125:11-23 (Robisch Decl., Ex. 2) (no indication that FRA would deny any quiet zone connected to the project); Amato Dep. 29:23-32:1 (Robisch Decl., Ex. 1) (Ecology never investigated whether the Federal Railroad Administration (FRA) was likely to approve a quiet zone). Even without quiet zones, noise and vibration caused by trains is already occurring because the railroads surrounding the Terminal are currently in active use. For all of these reasons, there is no benefit to denying the Terminal its permit. Berkman Expert Rep. at 28-29.

h. There are genuine issues of material fact as to the likelihood and scope of potential impacts to social and community resources.

The FEIS found that "[i]mplementation of voluntary and applicant mitigation measures identified above [such as establishing quiet zones] ***would reduce impacts*** on social and community resources and minority and low-income populations" in the nearby Highlands neighborhood. Robisch Decl., Ex. 71 at 3.2-25. The 401 Denial, however, ignores the mitigation measures identified in the FEIS to conclude that the Highlands neighborhood would be disproportionately impacted by the Terminal. Dkt. 1-1 at 8-9. There is a genuine dispute of material fact regarding these impacts. *See supra* at 8-10, 31, 34-35, 37-39. Furthermore, Defendants ignore the significant economic and health benefits that the Terminal would bring to low-income and minority groups in Longview. Indeed, "the Terminal could drive a

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desperately needed revitalization of the Highlands community," such that "the socioeconomic and health benefits of the Terminal ***far outweigh*** whatever impacts could potentially result." Decl. of Elizabeth Haeck, Community Organizer, Neighborhood Res. Coordination Council (Haeck Decl.) ¶ 13 (emphasis added); *see also* Sprague Decl. ¶ 18 ("[i]n fact, the Terminal will significantly ***benefit*** the Highlands neighborhood.") (emphasis added). Berkman Expert Rep. at 56 ("[D]evelopment of the proposed Terminal could provide important benefits to local communities.").

i. There are genuine issues of material fact as to the likelihood and scope of potential air quality impacts from locomotives.

The appropriate regulatory authorities have already determined that the Terminal will not expose local populations to unsafe air quality conditions. *See* Berkman Expert Rep. ¶ 34 ("Terminal emissions are not projected to violate any annual National Ambient Air Quality Standards (NAAQS)" which "are designed to protect public health, including protecting the health of sensitive populations such as asthmatics, children, and the elderly."). The FEIS accordingly found that the Terminal ***satisfies all federal, state, and local air quality laws***. Robisch Decl., Ex. 72 at 5.6-16 to 5.6-18 (emphasis added). Unsurprisingly then, the FEIS does not describe likely or reasonably likely air quality impacts. Placido Decl. ¶ 16. By its own terms, the FEIS models "conservative," "overstated," worst-case scenario, "***potential***" impacts. *See* Robisch Decl., Ex. 72 at 5.6-19 (emphasis added). Ecology's own expert admits as much. Palcisko SHB Dep. 34:9-17 (Robisch Decl., Ex. 73). Also, the FEIS is even more conservative than reality because BNSF's locomotives are cleaner than average locomotives because of, inter alia, BNSF's idling reduction technologies, BNSF's practice of replacing older locomotives with newer, more efficient models, and because in all events locomotive emissions are stringently regulated and BNSF's fleet is the newest and cleanest in North America. Hutchings Decl. ¶¶ 22-23; *see id.*, Ex. A at 9-11, Ex. B at 2-4 ("BNSF has the newest and cleanest freight locomotive fleet in North America.").

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Ecology also ignored the fact that its environmental consultant ICF did not consider the described air quality impact significant. Robisch Decl., Ex. 74 ("ICF suggests this [air quality] is not a significant impact."). As Lighthouse and BNSF's expert, Dr. Berkman, explains, "[a]ir quality is projected to be sufficiently protective of human health" and "Terminal operations will ***not*** lead to a significant increase in cancer incidence"—meaning that there are no air quality benefits to be gained from the 401 Denial. Berkman Expert Rep. at 19, 25-26 (emphasis added). In any event, it is likely that Lighthouse and BNSF could mitigate any alleged adverse impacts. Robisch Decl., Ex. 72 at 5.6-33 ("Project design measures, best management practices, and compliance with environmental permits, plans, and authorizations . . . would reduce air quality impacts."); *see also* Placido Decl. ¶¶ 16, 26.[54]

4. There are genuine issues of fact as to the 401 Denial's cited water quality deficiencies.

Defendants also contend that the 401 Denial was warranted because the Terminal would cause multiple water quality impacts. These alleged impacts are contested by Lighthouse.

First and foremost, the FEIS clearly and unambiguously concluded that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality." Robisch Decl., Ex. 18 at 4.5-34. In the words of the FEIS co-author, "there is no question the company can satisfy all local and state water quality standards." Placido Decl. ¶ 24. The discrepancy between the FEIS and the 401 Denial on this point by itself constitutes a fact issue for trial.

Second, to the extent that Defendants contend that Lighthouse failed to submit sufficient information to prove that water quality would ***not*** be impacted, Lighthouse and its environmental consultants have demonstrated that Ecology subjected Lighthouse to disparate, unfair treatment, including but not limited to:

- waiting until the end of the certification window to act on Lighthouse's permit;
- seeking an unprecedented scope of information;

[54] Despite the FEIS's findings, Defendants did not provide Lighthouse "a legitimate opportunity to present [air quality] mitigation." Placido Decl., ¶ 16.

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- seeking an unprecedented volume of information;
- seeking information that was impossible to prepare before the deadline ("setting Lighthouse up to fail");
- refusing to reduce its requests to writing, even after promising to do so, creating confusion over what information was required;
- invoking brand new "practices"; and
- ultimately denying the 401 certifictation, in part, based on information that Ecology never asked for.[55]

Lighthouse can demonstrate that it is ready, willing, and able to submit the water quality information that Ecology claims to need in Part III of the 401 Denial. Gaines Decl. ¶ 6. But because Ecology refuses to continue processing any permits for the Terminal, it will not accept the very information that it claims that it requested. *See supra* at 15. For all these reasons, there are genuine issues of material fact concerning every aspect of the water quality impacts that Defendants allege.

5. There are genuine issues of material fact as to the availability of less burdensome and discriminatory alternatives to the 401 Denial.

Lighthouse has also raised a genuine issue of material fact as to whether less burdensome and less discriminatory alternatives to Defendants' 401 Denial were available. *See Pac. Nw. Venison*, 20 F.3d at 1016 (evidence of less burdensome alternatives "may create a material dispute as to whether the burden on interstate commerce outweighs the state's interest"). As described in detail above, Defendants discounted likely mitigation and, in many cases, wholly refused to consider mitigation at all. *See, e.g.*, Placido Decl. ¶¶ 25-26. At depositions, Defendants conceded they ignored ***dozens*** of potential mitigation measures. *See, e.g.*, Cunningham Dep. 104:14-105:15, 126:6-127:4 (Robisch Decl., Ex. 75) (no consideration of smoking cessation programs and battery operated locomotives); Ecology 30(b)(6) Dep.

[55] *See* Grette Decl. ¶ 18 ("[T]hroughout the entire CWA Section 401 certification process, Ecology never once mentioned a single one of the nine SEPA issues identified in its 401 Denial."); *see also id.* ¶ 8; LaFranchise Decl. ¶¶ 13, 19.

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179:14-193:7 (Robisch Decl., Ex. 44) (Ecology didn't consider dozens of potential mitigation conditions). Drs. Berkman and Placido confirm that fact. Berkman Expert Rep. at 8 ("the benefits alleged by Ecology are modest at best . . . and asserted without sufficient recognition of available forms of mitigation."); Berkman Decl. ¶¶ 5, 10; Placido Decl. ¶ 25 ("Ecology ignored or discounted mitigation . . . ."); *see id.* ¶ 7.

Defendants could have granted (and typically do grant) the 401 certification on the condition that certain forms of potential environmental impacts were avoided or mitigated—a less burdensome and discriminatory alternative to denying the "project" with prejudice. ICF confirms this, agreeing that the mitigation measures mentioned in the FEIS but ignored in the 401 Denial are routinely accepted by regulatory agencies, so much so that ICF staff are unaware of "***any instances*** where that type of mitigation has been rejected." Amato Dep. 38:11-25 (Robisch Decl., Ex. 1) (emphasis added). And Dr. Placido, who "routinely works" with Ecology and has "led, co-led, or participated in ***hundreds*** of SEPA reviews," says "this is the ***first time in [her] career [she's] seen any regulatory agency wholly exclude an applicant from mitigation discussions***." Placido Decl. ¶¶ 3, 26 (emphasis added). Because the County "could have addressed Ecology's purported concerns by requiring mitigation in one of the local permits yet to issue," summary judgment is inappropriate. *Id.*

6. The cases cited by Defendants do not require summary judgment.

Defendants rely heavily on the Third Circuit's 1987 decision in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3d Cir.1987). As they see it, *Norfolk Southern* requires Lighthouse and BNSF to prove that Defendants' actions "favor in-state businesses or constitute economic protectionism." State Defs.' Mot. at 12. Defendants also argue that "only discriminatory burdens were relevant" to the *Pike* balancing test as analyzed by *Norfolk Southern*. *Id.* at 12-13. Neither of these arguments accounts for the factual differences between this case and *Norfolk Southern*, and interpreting *Pike* as *Norfolk Southern* did would be contrary to clear Ninth Circuit precedent.

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As discussed above, the record demonstrates that Defendants engaged in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc.*, 511 U.S. at 99; *see also Indep. Training and Apprenticeship Program*, 730 F.3d at 1038; *see supra* at 10, 21-26.[56] Indeed, Defendants here acted out of anti-coal animus, sought to protect in-state agricultural shippers against out-of-state coal trains carrying out-of-state coal, and applied unprecedented and unjustified scrutiny to the Terminal that Defendants would not apply to in-state industries and port facilities. *See supra* at 9-10, 21-26. The plaintiffs in *Norfolk Southern* had "no" such evidence. *See Norfolk Southern*, 822 F.2d at 403-04. Nor were there genuine issues of material fact in *Northern Southern*, as there are in this case, as to whether the benefits of Defendants' permitting denial are illegitimate and illusory. If that evidence is ultimately credited by the fact-finder, it would require judgment in Lighthouse's favor.

Apart from these factual differences relevant to the discriminatory purpose or effect test, *Norfolk Southern* and the Ninth Circuit differ on *Pike* balancing. The Ninth Circuit has made clear the difference between the two parts of the dormant interstate Commerce Clause test: "If a statute discriminates against out-of-state entities," it falls into one category; "***[a]bsent discrimination***," the *Pike* balancing test applies. *Int'l Franchise Ass'n*, 803 F.3d at 399 (emphasis added); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338-39 (2008). By demanding a "discriminatory burden" on commerce, *Norfolk Southern* improperly conflates the discriminatory purpose or effect test and the *Pike* balancing test, which does not require discrimination. *Norfolk Southern*, 822 F.3d at 406. That too-narrow reading of *Pike* and its progeny deviates from the Supreme Court's dormant Commerce Clause cases, and has subsequently been criticized, even within the Third Circuit. *See, e.g.*, *Cloverland—Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 138 F. Supp. 2d 593, 609 (M.D. Pa. 2001) ("[T]he narrow definition of 'incidental burdens' suggested by *Norfolk Southern* is no longer good law

[56] Because it was decided before *Oregon Waste Systems*, the Third Circuit's decision in *Norfolk Southern* does not use this concise formulation.

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. . . ."); *Virgin Islands Port Auth. v. Virgin Islands Taxi Ass'n*, 979 F. Supp. 344, 351 n.6 (D.V.I. 1997) (declining to follow *Norfolk Southern*).

It is also relevant that the burdens on interstate and foreign commerce in this case are markedly greater than those at issue in *Norfolk Southern*.[57] The "base" alleged burden in *Norfolk Southern* was that the state law "preclude[d] coal exporters from lowering their average transportation costs." *Norfolk Southern*, 822 F.2d at 407. Because they were not allowed to "top off" their coal ships in Delaware waters, the exporters would be marginally less competitive in overseas markets. *Id.* at 390. Here, the burden is not increased costs, but nearly complete restriction of market access, Begger Decl. ¶¶ 12, 14-15, causing billions of dollars in lost GDP and thousands of lost jobs on an annual basis. Schwartz Rebuttal at 1-2, 8-13; Berkman Expert Rep. at 15-17. The *Norfolk Southern* burdens pale in comparison to those here.

Defendants' reliance on the outcome in *Portland Pipe Line Corp. v. City of South Portland*, 332 F. Supp. 3d 264 (D. Me. 2018), is equally inappropriate. First and foremost, *Portland Pipe Line* was not decided on summary judgment—the court in that case recognized that dormant Commerce Clause cases require fact-intensive inquiries more appropriately decided at trial and accordingly denied defendants' summary judgment motion. *Portland Pipe Line Corp.*, 288 F. Supp. at 450. After a multi-day bench trial, the district court in *Portland Pipe Line* issued a lengthy opinion detailing its factual findings. 332 F. Supp. 3d 264.[58] Those findings included an extensive discussion of the facts surrounding the alleged discriminatory effect and purpose of the state ordinance. *Id.* at 300-08. The court's conclusion is irrelevant in

[57] The same is true of *Wood Marine Service v. City of Harahan.* There, the plaintiffs presented no evidence of impacts to *any* out-of-state businesses and alternative sites were available nearby that could and "desire[d] to accommodate" the proposed business. *See Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1064-65 (5th Cir. 1988); *Wood Marine Serv. Inc. v. Bd. of Comm'rs for E. Jefferson Levee Dist.*, 653 F.Supp. 434, 447 (E.D. La. 1986). Here, there is strong evidence of a significant burden and there are no alternative sites. *See supra* at 4-5. Defendants' reliance on *Columbia Pacific Building Trades Council v. City of Portland*, 412 P.3d 258 (Or. Ct. App. 2018), is similarly misplaced because there the "*record contain[ed] no attempt* . . . to demonstrate" how the challenged action "would affect interstate commerce . . . or how that burden . . . compare[d] to local benefits," *id.* at 267 (emphasis in original).

[58] The *Portland Pipe Line* plaintiffs have appealed to the First Circuit. *See Portland Pipe Line Corp. v. City of S. Portland*, 332 F. Supp. 3d 264 (D. Me. 2018), *appeal docketed*, No. 18-2118 (1st Cir. Nov. 13, 2018).

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this case, where the specific facts are not comparable. Similarly, the *Portland Pipe Line* court's *Pike* balancing decision was a nuanced factual determination that turned on the specific facts in that case. *Id.* at 308-13. The facts here demand a different conclusion. *See supra* at 26-42.

D. Material disputes of fact prevent summary judgment on Lighthouse's dormant foreign Commerce Clause claims.

Defendants downplay the role of the dormant Foreign Commerce Clause in this case, essentially asserting that their arguments apply equally to both interstate and foreign commerce. State Defs.' Mot. at 17 ("The analysis under each clause is the same, except that, under the foreign Commerce Clause, there is an additional requirement that state actions not interfere with the federal government's ability to 'speak with one voice when regulating commercial relations with foreign governments.'" (quoting *Japan Line*, 441 U.S. at 449)). That attitude betrays a fundamental misunderstanding of the significance of federal authority in the field of foreign commerce.

1. Defendants' actions should receive even greater scrutiny under the dormant foreign Commerce Clause.

As Lighthouse and BNSF explained in their motion for summary judgment, the dormant foreign Commerce Clause gives the federal government an "exclusive and plenary" power over international trade that "may not be limited, qualified, or impeded to any extent by state action." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57 (1933). Recognizing that, the Supreme Court has explicitly "rejected" the premise on which Defendants rely—that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved." *Japan Line*, 441 U.S. at 446. It is true that dormant foreign Commerce Clause claims are subject to the same test applicable in dormant interstate Commerce Clause cases. *Pac. N.W. Venison Producers*, 20 F.3d at 1014. But because of the federal government's exclusive regulatory role, "state restrictions burdening foreign commerce are also subjected to a ***more rigorous and searching scrutiny***." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (emphasis added); *see also Pac. N.W. Venison Producers*, 20 F.3d at 1014.

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Defendants and Defendant-Intervenors make little effort to understand or explain the dormant foreign Commerce Clause's heightened review requirements. They are correct that the Constitution prohibits the state from "prevent[ing] the Federal Government from 'speaking with one voice' in international trade." *Japan Line*, 441 U.S. at 446, 453-54; *see* State Defs.' Mot. at 17; WEC Mot. at 20. They fail to mention, however, that the "one voice" doctrine imposes two separate mandates on the state. At a minimum, their decision to block construction of the Terminal is unconstitutional if it "***either*** implicates foreign policy issues which must be left to the Federal Government ***or*** violates a clear federal directive." *Container Corp.*, 463 U.S. at 194 (emphasis in original).

Lighthouse and BNSF's summary judgment motion addresses both of these paths to a dormant foreign Commerce Clause violation. Dkt. 212 at 7-19. It argues that Defendants' decision inherently usurps the federal government's exclusive policymaking authority in the sphere of foreign trade. *Id.* at 7-16. To the extent Defendants attempt to raise fact questions to avoid summary judgment on this point, it obviously precludes summary judgment in their favor here.[59]

2. At a minimum, Lighthouse's and BNSF's foreign Commerce Clause claims involve factual questions about the federal government's coal export policy.

Ignoring the question of whether their actions improperly implement State policy preferences in an area reserved to the United States, *see* Placido Decl. ¶ 10 (Denial is "pretext and [] the real reason for the [certification] denial is to further unstated State policy preferences"), Defendants focus instead on the existence of a "clear federal directive" concerning coal exports. Defendant-Intervenors explicitly assert that "there is no overarching federal policy favoring the export of coal." WEC Mot. at 20. Defendants, consistent with their discovery responses, take no position on the substance of federal coal export policy, but suggest

[59] Lighthouse and BSNF continue to believe, for the reasons set out in their affirmative summary judgment motion, that Defendants' decision to block the Terminal violates the dormant foreign Commerce Clause as a matter of law. *See* Dkt. 212; Dkt. 214.

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that Lighthouse and BNSF have failed to establish one. State Defs.' Mot. at 17-18.[60] These are both ***factual*** arguments, which Lighthouse and BNSF will strongly contest at trial. If they can show that federal policy favors coal export—and they have a variety of evidence and an unrebutted expert who say that it does—Defendants' decision to prevent that export by blocking the Terminal would contravene the Supreme Court's "one voice" doctrine. *See* Begger Decl. ¶ 18; Dkt. 215 ¶ 25 (Ushimaru Decl.); Dkt. 218 (Banks Decl.).[61] That alone precludes entry of summary judgment in Defendants' favor.

Perhaps recognizing the unavoidably factual nature of their policy argument, Defendants and Defendant-Intervenors also recycle their claims that the Terminal decision should be upheld as a simple denial of "this particular project at this particular location." Their claim that Lighthouse remains "free" to export coal from other locations attempts to disguise more factual disputes that prevents summary judgment. The parties and their experts disagree about the West Coast's lack of capacity to export coal to Asia and about whether the Terminal location is in fact the only suitable location for a coal export facility in the Pacific Northwest. *See, e.g.*, Schwartz Rebuttal at 8-13. These factual disputes cannot be resolved on summary judgment.

[60] In this vein, Defendants admit that Lighthouse already has two contracts to deliver coal to customers in South Korea, but wrongly assert that it can fulfill these contracts without the Terminal. State Defs.' Mot. at 18 n.7; *see* Schwartz Expert Rep. at 17; *see also* Sweeney Dep. 67:8-69:3 (Robisch Decl., Ex. 53). This represents yet another factual dispute.

[61] *See also* Dkt. 219 (Banks Decl.); Dkt. 228-11 (2017 White House National Security Strategy); Dkt. 228-10 (remarks by President Trump at Unleashing American Energy Event); Dkt. 228-25 (Associated Press Article quoting U.S. Secretary of Interior, Ryan Zinke); Dkt. 228-27 (statement of Secretary Zinke in Support of President Trump's American Energy Executive Order); Dkt. 228-24 (Dept. of Energy press release regarding U.S.-Ukraine coal deal); Dkt. 228-26 (Joint Press Release from Vice President Mike Pence and Deputy Prime Minister Taro Aso on the Second Round of the U.S.-Japan Economic Dialogue); Robisch Decl., Ex. 80 (Statement by Shawn Bennett, U.S. Dept. of Energy at Mont. Energy Summit); *id.* Ex. 76 (Reuters article regarding U.S.-Japan energy talks); *id.*, Ex. 82 (statements of Chairman Gosar, Rep. Cheney, and Rep. Curtis at H. Comm. on Nat. Res. Oversight Hearing); *id.* Ex. 83 (statements of Sen. Barrasso at Senate Envt. & Pub. Works Comm. Hearing); *id.* Ex. 84 (statements of S. Smouse, U.S. Dept. of Energy); Banks Dep. 58:4-25 (Robisch Decl., Ex. 3).

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E. Preclusion does not apply to this Court's review of the 401 Denial.

Defendants argue that (i) the *Elliott* case, (ii) the *Kleenwell* case, and (iii) the FEIS preclude this court from reviewing the 401 Denial as a violation of the U.S. Constitution. WEC Mot. at 8. They are wrong on all three fronts.

Collateral estoppel by way of *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986), does not apply to this case. Under *Elliott*, collateral estoppel from an administrative decision only applies to the extent permitted under state issue preclusion law. Under Washington State law, collateral estoppel only applies when there exists: (1) an identical issue; (2) a final judgment on the merits; (3) privity; and (4) injustice will not result. *Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 507, 745 P.2d 858, 860 (Wash. 1987). Further, "[w]here, [as here], the prior adjudication took place before an administrative body," additional factors must also be considered: "(1) whether the agency acting within its competence made a factual decision; (2) agency and court procedural differences; and (3) policy considerations." *Id.* at 508.

Defendants' conclusory argument that *Elliott* requires preclusion omits any facts showing that they meet the elements of the above tests. The reality is that Defendants cannot satisfy them. The administrative agencies in Washington never examined the 401 Denial for compliance with the dormant Commerce Clause, which is the issue in this case. Because there is no "identical issue," *Elliott* does not apply. *See, e.g.*, *Peterson v. Clark Leasing Corp.* 451 F.2d 1291, 1292 (9th Cir. 1971) ("[i]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same."); *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1523 (W.D. Wash. 1996) (same).

Defendants' reliance on *Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995) fails for the same reason. The Federal court was asked to re-examine the ***same*** issue that the state tribunal examined: "whether Kleenwell was exempt

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from state regulation because it engaged in interstate commerce." *Kleenwell*, 48 F.3d at 393.[62] Defendants cannot claim that any state tribunal made such an examination here.

Instead, the situation in this case is much like *Friends of the Earth v. Hall*, 693 F. Supp. 904, 920-21 (W.D. Wash. 1988), where the court rejected the very argument that Defendants bring here. In *Hall*, the defendants argued that because the state PCHB had reviewed a Clean Water Act (CWA) permit decision, the federal court was precluded from reviewing the factual issues related to that permit denial. But in *Hall*, because "the [PCHB] merely resolved state legal issues [and] did not, and could not, address the [federal legal claims]," no preclusion attached. *Id.* Furthermore, the court in *Hall* reasoned, "according preclusive effect to either [state] board's decision would be inappropriate because the record before the court contains a variety of evidence not reviewed at the state level." *Id.* at 920. The same rationale prevents application of preclusion here, where no state tribunal has ever considered Lighthouse's and BNSF's Commerce Clause claims or the evidence being presented in this case. As in *Hall*, preclusion "would contravene public policy and work an injustice on [the Plaintiffs]." *Id.* at 921.

In addition, the Washington Supreme Court recently refused to "give preclusive effect to agency decisions" where, as here, "they are intertwined with . . . important constitutional questions." *Sprague v. Spokane Valley Fire Dep't*, 409 P.3d 160, 186 (Wash. 2018). As in *Sprague*, this case presents "an important public question of law such as the validity of [a significant state decision] . . . ." *Id.* at 185. For the above reasons, this case therefore should not, and cannot, be subject to collateral estoppel. *See id.*

Defendants separately suggest that Lighthouse and BNSF cannot challenge the FEIS's conclusions. Defendants do not cite any cases binding on this court that state as much. More

[62] Defendant-Intervenors attempt to support their discussion of *Kleenwell* with a citation to *General Motors Corp. v. EPA*, 168 F.3d 1377, 1382 (D.C. Cir. 1999), which considered whether a CWA permittee could challenge a state-issued CWA Section 402 permit in a federal enforcement proceeding. *Id.* This case involves neither an ***enforcement proceeding*** nor a Section 402 permit. *See* 33 U.S.C. § 1342. And unlike the *General Motors* plaintiff, Lighthouse ***did*** challenge the Section 401 Denial in state court.

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important, Defendants misapprehend Lighthouse and BNSF's primary arguments. This case does not challenge the FEIS. It challenges Defendants' ***mischaracterization*** and ***misuse*** of the FEIS. The purpose of the FEIS is to "present decision-makers with a reasonably thorough discussion" of environmental impacts. *Kiewit Constr. Grp. Inc. v. Clark Cty.*, 920 P.2d 1207, 1211 (Wash. Ct. App. 1996). One of the consistent themes in this case shown through discovery is how the State Defendants took FEIS findings and materially changed them to suit their own purposes in the 401 Denial. By its own terms, the FEIS therefore represents just ***one*** source of ***some*** information for decision-makers and courts, and an incomplete, limited source at that.[63]

F. The Clean Water Act's implementing authority is irrelevant to this case.

Defendants also argue that because Congress passed Section 401 of the CWA, all 401 certification decisions, including the 401 Denial, are immunized from Commerce Clause review. Defendants cannot, however, demonstrate that Congress insulated those certification decisions from judicial review for Commerce Clause violations.

Congress has the power to "authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). But "[t]he standard for finding congressional consent is high." *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n*, 198 F.3d 1, 9 (1st Cir. 1999). "[C]ongressional intent and policy to insulate state legislation from Commerce Clause attack [must be] '***expressly stated***.'" *Wunnicke*, 467 U.S. at 90 (quoting *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982)) (emphasis added). To establish congressional intent to protect state action from a Commerce Clause challenge, Defendants must clearly and unambiguously show that Congress "***affirmatively contemplate[d] [the] otherwise invalid" state action***. *Id.* at 91 (emphasis added); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) ("We need say no more to conclude that Oklahoma has not met its burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce occurring here."). To show

[63] Nothing in the FEIS prevents Lighthouse and BNSF from introducing evidence outside the FEIS; in fact, Washington EIS rules contemplate just that. *See, e.g.*, Wash. Admin. Code § 197-11-448(1).

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that Congress immunized state action against dormant ***foreign Commerce Clause*** attack, Defendants must show "affirmative approval"—that Congress affirmatively approved state action conflicting with the foreign dormant Commerce Clause. *Wunnicke*, 467 U.S. at 92 n.7.

Defendants cannot satisfy these standards. First and foremost, they cite no case standing for the proposition that through the CWA Congress immunized state action from Commerce Clause attack. The most relevant precedent suggests that it has not. For example, in *Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 783 (4th Cir. 1996), the Fourth Circuit rejected the argument that similar federal environmental laws—the Resources Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—displaced the Commerce Clause simply because those federal laws authorized and incorporated related state decisions and laws. Because Congress had not "expressly approved any of the contested [state] laws," the court explained, those laws could not displace the Commerce Clause. *Id.* at 783. Analogously, in *Sporhase*, 458 at 960-61, the Supreme Court rejected the argument that because Congress cedes some "deference to state water law," the dormant Commerce Clause cannot apply. Here, just as Congress did not expressly immunize the state laws from Commerce Clause attack in *Environmental Technology Council*, Congress did not expressly authorize the 401 Denial itself, even if it did broadly authorize the states to make water quality decisions under Section 401.

Put differently, Defendants are arguing that Congress authorized 401 certification denials, and that the 401 Denial is consistent with the CWA's cooperative federalism structure that places water quality decision-making in the hands of the states. That is insufficient. Congress did not expressly authorize ***the*** 401 Denial. It is not enough that state action is "consistent with federal policy." *Wunnicke*, 467 U.S. at 83 (general consistency with, or even furtherance of federal goals "is an insufficient indicium of congressional intent."). Accordingly, Congress's broad authorization to the states in Section 401 does no harm to Lighthouse and BNSF's Commerce Clause claims.

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As a factual matter, the record demonstrates that the "with prejudice" 401 Denial was not based on water quality, which is all that Section 401 of the CWA authorizes.[64] The 401 Denial's reliance on ***non-water quality*** potential impacts—train, vessel, and construction effects—raises serious questions about whether the 401 Denial constitutes a valid exercise of Congress's delegated ***water quality*** authority under Section 401. *See e.g., Arnold Irr. Dist. v. Dep't of Envtl. Quality*, 717 P.2d 1274, 1278 (Or. Ct. App. 1986) (striking down a 401 denial which was based on failure to show compliance with local land use requirements, i.e., non-water quality impacts); *Summit Hydropower v. Comm'r of Envtl. Prot.*, 1992 Conn. Super. LEXIS 2177, at *29-30 (Conn. Super. Ct. 1992) ("state agenc[ies] cannot engage in a broader environmental impact review of the project or reject it for any reasons except noncompliance with existing WQS [water quality standards]."); *Power Auth. v. Williams*, 457 N.E.2d 726, 730 (N.Y. 1983) ("Congress did not empower the States to reconsider matters, unrelated to their water quality standards."). Defendants cannot and do not suggest that SEPA—a state statute—somehow displaces the Commerce Clause.

IV. CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment should be denied.

[64] *See, e.g.*, Rothwell Dep. 140:17-141:8 (Robisch Decl., Ex. 46).

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 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.

By: s/ Amanda L. Crawford

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