The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands of the State of Washington,

Defendants.

Case No. 3:18-CV-05005-RJB

**BNSF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BNSF'S FOREIGN AFFAIRS DOCTRINE CLAIM**

**BNSF's and Defendants' Summary Judgment Motions Noted on Motion Calendar:**

**March 15, 2019**

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## Introduction

The Foreign Affairs Doctrine preempts state actors from substituting their own policy for the nation's foreign policy in two ways. First, under conflict preemption, the Doctrine preempts state actions that conflict with express federal foreign policy. Second, under field preemption, the Doctrine preempts state actions that intrude on the field of foreign affairs without seriously addressing a traditional state responsibility. BNSF has shown that the Doctrine preempts State Defendants' 401 denial with prejudice under conflict and field preemption, and Defendants have not rebutted BNSF's showing with any genuine disputes of material fact. At most, however, Defendants' attempts to rebut BNSF's showing highlight genuine disputes of material fact, precluding their motions for summary judgment on BNSF's Foreign Affairs Doctrine claim.

To support its showing that State Defendants' 401 denial with prejudice is both conflict and field preempted, BNSF presented evidence that the United States has a national foreign policy to promote coal and other energy exports through private terminals to key allies. That policy fosters national security through global energy dominance, by increasing key allies' energy security and requiring streamlined approval processes for projects like the Terminal. BNSF also presented evidence that State Defendants ignored this national foreign policy and substituted their own anti-coal policy by blocking the Terminal because coal is an energy source they dislike, regardless of where it will be used or by whom. Because they recognize that the Foreign Affairs Doctrine preempts states from thwarting national foreign policy, State Defendants took a subtle approach: they manipulated the Clean Water Act's ("CWA") 401 certification process in unprecedented ways, attempting to "federalize" state-law, non-water quality bases for denying the certification with prejudice. And BNSF presented evidence that State Defendants' "real purpose" for using extraordinary measures to deny the 401 certification with prejudice was not to protect Washingtonians' health, safety, and welfare and that the denial has more than "incidental" and "indirect" effects on foreign affairs. Based on this evidence, the Court should grant BNSF's motion for summary judgment because State Defendants cannot genuinely dispute any of the evidence that BNSF has presented on facts material to that claim.

At most, Defendants have highlighted factual disputes that preclude the Court from granting summary judgment. They have responded that BNSF's evidence of an express federal foreign policy favoring coal exports is not enough to show a "clear" or "consistent" federal policy. They have urged the Court to ignore two declarants' directly relevant experience and expertise with federal foreign policy who demonstrate the clear and consistent federal policy. And they have submitted a reply declaration by Defendant Bellon, who disputes facts that are material to resolving BNSF's Foreign Affairs Claim. If the Court does not grant BNSF's motion for summary judgment on the Foreign Affairs Doctrine, it should not grant Defendants' motions either because they have underscored, not dispelled, genuine disputes of material fact as to both conflict and field preemption.

## Argument

### I. BNSF Showed That State Defendants' Actions Are Preempted Because They Conflict With Express Federal Foreign Policy That Promotes Coal Exports.

#### A. BNSF Is Entitled To Summary Judgment On Conflict Preemption.

The Foreign Affairs Doctrine preempts state actions that conflict with express federal foreign policy. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012). The Supreme Court in *American Insurance Association v. Garamendi* confirmed that under the Foreign Affairs Doctrine, Executive Branch policies concerning foreign affairs preempt conflicting state actions. 539 U.S. 396, 414 (2003). On that point, BNSF provided indisputable evidence of Executive Branch policies that conflict with Defendants' 401 denial with prejudice and is entitled to summary judgment. For example, BNSF has shown the Executive Branch has an express foreign policy of global energy dominance, embodied in the President's National Security Strategy and Executive Order 13783 on Promoting Energy Independence and Economic Growth. Dkt. 214 at 6-8. In response, Defendants cite no authority undermining the preemptive effect of the Executive Branch's global energy dominance policy. Instead, they cite 50 U.S.C. § 3043, which requires the President to deliver the National Security Strategy to Congress and to include a "comprehensive description [of] the foreign policy . . . ." of the United States." 50

U.S.C. § 3043(b). That statute suggests the National Security Strategy *embodies* the Executive Branch's foreign policy. In foreign policymaking, the President can decide what that policy should be, and the President has done just that. *Garamendi*, 539 U.S. at 414.

BNSF also showed the Executive Branch policy's goal is clear: to promote exports of U.S. energy resources, including coal, to U.S. allies in Asia by expanding export capacity though private sector development of coastal terminals. Dkt. 214 at 6-8. To accomplish this, the Executive Branch policy requires reducing barriers to global energy dominance by streamlining the approval process for large-scale infrastructure like the Terminal. *Id.* Defendants assert the Executive Branch policy is neither clear nor express because the National Security Strategy does not specify the Terminal or list specific types of fossil fuels within the mix of U.S. energy exports it supports, Dkt. 260 at 6-9, even though Executive Order 13783 does specify coal among the types of fossil fuels it encourages U.S. producers to develop. 82 Fed. Reg. 16,093, 16,093. The threshold, however, is not as high and rigid as Defendants make it out to be. In *Garamendi*, for example, the Supreme Court held that the Executive Branch policy at issue was sufficiently clear even though it did not by its terms expressly preempt the state law challenged there. 539 U.S. at 416-17. Nevertheless, BNSF provided a declaration from an expert on these issues—the primary author of relevant portions of the President's National Security Strategy—and Defendants deposed him for hours. This evidence confirms that the Executive Branch's foreign and national security policy is unequivocal in its objectives: the U.S. seeks to export coal through coastal terminals to "provide true energy security to [U.S.] friends, partners, and allies across the globe." Dkt. 214 at 8. Numerous statements and actions from high-ranking federal officials confirm the President's policy choice. *Id*. Defendants cannot genuinely dispute that a very specific component of federal foreign policy is to promote coal exports.

In addition to providing evidence of preemptive, express Executive Branch foreign policy, BNSF also showed that Defendants' unprecedented exercise of state power regarding the Terminal conflicts with that express foreign policy. Specifically, State Defendants took the following extreme and unprecedented actions to erect regulatory barriers, not reduce them, and

to kill the Terminal: (1) they radically expanded the scope of the State Environmental Procedure Act ("SEPA") environmental review, at odds with the federal government's review, to include the end use of coal in Asia, Dkt. 214 at 12; (2) they used non-federally-delegated, discretionary, state SEPA substantive authority to deny with prejudice a 401 water quality certification based largely on purported rail-related impacts, *id*. at 12-13; (3) they misrepresented the findings in the Final Environmental Impact Statement ("FEIS") by concluding that significant adverse impacts that the FEIS stated "could" occur "would" in fact occur, without conducting any additional analysis or even contacting BNSF regarding purported rail-related impacts in the FEIS;[1] (4) they denied a 401 certification "with prejudice" for the first time ever, preventing Lighthouse or any party from filling claimed information gaps related to water quality, Dkt. 214 at 14; (5) they issued the first 401 certification decision signed by Defendant Bellon herself rather than the Staff director who oversaw the 401 process;[2] and (6) Defendant Bellon ordered her Staff to refuse to process any additional applications for the Terminal, Dkt. 214 at 15. In sum, the evidence shows there can be no genuine dispute that the barriers State Defendants erected to kill the Terminal flout express U.S. foreign policy and promote their own anti-coal policy. Dkt. 214 at 10-12. Accordingly, BNSF is entitled to summary judgment under conflict preemption.

### B. Defendants Cannot Avoid Preemption By Claiming That They Exercised Federally Delegated Authority; They Did Not.

Defendants argue that their unprecedented actions with respect to the Terminal's 401 permitting process "cannot be conflict-preempted because it is a valid exercise of delegated

[1] *Compare* FEIS S.7.4 ("If improvements to increase capacity were not made, Proposed Action-related trains would contribute to these capacity exceedances and *could* result in an unavoidable and significant adverse impact on rail transportation.") *with* Dkt. 1-1 at 9 ("The FEIS found that the Project *would* cause significant adverse effects on rail transportation that cannot be mitigated."); *compare* EIS S.7.5 ("[T] the Proposed Action *could* result in an unavoidable and significant adverse impact on rail safety. ") *with* Dkt. 1-1 at 11 ("The FEIS found that Millennium-related trains *would* increase the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington. . . . [T]he 22 percent increase to the rail accident rate over baseline conditions attributable to Millennium *would* result in unavoidable and significant adverse impacts on safety."); *compare* EIS S.7.6. ("[T]he Proposed Action at full operations in 2028 *could* result in unavoidable and significant adverse impact on vehicle transportation at certain at-grade crossings in Cowlitz County.") *with* Dkt. 1-1 at 6 ("The FEIS found that there *would* be significant unavoidable adverse impacts to vehicle traffic from the proposed action when the Project reaches full operation in 2028 due to vehicle delays caused by increased train traffic that *would* block rail crossing in Cowlitz County."). The list goes on.

[2] Tabor Decl. at 9 (Bellon deposition at 18-20).

federal authority" under the CWA. Dkt. 260 at 8. Defendants' argument fails for one dispositive reason. BNSF does not challenge the State's ability to decide, based on water quality considerations, Section 401 certifications. Even if the 401 decision document represents *some* exercise of validly delegated federal authority—which BNSF does not concede and which is being litigated elsewhere—other aspects of the 401 decision-making process, like Defendant Bellon's importation of substantive SEPA authority and refusal to process future 401 applications from Millennium, show that Defendants exercised state (not federal) authority to kill the Terminal. And that is what BNSF's Foreign Affairs Doctrine claim challenges: State Defendants' unprecedented actions exceeding Ecology Staff's otherwise routine 401 certification decision-making process. Executive Branch foreign policy preempts the extraordinary use of *state* SEPA substantive authority to deny a 401 certification with prejudice based on non-water quality issues.

Indeed, the scope of Section 401 is not seriously under debate: it authorizes states to certify that discharges associated with an application for a federal permit comply with the CWA, including state water quality standards. 33 U.S.C. § 1341(a)(1). State Defendants paint their exercise of SEPA substantive authority as part and parcel of their exercise of congressionally delegated power under Section 401. It was not. Again, the substantive SEPA bases for denial with prejudice have nothing to do with water quality, let alone CWA delegated authority. On the contrary those substantive SEPA bases primarily target the method of transporting coal to the Terminal: rail. *See* Dkt. 1-1 at 5-14 (401 denial listing non-water quality bases for decision).

The cases Defendants cite demonstrate their argument's fatal flaw. In *Central Valley Chrysler-Jeep, Inc. v. Goldstein*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), after an examination of the Clean Air Act, the court concluded that an Executive Branch policy cannot interfere with Congress's manifest intent to empower EPA to address motor vehicle carbon dioxide emissions and thus that policy also cannot interfere with the "congressionally-established pathway in the Clean Air Act that enables California to seek and receive a waiver of preemption so that California . . . may require compliance with more protective [vehicle emissions] regulations." *Id.*

at 1182; *see Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 395-97 (D. Vt. 2007) (same). At most, those cases stand for the limited proposition that Executive Branch policy does not override congressional intent as expressed in the plain language of a federal statute. Those cases do not allow states to bootstrap any state law into the umbrella of some congressionally-delegated authority to avoid conflict with Executive Branch policy under the Foreign Affairs Doctrine.

As noted above, there is simply no congressional intent, manifest or otherwise, in Section 401's plain language that enables Defendants to deny the 401 certification with prejudice using SEPA substantive authority and based on purported impacts that have nothing to do with the CWA's enumerated provisions or state water quality standards. 33 U.S.C. § 1341(a)(1). Recognizing this, Defendants ask this Court not to look at the scope of delegated authority under Section 401. *See* Dkt. 260 at 4. But that is precisely the type of inquiry undertaken by the courts in *Central Valley* and *Green Mountain* to determine if, under the doctrine of Foreign Affairs conflict preemption, Executive Branch policy preempted the states' actions. *Central Valley*, 529 F. Supp. 2d at 1182; *Green Mountain* at 508 F. Supp. 2d 395-97. Unlike the law and facts at issue in those cases, even a cursory examination of the text of Section 401 demonstrates that the CWA is not the source of Defendants' authority to exercise state SEPA substantive law to deny the 401 certification with prejudice based on non-water quality grounds. The SEPA substantive decision exists on its own state-law island and is independent from its 401 authority to certify compliance with state water quality standards. Indeed, the CWA only preserves state law in the context of water quality issues; it does not expand state power into other federal areas, like foreign affairs. *See* 33 U.S.C. § 1251(b).

Finally, even if Defendants could find safe harbor in the CWA for its SEPA substantive decision—they cannot—Defendants' argument incorrectly assumes that the 401 denial with prejudice is the only action that runs afoul of the express Executive Branch foreign policy. As described above, Defendants imposed at least six specific regulatory barriers during the Terminal approval process and not all of them are part of the 401 decision document, including

the radical expansion of the SEPA environmental review's scope and Defendant Bellon's ordering her Staff to refuse to process any additional applications for the Terminal.

For these reasons, the CWA does not provide a basis for avoiding judicial review of whether the Executive Branch foreign policy at issue here preempts State Defendants' substantive-SEPA basis for denying the 401 certification with prejudice.

### C. Mr. Banks' And Mr. Ushimaru's Declarations Are Admissible.

#### 1. Mr. Banks' Testimony Is Expert Testimony On Foreign Policy That Timely And Properly Rebuts State Defendants' Purported Expert Ian Goodman.

Mr. Banks' testimony is timely and proper expert testimony. As Defendants concede, Lighthouse and BNSF timely disclosed Mr. Banks as a rebuttal expert to State Defendants' purported expert witness Ian Goodman. Dkt. 260 at 10. They contend, however, that Mr. Banks' declaration should be stricken because his opinion does not properly rebut Mr. Goodman's since Mr. Goodman "is not an expert in—and offers no opinions on—U.S. foreign policy."[3] *Id.* This mischaracterizes Mr. Goodman's report.

First, Mr. Goodman relies and comments upon the International Energy Agency and the U.S. National Coal Council—a federal advisory committee to the Secretary of Energy—to opine that the U.S. "is set to remain a swing supplier to international coal markets." Tabor Decl. at 18-19, Ex.B (Goodman report excerpts). Second, Mr. Goodman's principal expert report relies upon the World Energy Outlook's ("WEO") "New Policies Scenario." *Id.* at 20-29 (same). The New Policies Scenario "aims to provide a sense of where today's policy ambitions seem likely to take the energy sector" and incorporates "not just the policies and measures that governments around the world have already put in place, but also the likely effects of announced policies."[4] Mr. Banks rebutted Mr. Goodman's report because it failed to properly consider the

[3] Lighthouse and BNSF timely moved to exclude Mr. Goodman as an expert witness under *Daubert*. Dkt. 232. That motion is noted for April 5, 2019. Dkt. 258 at 3. Defendants, who missed the *Daubert* motion deadline, should have made these arguments against Mr. Banks in a *Daubert* motion.

[4] International Energy Agency, *WEO Model*, https://www.iea.org/weo/weomodel/ (describing the New Policies Scenario) last accessed March 14, 2019.

Administration's policy regarding coal and the WEO's *current* policies.[5] *See* Tabor Decl., Ex.C at 46-47 (excerpts from Banks deposition transcript). Third, in his principal expert report Mr. Goodman opines on the foreign energy policies of U.S. energy partners and competitors. Tabor Decl., Ex.B at 13-17 (Goodman report excerpts). Because Mr. Goodman opines on the ability of the United States to export coal; relies on worldwide aspirational, as opposed to actual, coal policies; and opines on foreign countries' coal import and export policies, Mr. Banks timely and properly rebuts his opinions.

Defendants also seek to exclude Mr. Banks' declaration because it "both lacks foundation and is textbook hearsay." Dkt. 260 at 10. First, the need for personal knowledge of facts does not apply to Mr. Banks because he testifies as an expert. FRE 602. Even so, Mr. Banks' testimony does not lack foundation. Mr. Banks explained in his deposition that he wrote the relevant portions of the National Security Strategy that pertain to the federal government's policy promoting U.S. coal exports. Tabor Decl., Ex.C at 43. Mr. Banks also explained that he has direct knowledge of Japan's and South Korea's policy positions on the same issue. *See id.* at 49-50 (excerpts from Banks deposition transcript). Mr. Banks also explained that the Energy Information Administration's report of increased U.S. coal exports to Asia strengthened his "existing knowledge and understanding of the demand for U.S. coal" in Asia. *Id.* at 44.

Second, Defendants do not explain how the federal government's and U.S. allies' policy positions qualify as hearsay.[6] Nevertheless, expert witness testimony ordinarily may rely on hearsay if the underlying facts or data are of the type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject. FRE 703; *E.J. Bartells Co. v. Sw.*

[5] Defendants' suggestion that Mr. Banks' testimony constitutes "unfair surprise" is disingenuous. They deposed him on Feb. 22, 2019, two weeks before filing their opposition and reply brief on BNSF's Foreign Affairs Claim.

[6] As Mr. Banks testified in his deposition, many of his conversations and notes reflecting those conversations are presidential records to which he no longer has access. The public records and residual hearsay exceptions apply here. *See* FRE 803(8) (hearsay exception for records or statements of a public office if, among other things, it sets out the office's activities and opponent does not show the source of the information or other circumstances indicate a lack of trustworthiness); FRE 807.

*Marine Inc.*, 70 F.3d 1277 (9th Cir. 1995). Mr. Banks was timely and properly disclosed as an expert rebuttal witness in this matter and the Court should not exclude his declaration.

**2. Mr. Ushimaru's Lay Witness Testimony Does Not Contain Hearsay.**

First, Defendants note that BNSF did not identify Mr. Ushimaru as an expert witness. Dkt. 260 at 9. For good reason. Mr. Ushimaru is a lay witness and his declaration contains proper lay witness testimony. *See* Dkt. 215; FRE 701. Contrary to Defendants' portrayal, Mr. Ushimaru's declaration contains only his experience in political consulting and his perceptions from observing the type of interactions he brokers every day in his government consultant work with the State of Washington; Japan External Trade Organization; Japan's Ministry of Economy, Trade and Industry; and Japan's Ministry of Foreign Affairs. Dkt. 215 ¶¶ 1-9. To the extent he offers any opinion or inference, it is rationally based on his perceptions and personal observations and, given the subject matter, will help the Court decide BNSF's Foreign Affairs Claim. FRE 701.

Second, Defendants contend Mr. Ushimaru's declaration should be stricken because it is "replete" with hearsay. Dkt. 260 at 11. It is not. First, Mr. Ushimaru offers no oral, written, or nonverbal conduct intended as an assertion by his clients. FRE 801(a) (defining "statement" for hearsay). Second, any statements by his clients that Mr. Ushimaru describes in his declaration go to the effect on the listener of perceived tensions and frustrations with Washington State's blocking of the Terminal and are non-hearsay. *United States v. Cedeno-Cedeno*, No. 14CR3305, 2016 WL 4376845, at *8 (S.D. Cal. Aug. 17, 2016) ("Out-of-court statements introduced to show the effect on the listener are not hearsay."). And whatever remaining statements in Mr. Ushimaru's declaration that might qualify as hearsay fall within a hearsay exception because they show the declarant's then-existing state of mind with respect to the state of foreign affairs and coal export issues on the U.S. West Coast. FRE 803(3). The Court should not strike Mr. Ushimaru's declaration on hearsay grounds.

## II. BNSF Showed That State Defendants' Actions Are Preempted Because They Intrude On The Field Of Foreign Affairs Without Addressing A Traditional State Responsibility.

### A. State Defendants' Motives And The 401 Denial Itself Indisputably Show The "Real Purpose" Behind The Denial Was To Block Coal Exports.

As BNSF has explained, and Defendants agree, Dkt. 260 at 12, even without an express federal policy, state action "may be preempted under the Foreign Affairs Doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility." *Movsesian* 670 F.3d at 1072. Defendants also now agree that whether a state action addresses a "traditional state responsibility" requires more than a review of the "general subject area" of the action. *Id.* at 1074; *see* Dkt. 260 at 12. Courts examine the "real purpose" of state action to determine whether it addresses an area of "traditional state responsibility." *Id.* at 1075.

BNSF has provided evidence that State Defendants strongly oppose coal and do not want it burned anywhere. Dkt. 214 at 10-15. Defendants now argue that State Defendants' motives for denying the 401 certification are irrelevant for determining the denial's "real purpose" in this as-applied challenge. For support, Defendants cite case law discussing "legislative motive" and its immateriality in facial challenges to statutes. Dkt. 260 at 12-15. But this case involves an as-applied challenge to State Defendants' denial of a 401 certification, not a facial challenge to a statute.[7] *Id.* at 12-13 n.4. Moreover, the Ninth Circuit has expressly declined to decide "how courts might determine the real purpose of a statute when that purpose is not apparent from the legislative findings and scope of the statute." *Movsesian* 670 F.3d at 1076. Stated differently, even in the context of a facial challenge to a statute, the Ninth Circuit has declined to adopt Defendants' formulation of ignoring motive entirely when examining the "real purpose" of a state action under the Foreign Affairs Doctrine. State Defendants' anti-coal animus behind the 401 denial comes to the forefront when determining the denial's "real purpose" in this case.

[7] Defendants fail to distinguish the as-applied Foreign Affairs Doctrine challenge in *Zschernig v. Miller*, 389 U.S. 429 (1968). There, the Supreme Court struck a probate statute based on state courts' "notorious" practice of withholding remittances to legatees residing in Communist countries. *Id.* at 440. *Zschernig* does not suggest that the state courts acted robotically without motive. Nor does it highlight motive as the touchstone for as-applied challenges when state courts administer probate statutes in ways that affect foreign affairs.

Accordingly, evidence of their true motive for denying the certification is relevant and demonstrates that the 401 denial's "real purpose" was to block coal exports.

Even as the Court examines the 401 denial letter's language to determine the "real purpose" behind it (which Lighthouse, BNSF, and Defendants all urge it to do) the letter's language—particularly its unsupported certainty regarding environmental impacts and its lack of mitigation considerations—confirms that State Defendants' "real purpose" was to block coal exports, not protect Washingtonians as Director Bellon contends in her reply declaration. Dkt. 261 ¶ 4. For example, as Lighthouse and BNSF noted in their March 8 opposition briefing, the 401 denial with prejudice departed in crucial ways from Ecology's historic practices in evaluating 401 requests; it "repeatedly changed FEIS findings that 'potential' impacts 'could' occur into definitive conclusions that they 'would' occur." Dkt. 262 at 14; Dkt. 275 ¶¶ 7-9, 15, 17, 20 (Placido declaration highlighting instances where the FEIS identified impacts that *could* occur and the 401 decision, without any further analysis, which stated that they *would* occur). The 401 denial with prejudice ignored the FEIS's conclusion that the Terminal would satisfy all applicable water quality standards, Dkt. 274 ¶ 20, and ignored the expected, planned, or likely mitigation and infrastructure improvements addressing non-water quality impacts that are discussed in the FEIS. Dkt 262 at 14. Indeed, setting the 401 denial letter's "woulds" against the backdrop of the FEIS's "coulds"—without any explanation for the letter's insistence that certain impacts would occur—highlights that State Defendants seized the opportunity to use the 401 water quality certification process to block coal exports on non-water quality grounds which was the 401 denial's "real purpose." *See* Dkt. 262 at 14, 51.

### B. BNSF Showed The "Real Purpose" Behind The 401 Denial With Prejudice Was To Block Coal Exports; Defendants Underscore Genuine Disputes Of Material Fact, They Do Not Show The Absence Of Any.

BNSF has provided multiple examples of how State Defendants' "real purpose" in denying the 401 certification with prejudice was to block coal exports, not "to protect state water quality and the health, safety, and welfare of" Washingtonians as Defendant Bellon asserts in her declaration in reply. Dkt. 261 ¶ 4. The examples BNSF has cited show State Defendants'

extraordinary departures from normal 401 certification practices and are relevant evidence because they tend to make more probable the fact that State Defendants' "real purpose" in denying the 401 certification was to block coal exports. FRE 401. At most, Defendants' counter-examples, offered principally through Defendant Bellon's reply declaration, create genuine disputes of material fact as to State Defendants' "real purpose" for the 401 denial. *Viero v. Bufano*, 925 F. Supp. 1374, 1380 (N.D. Ill. 1996) ( "[d]ueling affidavits are a matter for a factfinder at trial, not for this Court at the summary judgment stage."); *Waters v. City of Chicago*, 416 F. Supp. 2d 628, 629 (N.D. Ill. 2006) ("[N]othing that the movant can offer up by way of reply as to its version of the facts can stave off the rejection of the summary judgment motion—just as an omelette, once scrambled, cannot be stuffed back into the eggshell."); *see also Schneider Nat'l Carriers, Inc. v. Fireworks Nw., LLC*, No. C15-0747, 2017 WL 1438035, at *3 (W.D. Wash. Apr. 24, 2017) (competing declarations established a genuine dispute of material fact).

First, BNSF showed that State Defendants attempted to extend the State's local regulatory authority over the Terminal's construction to a global scale by examining the underlying commodity's end use in foreign countries. Dkt. 214 at 17-18. Defendant Bellon insists that global greenhouse gas emissions were examined because SEPA required it; the public asked for it; the EIS consultant assured that it had tools to conduct the analysis "in a rigorous and legally defensible manner"; and *federal* precedent on the *National* Environmental Policy Act ("NEPA") suggested one might be necessary.[8] Dkt. 260 at 17; Dkt. 261 ¶ 5. Defendant Bellon's retorts underscore a genuine dispute of material fact regarding why a global greenhouse gas analysis was performed under the SEPA EIS process.[9]

Second, BNSF showed that in early September 2017, Director Bellon's Staff drafted, signed and prepared for mailing a letter denying the Terminal's Section 401 certification

[8] This begs the question of whether State Defendants' actions invoking "substantive SEPA," (a matter of state law) can rely on precedent pertaining to NEPA (a matter of federal law) to intrude on foreign affairs.

[9] Indeed, Director Bellon's focus on exported coal's end use in Asia evidently caused the Army Corps of Engineers to discontinue pursuing a joint NEPA/SEPA EIS for the Terminal. Dkt. 214 at 12; Dkt. 216 at 168-169. Defendants' brief and Defendant Bellon's reply declaration entirely ignore this material fact.

"without prejudice," basing the denial on the purported need for additional information concerning the Terminal's potential impacts on water quality. Within a few weeks, following review of the Ecology Staff's recommended decision and letter by Defendant Inslee's office and Director Bellon herself, the Staff's "without prejudice" denial, which was based on their desire for additional water quality information, was converted into an unprecedented "with prejudice" denial based on non-water quality impacts that were suddenly assumed to be certain and were not cited at all in Staff's denial letter. Dkt. 214 at 14; *compare* Dkt. 216 at 347-349 (without prejudice 401 denial) *with* Dkt. 1-1 (with prejudice 401 denial). Defendants ignore that the salient difference between Ecology Staff's recommended "without prejudice" denial and Director Bellon's "with prejudice" denial is the latter's addition of non-water quality, rail- and vessel-based impacts. This, on top of the unwarranted and unprecedented actions of ignoring FEIS findings and conjuring certainty from potential impacts by changing "could" to "would." Dkt. 260 at 17; Dkt. 261 ¶ 6. Instead, Director Bellon insists that she "could not in good conscience" approve the certification request given its purported "significant, adverse, unavoidable, environmental impacts as documented in the [FEIS]." Dkt. 261 ¶ 4. Director Bellon's account is but one piece of evidence of the "real purpose" of the 401 denial and it conflicts with evidence BNSF has presented on that issue.

Third, BNSF showed that Director Bellon and Ecology, for the first time ever, invoked purported state authority under the "substantive" aspects of the SEPA to effectuate the "with prejudice" denial. Dkt. 214 at 13-14; Dkt. 216 at 331-332. Defendant Bellon counters that this occurred because the Terminal "would" have numerous significant, adverse, unavoidable, environmental impacts. Dkt. 261 ¶ 6. Defendant Bellon's declaration, like her 401 denial letter's use of "would" instead of "could" to describe potential impacts associated with the Terminal, asserts a level of certainty in the FEIS that does not exist in that document. *See*, *supra* Section I.A. It thus directly conflicts with key evidence in this case—the FEIS's contents. *Id.* Here, too, Defendant Bellon has underscored a genuine dispute of material fact.

Fourth, BNSF showed that a month after her unprecedented "with prejudice" 401 denial, Director Bellon sent Lighthouse a letter stating that her Staff would not spend any more time processing any other applications related to the Terminal. Dkt. 1-4. Director Bellon does not dispute that she sent this letter but assures it was simply a decision about how to allocate her staffing resources. Dkt. 260 at 17; Dkt. 261 ¶ 7. That letter was unprecedented and served no other genuine purpose than to show Director Bellon's bias against the coal export Terminal. Indeed, even as to *future* permit applications, Director Bellon told Millennium to direct questions concerning them to the State Attorney General's Office. Dkt. 1-4 at 2.

Instead of adhering to its longstanding standard practice of protecting Washingtonians by requiring a complete record and making a 401 certification based on that complete record, State Defendants did the opposite here. They ignored Ecology Staff recommendations and prohibited the supplementation and completion of the record by denying the 401 certification with prejudice. If that unprecedented step were not enough, they also mischaracterized the existing incomplete record (e.g., changing "could" to "would"). Why? Because the Defendants recognized that following their standard time-tested practice—while protecting Washingtonians—might not accomplish their real purpose: preventing the construction of a critical piece of coal export infrastructure in Washington State. This is not only plausible but is the most logical explanation for the extraordinary measures Defendants took here. In attempting to provide an alternative explanation, Ms. Bellon creates disputed issues of fact precluding summary judgment.

### C. BNSF Showed That State Defendants' Actions Intrude on the Field of Foreign Affairs Because They Have More Than "Incidental" or "Indirect" Effects on Foreign Relations.

As BNSF has shown with admissible evidence,[10] several factors weigh in favor of finding that the 401 denial with prejudice has more than an incidental or indirect effect on foreign relations between the United States and key allies who seek to buy coal from Powder River Basin states, and are thus field preempted. *See Movsesian*, 670 F.3d at 1076. Dkt. 214 at

[10] *See*, *supra* Section I.C.

21-22. First, BNSF has shown that the 401 denial was intended to prevent coal exports through Washington ports and burned in Japan, South Korea, and other Asian countries. Dkt. 214 at 21. Defendants essentially respond, "no it wasn't," *see* Dkt. 260 at 19, and have introduced a genuine dispute of material fact as to this issue.

Second, BNSF has shown that State Defendants' actions have had their intended effect: some thermal coal from the Powder River Basin that would be mined and shipped through the Terminal to Asian countries is not being produced. BNSF showed this previously through Mr. Schwartz's expert report, which separates Powder River Basin coal production on two line graphs which show significantly lower production levels without the Terminal than with it. Dkt. 214 at 22 n.70; Dkt 216 at 155. Defendants respond only that "[o]ther Western U.S. coal mines export coal to Asian markets from terminals as far away as Mexico" and "there is coal terminal capacity on the East and Gulf coasts." Dkt. 260 at 20. Those remarks say nothing of whether the 401 denial on non-water quality grounds has had the effect that Mr. Schwartz's rebuttal report predicts. Accordingly, Mr. Schwartz's predicted effect of the state law-based 401 denial remains unrebutted.

Third, BNSF has shown that the effects of State Defendants' actions may be magnified because other coastal states wishing to prevent fossil fuel exports on policy grounds will likely use this case as a blueprint if Defendants prevail. Coastal states have opined that Lighthouse's and BNSF's foreign and domestic commerce claims constitute "attempted intrusion[s] on state and local police power to protect . . . local environments," Dkt. 237 at 1, when in fact the opposite is true. Of course, precedent sets the boundaries for what a state's 401 certification decisions may consider and when the Foreign Affairs Doctrine stops them from intruding upon the field of foreign affairs. This case may set such a precedent. If Defendants and the coastal amici states have their way, they will be allowed override federal foreign policy when deciding projects in the future involving commodities they disfavor at the time. This factor weighs in favor of finding that the 401 denial with prejudice has more than "incidental" or "indirect" effects on foreign affairs.

Fourth, BNSF has shown that State Defendants have chosen a course "divergent" from federal law which raises the prospect of embarrassment for the United States. Federal law allows fossil fuel exports, and Executive Branch policy encourages them. The U.S. faces embarrassment because Washington State's officials, by making parochial decisions for a coastal state with disproportionate power over exports vis-à-vis landlocked states and by diverging from the federal government's energy dominance policy, are blocking critical infrastructure for coal exports to Asian allies who need them for their energy security. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 55 (1st Cir. 1999) (describing departure from country's conduct of foreign relations as potential threat of embarrassment). As Mr. Kenji Ushimaru stated, his Japanese government clients and he "are frustrated" at the prospect of "greater energy insecurity because their closest geopolitical ally—the United States—cannot ship Japan a critical commodity its own government says it wants to provide." Dkt. 215 ¶ 31. Defendants assert that the 401 denial doesn't threaten embarrassment to the country, Dkt. 260 at 19, introducing a genuine dispute of material fact as to this factor.

As BNSF has shown, four of the five *Natsios* factors weigh in favor of finding that State Defendants' 401 denial with prejudice has resulted in more than an "indirect" or "incidental" intrusion into the field of foreign affairs. At most, Defendants' counterpoints concerning those factors create a genuine dispute of material fact as to the degree of the 401 denial's intrusion into the field of foreign affairs.

## III. A Cause Of Action Is Available To BNSF.

BNSF has a cause of action to bring its Foreign Affairs Claim because it is a stakeholder directly affected by this case's outcome. The Court said as much when it allowed BNSF to intervene as of right. Dkt. 47. Dr. William Huneke has explained that if the Terminal is not built, BNSF could lose $771 million in annual revenue associated with lost coal transports and another $1 billion in annual revenue from lost business resulting from the potential need to raise shipping rates if the Terminal is not built. *See* Dkt. # 191-1 at 15-16.

State Defendants have already conceded that "a person directly aggrieved by state regulation may seek injunctive or declaratory relief if such action is preempted." Dkt. 208 at 21. But they have failed to acknowledge that the Court and Dr. Huneke have concluded BNSF is being directly aggrieved by State Defendants' actions. Instead, Defendants insist that BNSF must satisfy a zone of interests test that even they recognize applies "principally in cases challenging regulatory actions under the Administrative Procedure Act."[11] Dkt. 260 at 21. Yet, as evidenced by the Defendants' brief, the Ninth Circuit has declined to adopt the zone of interests test for equitable causes of action or any rule that an equitable cause of action is not available to bring a Foreign Affairs Doctrine claim. *See* Dkt. 260 at 20-21.

BNSF's interests are economic and structural, as the Terminal is a crucial link in a global supply chain as BNSF connects domestic businesses to global consumers. Dkt. 121 ¶ 34. Defendants have not rebutted that allegation. And regardless of whether the Foreign Affairs Doctrine creates individual rights or is a "structural" feature of the federal constitution, it remains a "constitutional guarantee" that foreign affairs will be conducted by the federal—not state—government. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). Accordingly, BNSF's interests in the Terminal are within the zone of interests that the Foreign Affairs Doctrine protects and regulates, and BNSF has a cause of action under that test's standards.

**Conclusion**

BNSF has shown that the federal government has an express foreign policy that favors coal exports. State Defendants oppose coal and their unprecedented end-stage maneuvers behind the 401 certification process are state actions that conflict with express federal foreign policy. Their actions are conflict preempted under the Foreign Affairs Doctrine. Further, BNSF has shown that State Defendants' actions intrude on the field of foreign affairs without addressing a traditional state responsibility. Those actions are also field preempted under the Foreign Affairs

[11] Federal jurisdiction scholar Erwin Chemerinsky endorses Laurence Tribe's view that the zone of interests test is "superfluous" in constitutional litigation. Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.6 (7th ed.).

Doctrine. For those reasons, the Court should grant BNSF's motion for summary judgment on its Foreign Affairs Doctrine claim. At minimum, Defendants highlight genuine disputes of material fact as to the "real purpose" behind the 401 denial with prejudice and as to whether it only "incidentally" or "indirectly" intrudes on the field of foreign affairs. Accordingly, the Court should deny Defendants' motions.

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