No. _____, Orig

In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
Plaintiffs,

v.

STATE OF WASHINGTON,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT

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In the Supreme Court of the United States

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STATE OF WASHINGTON,
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MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Montana and the State of Wyoming respectfully move this Court for leave to file the attached Bill of Complaint. The grounds for this Motion are set forth in the accompanying Brief.

Respectfully submitted,

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JANUARY 21, 2020

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In the Supreme Court of the United States

STATE OF MONTANA AND STATE OF WYOMING,
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v.

STATE OF WASHINGTON,
Defendant.

BILL OF COMPLAINT

The States of Montana and Wyoming bring this action against the State of Washington, and for their cause of action assert as follows:

NATURE OF THE ACTION

1. This is a Commerce Clause challenge to Washington State's discriminatory denial of port access to ship Montana and Wyoming coal to foreign markets. This case implicates an important purpose of the Commerce Clause: prohibiting coastal states from blocking landlocked states from accessing ports based on the coastal states' economic protectionism, political machinations, and extraterritorial environmental objectives. When Washington denied "with prejudice" a Section 401 Water Quality permit for the Millennium Bulk Terminal in Cowlitz County, it did so to protect its own agricultural interests and because it objected, as a matter of political posturing, to the commodity that Wyoming and Montana sought to export: coal.

2. Washington State's discrimination severely impacts Montana and Wyoming. While domestic coal production has declined in recent years, foreign markets are booming. These markets desire the low-sulfur, cleaner-burning coal found in Montana's and Wyoming's Powder River Basin. Asian markets have a distinct need for Montana and Wyoming coal as they seek to expand their electric generating capacity to bring a higher quality of life to their populations and replace problematic nuclear facilities. State officials in Wyoming and Montana have made significant efforts to promote the States' coal resources in those Asian markets. But without port access, Wyoming and Montana are unable to export coal to these foreign markets.

3. Wyoming and Montana depend on taxes from coal production to fund critical state and local infrastructure and programs. Coal severance taxes and other coal revenue generate hundreds of millions of dollars annually in state revenue, and coal extraction produces thousands of high-paying jobs. Without the ability to maintain that revenue, the States would have difficulty funding governmental programs, like K through 12 education.

4. With every passing year the problem is exacerbated as Montana and Wyoming have fewer markets for their massive coal reserves. Ironically, without an opportunity to import low-sulfur, cleaner-burning coal from Montana and Wyoming, Asian markets turn to other sources of coal that do not burn as clean and that ultimately harm the environment.

5. Washington's efforts to block port access also impact federal energy and security policies. The United States has made it clear that exporting coal to Asia and other global markets is key to boosting the American economy and protecting our national security. The previous Administration also stressed the importance of coal exports, with President Obama calling the United States "the Saudi Arabia of coal." A key component of the National Security Strategy is to boost energy exports through coastal terminals like Millennium Bulk.

6. Washington, however, unilaterally blocked port access because of: (1) its Governor's and his appointees' discriminatory favoritism of Washington products over Montana and Wyoming coal; (2) the Governor's political opposition to coal; and (3) perceived extra-territorial environmental impacts of coal combustion in foreign markets. Discriminating against Montana and Wyoming coal for these reasons violates both the Dormant Commerce Clause and the Foreign Commerce Clause.

JURISDICTION

7. This Court has original and exclusive jurisdiction over this action under Article III, § 2, cl. 2 of the U.S. Constitution and 28 U.S.C. § 1251(a). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

PARTIES

8. Plaintiffs the State of Montana and the State of Wyoming are sovereign States losing significant coal severance taxes because of Washington State's discriminatory conduct. Montana brings this original action through its Attorney General, Timothy C. Fox. Wyoming brings this original action through its Attorney General, Bridget Hill.

9. Defendant State of Washington is a sovereign State. Service on the Defendant the State of Washington is made in this action on the Governor and the Attorney General of Washington. Sup. Ct. R. 17, 29.

GENERAL ALLEGATIONS

MONTANA'S AND WYOMING'S COAL RESERVES AND BOOMING FOREIGN DEMAND

10. Montana and Wyoming have vast coal reserves. Wyoming has a reserve base of 58.1 billion tons and is the biggest producer in the country by far. Montana has the largest recoverable coal reserve in the country, measuring 118 billion tons, and is the sixth largest producer.

11. Both Wyoming and Montana depend heavily on coal severance taxes and other taxes and fees related to coal production to fund critical state and local infrastructure and programs.

12. Wyoming's coal production generates hundreds of millions of dollars each year in tax revenue. Since 2007, Wyoming has generated approximately $4.89 billion in severance and ad

valorem taxes from coal production. Over ninety percent of the coal Wyoming produces is shipped out of state.

13. Montana's coal severance tax generates over 80 million dollars each year. Over seventy-five percent of Montana coal is shipped out of state.

14. Domestic demand for coal is declining, and that decline will only increase as domestic coal-fired plants near the end of planned life cycles and are not being replaced with new facilities. The U.S. Energy Information Administration estimates that coal consumption in 2019 will reach a 40-year low and will continue to decline in 2020.[1]

15. As a result of reduced domestic demand, Montana and Wyoming have significant excess coal capacities. They are unable to transfer production to the export market, however, because as land-locked states they lack port capacity. Both States have concluded, after substantial research, that the future of the States' coal production largely depends on whether Asian markets are available through West Coast port access.

16. Asian coal markets are expanding and have a distinct need and economic desire for the low-sulfur Powder River Basin Coal in Montana and Wyoming.

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[1] U.S. Energy Information Administration, *Short-Term Energy Outlook* (December 10, 2019), https://perma.cc/BB47-8RKA; *see also* U.S. Energy Information Administration, *Almost all U.S. Coal Production Is Consumed for Electric Power* (June 10, 2019) (noting that domestic coal production exceeds consumption), https://perma.cc/PL6Z-3X5V.

Japan, Taiwan, South Korea, and China especially are expanding coal-fired power stations. Japan is the third largest coal-importing country in the world and its use of coal, particularly considering recent failures related to nuclear energy, is increasing. South Korea has limited domestic energy resources and is expected to become a large importer of U.S. coal, which is beneficial for both economic and national security reasons.

17. U.S. companies have already secured prospective export contracts with South Korea, but because of the limited ability to obtain U.S. coal, South Korea has looked elsewhere, including Russia, which has increased its coal exports to the country. These Asian countries need to supply their expanding power stations; if they are unable to get clean-burning coal from Wyoming and Montana, they will get high sulfur coal from other countries.

18. Japan is also dependent on imports for its energy, especially following the Fukushima nuclear power plant accident. Japan is installing clean coal plant technologies to meet environmental targets, and it plans "to develop about 45 additional coal power plants, adding more than 20 GW of capacity in the next decade."[2] In 2016, Wyoming entered a five-year Memorandum of Understanding (MOU) with the Japan Coal Energy Center. The MOU contemplates the parties' cooperation in the facilitation of coal exports and sales, which may include the development of new U.S. coal export and Japanese coal import terminals,

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[2] U.S. Energy Information Administration, *Japan: Overview* (February 2, 2017), https://perma.cc/B97V-UZTU.

public support to existing export facilities together with establishing sale contracts for Wyoming coal.

19. Japan, like other Asian countries, has identified Powder River Basin coal from Montana and Wyoming as being particularly desirable for the country's next generation of high efficiency, low emissions coal-fired power plants.

20. Wyoming and Montana have made significant efforts to expand coal exports to Asian markets. Both States' Governors have visited Asian countries to promote the States' coal. The States recognize that the ability to export to Asian markets is critical to their economic security, as well as production of high-paying jobs in the States.

21. Landlocked states like Montana and Wyoming depend on port access on the West Coast to get their most important commodities, like coal, to foreign markets. The only currently available port to ship Wyoming and Montana coal to foreign markets is in British Columbia, Canada. The facility is already at maximum capacity. Although proposals for port terminals have been investigated in Oregon and California, none of those proposals has materialized.

WASHINGTON'S DENIAL OF PORT ACCESS FOR WYOMING AND MONTANA COAL EXPORTS

22. Lighthouse Resources, which is a coal energy supply chain company that operates mines in Montana and Wyoming, proposed to convert a contaminated former aluminum smelter site in Cowlitz County, Washington on the lower Columbia River into a transloading facility called Millennium Bulk Terminal.

23. The U.S. Department of Transportation has designated the Columbia River as a Marine Highway for the transportation of commerce. Congress authorized an expenditure of over $180 million to deepen the river to accommodate increased export and import growth.

24. Washington recognizes that it "is a gateway state, connecting Asian trade to the U.S. economy," and that "[m]any states are [] dependant on the ports in Washington to import and export freight."[3] In addition to the significant federal investment in the Columbia River to facilitate United States exports, Washington boasts that "ports in Washington have several significant advantages, including natural deep-water harbors on the coasts, a West Coast location close to Asian markets, and strong connections to Freight Economic Corridors."[4]

25. Washington's geography allows it to use its ports for its own economic stability and competitiveness while denying those benefits to interior states like Montana and Wyoming. Washington is one of the most trade-dependent states in the Nation, with total imports and exports valued at $126.8 billion in 2016 alone.[5]

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[3] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[4] *Ibid.*

[5] *Id.* at 2.

26. Most of the coal that would be exported from the Millennium Bulk Terminal would be from the Powder River Basin in Montana and Wyoming. The Millennium Bulk Terminal would have the capacity to ship 44 million metric tons of coal per year, which would be transported from Montana and Wyoming by rail, and then exported to foreign markets.

27. The Millennium Bulk Terminal permitting process began in 2012 and included an application for water quality certification under Section 401 of the Clean Water Act (33 U.S.C. § 1341). The Clean Water Act seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution." 33 U.S.C. § 1251(b). As part of that process, the Washington Department of Ecology ("Ecology"), Cowlitz County, and the United States Army Corp of Engineers initially sought to undertake a joint Environmental Impact Statement ("EIS"). The Washington Department of Ecology, however, demanded that the EIS include within its study area an analysis of the impact and global greenhouse effect of emissions from the combustion of coal in foreign markets. *See* EIS, Section 1.3; 2.1.

28. When assessing permitting decisions and the environmental impacts of a proposal, Washington state law explicitly requires that agencies assess the end use of products exported from Washington ports. "In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impact only to those aspects within its jurisdiction, including local or state boundaries." WAC 197-11-060(4)(b); *see*

also RCW 43.21C.030(1)(f) (requiring agencies to "[r]ecognize the worldwide and long-range character of environmental problems.").

29. Pursuant to that authority, the Governor's Director of the Department of Ecology stated that a broader and more rigorous scope of review for an EIS involving a terminal to export coal is justified because of "the end use of [the] product" and that "there is no speculation as to the end use of the exported coal; it will be combusted for thermal power" and because it will "increase[e] America's total export of coal." App. 96-97. Because of Washington's insistence that the EIS have a broad scope of analysis and include extra-territorial impacts of coal combustion on greenhouse gas emissions, the Corp of Engineers decided that it could not participate in a joint EIS. App. 83.

30. Washington treated the Millennium Bulk Terminal very differently from other ports served by the same rail line. The State did not subject other projects at the Terminal to expanded environmental review like it did the Millennium Bulk Terminal. It is undisputed that the only reason that Washington imposed expanded and ultimately unfair environmental review and scrutiny was because the commodity that the Millennium Bulk Terminal will ship is coal. App. 53-55; App. 89-93.

31. For example, the Governor promised Washington-based Boeing that the scope of environmental review for one of its projects would be much different because it did not involve coal. The Governor's talking points for a meeting with Boeing stated "Let me be clear that the next generation of 777x

wings is a very different commodity than coal. Based on what we know about the 777x at this time, we would expect a much different SEPA approach would apply to a proposed 777x project." App. 63. Because "State law discourages greenhouse gas pollution and coal power," ports shipping coal to Asia and other international markets would be subject to heightened review. *Ibid.*

32. The State of Washington has made itself a gatekeeper for interstate and international commerce based on what it alone concludes are good environmental policies beyond its borders. The Governor confirmed that the degree of scrutiny for environmental reviews under the State Environmental Policy Act ("SEPA") was dependent on the end use of the commodity that would be shipped from Washington's terminals. If a product, in Washington's view, increased greenhouse gas emissions, it would not be permitted.

33. After four years of review, Washington and Cowlitz County published the EIS in April, 2017. The EIS identified nine potential environmental impacts that *could* result from construction and operation of the Millennium Bulk Terminal. App. 52. Cowlitz County, which was co-lead on the EIS, stressed that the EIS described only potential impacts and that they were capable of mitigation or elimination. *Ibid.* Cowlitz County concluded that the EIS described a fully permittable project. App. 55.

34. For purposes of the Section 401 water quality certification, the EIS concluded that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality." EIS, Section 4.5.8. For all

but one potential impact, the EIS recognized that mitigation or infrastructure improvements would resolve any potential adverse impacts. Air quality was the only impact needing additional mitigation plans because it was a last-minute addition to the EIS and there had been insufficient opportunity to address mitigation. App. 56.

35. In response to the EIS and additional comments that needed to be reviewed, the Washington Department of Ecology planned to deny the Section 401 water quality certification "without prejudice," which was the Department's usual practice when still evaluating information before an impending certification deadline. App. 5. Following a denial without prejudice, an applicant may resubmit a water quality certification application, and the Department of Ecology could complete any review within the new timeframe. The Department of Ecology drafted a letter denying the Section 401 Certification "without prejudice." The draft letter was signed and was prepared to be sent by certified mail. App. 1.

36. Before the letter was sent, the Department sent a copy to the Governor's office. App. 78-79. In response, the Governor's office asked that the Department delay sending the letter. App. 80-81. The Governor's political appointee at the Department of Ecology then took over the process and drafted a new letter denying the Section 401 water quality certification "with prejudice" for a variety of reasons not addressed in the letter prepared by career professionals at the Department of Ecology. App. 7, 45. The new reasons for denying the permit included

impacts from train traffic, vehicle congestion, noise and vibration, rail safety, and air quality. These potential impacts, however, were addressed in the EIS as either capable of mitigation or elimination. App. 52.

37. The State denied the water quality certification based on the State Environmental Protection Act ("SEPA"), which is the state version of the National Environmental Policy Act ("NEPA"). Washington employed what the State calls "substantive SEPA authority" which grants broad discretion to deny a permit for a variety of reasons. RCW 43.21C.060. Upon information and belief, the denial of the permit for the Millennium Bulk Terminal was the first time in Washington's history that it had used substantive SEPA authority to deny a permit.

38. The co-lead of the EIS, Cowlitz County, charged the State with denying the water quality certification based on pretextual reasons that did not accurately reflect the EIS or the potential impacts and mitigation plans it identified, and that the application would have been approved if the Millennium Bulk Terminal sought to export anything but coal. App. 53.

39. In defending its denial of the Section 401 Water Quality Certification, it became clear that the State denied the permit in part to protect Washington's own agricultural interests. The State justified the denial because the "Millennium proposal would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site." App. 71. The State claimed that "increased coal trains from the Millennium proposal would compete with rail shipments of other goods, including

Washington's important agricultural products." *Ibid*; *see also* App. 71.

40. The State argued that the Millennium Terminal would not boost Washington's Agricultural exports, claiming that "[t]he opposite is probably true. The Millennium coal proposal could harm farmer's ability to get their commodities to market by increasing Washington's rail traffic on a line that would already be over capacity." App. 72.

41. When Governor Inslee was asked at a press conference whether he felt "any sympathy for Montana and Wyoming who are trying to get an important product, coal, to market," he said "no" because "apple[s] [are] healthy, eating coal smoke [] is not."[6]

42. Governor Inslee has repeatedly targeted prohibiting port access for Montana and Wyoming coal as a key campaign issue. In his first press conference, the Governor declared that "there are ramifications ultimately if we burn the enormous amounts of Powder River Basin coal that are exported through our ports." He said that the permitting decisions for those ports would be the largest decision for the state during his lifetime.[7]

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[6] Governor's Press Conference On Clean Power Plan, 29:48-30:23, https://perma.cc/HLF8-K4N6.

[7] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint*," ThinkProgress (January 22, 2013), https://perma.cc/8GBE-QMVK.

43. The Governor's office also suggested that Washington could tolerate emissions from the aerospace industry because it "brings thousands of jobs with those emissions; coal export doesn't." App. 65.

44. Washington also denied the permit because of the Governor's bias against coal and his unjustified extraterritorial concerns that shipments of coal to overseas markets would increase greenhouse gas emissions. That fact is reflected in the State's insistence that the EIS include a study of global greenhouse gas emissions by Asian markets, as well as public statements made by State officials.

45. Without port access, the landlocked states of Wyoming and Montana are unable to access overseas markets for one of the States' most important commodities and one of the biggest drivers of their economies. As a result, Montana and Wyoming are suffering direct injury by losing tens of millions of dollars each year in taxes and fees from coal production and losing thousands of high paying jobs in the coal industry.

46. Meanwhile, Washington can export nearly 35 million bushel cartons of apples to more than 60 countries around the world, simply because it is a State with port access.[8] The effectiveness of the State's port access was made possible by significant federal investment in making the Columbia River suitable for large-scale export. Washington has blocked Montana and Wyoming from engaging a similar export market

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[8] *See* Washington Apple Commission, *Washington Export Marketing- Overview*, https://perma.cc/MT5A-MR3Y.

simply because the State wants to protect its own agricultural interests and because it has a political objection to the commodity that Wyoming and Montana seek to export: coal.

Count I- Violation of the Dormant Commerce Clause

47. Paragraphs 1 to 46 are incorporated by reference as if set forth fully here.

48. The Commerce Clause of the U.S. Constitution, Article I, § 8, prohibits States from engaging in discriminatory or protectionist actions against other States. The Commerce Clause also prohibits a State from regulating conduct outside its borders or placing an undue burden on interstate commerce.

49. Washington's denial of a Section 401 Water Quality certification was based on protecting the State's own agricultural interests, the political concerns and aspirations of its Governor, and because of extraterritorial and unfounded concerns that coal exports from Wyoming and Montana would increase greenhouse gas emissions in Asia.

50. Washington is seeking to regulate conduct—the export and combustion of coal in foreign markets—that is wholly outside its borders.

51. Washington denied the Section 401 Water Quality certification because of Washington officials' political opposition to the commodity sought to be exported from Montana and Wyoming: coal.

52. Washington has intentionally discriminated against the landlocked States of Montana and Wyoming and has effectively blocked port access for these States to get one of their most important commodities to market.

53. Washington's discriminatory action against Wyoming and Montana coal for political purposes and to protect its own economic interests is per se invalid.

54. Washington's discriminatory and protectionist actions are imposing a heavy burden on Montana and Wyoming, including the loss of significant coal severance and other taxes generated by coal production and sale.

55. Washington's protectionist actions discriminate against Wyoming and Montana and impose a heavy burden on interstate commerce.

56. The burdens on interstate commerce imposed by Washington's decision to block Wyoming and Montana's port access are excessive in relation to putative local benefits.

57. Wyoming and Montana therefore seek declaratory and injunctive relief holding that Washington's actions are invalid under the Commerce Clause.

Count II- Violation of the Foreign Commerce Clause

58. Paragraphs 1 to 57 are incorporated by reference as if set forth fully here.

59. The Foreign Commerce Clause of the U.S. Constitution, Article I, § 8, cl. 3, prohibits States from regulating foreign commerce, especially when it is at odds with the foreign policy of the United States Government.

60. Increasing U.S. energy exports, especially coal, is an important policy goal of the federal government. Exporting coal to Asia and other global markets is a key federal priority to boost the American economy and advance national security interests.

61. Realizing federal investment in coastal ports like Washington's by expanding American energy exports, including coal, is a key foreign policy goal of the United States.

62. Washington State's decision to deny port access for coal exports based on protecting its own agricultural interests and based on its extraterritorial concerns about greenhouse gas emissions infringes on the Federal Government's exclusive role to regulate foreign commerce.

63. Washington's actions have created a risk of conflict with foreign governments that rely on reliable export of Powder River Basin coal from Wyoming and Montana.

64. Washington's discriminatory actions have impeded Wyoming's and Montana's ability to engage in foreign commerce.

65. Wyoming and Montana therefore seek declaratory and injunctive relief holding that

Washington's actions are invalid under the Foreign Commerce Clause.

PRAYER FOR RELIEF

A. Declare that Washington's discrimination against Wyoming and Montana coal exports violates the Dormant Commerce Clause;

B. Preliminarily and permanently enjoin Washington from engaging in protectionist and discriminatory actions in its permitting decisions for the Millennium Bulk Terminal and from basing its permitting decisions on extraterritorial factors;

C. Preliminarily and permanently enjoin Washington from denying the Clean Water Act Section 401 Water Quality Certification on grounds unrelated to water quality;

D. Award costs and reasonable attorneys' fees to the Plaintiff States;

E. Grant such other relief as the Court deems just and proper.

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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INTRODUCTION

Montana and Wyoming seek to invoke the Court's original jurisdiction to prevent Washington from discriminating against Montana's and Wyoming's ability to engage in interstate and foreign commerce by blocking port access to foreign markets. The Framers understood that landlocked States, which lack convenient ports for foreign commerce, were ripe for abuse by coastal States. Their solution was the Commerce Clause, which guaranteed that no individual State could dictate the terms of interstate or foreign trade. Today, however, Montana and Wyoming are suffering the harms that the Framers sought to prevent.

Montana and Wyoming have vast reserves of low-sulfur coal that generate hundreds of millions of dollars in critical state revenue each year. But the sharp decline in domestic coal consumption is having an enormous impact on both States, affecting state and local funding across the board. Foreign markets, however, have a specific need for Montana's and Wyoming's abundant low-sulfur coal. If only they can get it.

There are no West Coast terminals that can handle the export of Montana and Wyoming coal. Currently, the only viable option is a proposed terminal in Longview, Washington called Millennium Bulk. Based on political opposition to increased coal exports and economic self-interest, Washington officials denied a Section 401 Water Quality Certification for the Terminal, *with prejudice*, effectively killing the project. Washington's discriminatory closure of its ports to

Montana and Wyoming coal violates the Dormant Commerce Clause and the Foreign Commerce Clause, leaving Montana and Wyoming no option to get one of their most important commodities to foreign markets.

Washington's discriminatory actions amount to a de facto embargo on Montana and Wyoming coal. This Court provides the only forum in which Montana's and Wyoming's claims can be heard, and the States ask this Court to exercise its exclusive and original jurisdiction to remedy Washington's inequitable and unconstitutional actions.

STATEMENT

I. Montana's and Wyoming's Large Reserves of Low-Sulfur Coal Generate Critical State Revenue.

Wyoming and Montana have enormous coal reserves, much of which is in the Powder River Basin spanning both States. Wyoming has led the Nation in coal production since 1986 and has the second largest reserve base at 58.1 billion tons.[1] Wyoming exports approximately 91% of the coal it produces.[2] Montana has the largest coal reserve in the country, amounting to 118 billion tons, and is the sixth largest coal

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[1] U.S. Energy Information Administration, *FAQ about Coal,* https://perma.cc/G4V2-NEJ3.

[2] Wyoming State Geological Survey, *Coal Production & Mining*, (Third Quarter, 2019), https://perma.cc/TSX4-7WR2.

producer.[3] Seventy-five percent of Montana's production is shipped out of the State.[4]

This Court has previously recognized the vast quantity and unique quality of Montana and Wyoming coal. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612 (1981) ("Buried beneath Montana are large deposits of low-sulfur coal"); *Wyoming v. Oklahoma*, 502 U.S. 437, 442 (1992) ("Wyoming is a major coal-producing State" that "has a significant excess mining capacity."). Because Powder River Basin coal has a low sulfur content, "less sulfur escapes and pollutes the air when Wyoming [and Montana] coal is burned." *Id.* at 455, n.7.

Revenues generated from coal production are vital to both Wyoming and Montana. While neither State sells coal directly to generating facilities, both States "impose a severance tax upon the privilege of severing or extracting coal from land within its boundaries." *Id.* at 442 (recognizing Wyoming's severance tax); *see also* Mont. Code Ann. §§ 15-35-101 to -122; Wyo. Stat. §§ 39-14-101 to -111. Coal production in Wyoming generates several hundred million dollars each year in taxes, royalties, and fees and is the second largest source of

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[3] *See* National Mining Association, *U.S. Reserves by State and Type-2016* (November 2017), https://perma.cc/2YJP-J3XE.

[4] Montana Environmental Quality Council, *Final Report to the 66th Montana Legislature, 15* (June 2018), https://perma.cc/P8EF-7X76.

tax revenue for state and local governments.[5] Coal production revenue in Montana is the State's second-highest source of natural resource tax revenue, totaling over $80 million per year.[6] Those receipts fund a broad range of important programs in both States, from education to infrastructure, and coal production provides thousands of high paying jobs.[7] The States also lease State lands for coal extraction, which is an important source of revenue for their school trusts. For example, in 2019, Montana generated $11.3 million for state schools from coal royalty revenue produced from leases on 14,692 acres of state land.[8]

II. Though Domestic Consumption of Montana and Wyoming Coal Has Declined, International Demand is Increasing.

Montana and Wyoming have suffered severe financial impacts from the sharp decline in domestic demand for coal. Coal production in Montana has declined "from about 45 million tons in 2008 to 32

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[5] Wyoming Mining Association, *Wyoming Coal-September 2018 Concise Guide*, *4*, https://perma.cc/5BJP-ULWR.

[6] Montana Environmental Quality Council, *Montana Department of Revenue Biennial Report, July 1, 2016-June 30, 2018, p. 97*, https://perma.cc/KA2T-GLMJ.

[7] Montana Department of Revenue Biennial Report, at 105; Wyoming Mining Association, at 4.

[8] Montana Board of Land Commissioners Agenda, at 84; https://perma.cc/7GA3-9LKJ.

million tons in 2016."[9] Between 2016 and 2017, Wyoming saw a nearly $178 million dollar decrease in revenue generated from coal production, which was a 16.7 percent decrease from the previous year.[10] Most of this decline is due to weakening domestic markets for coal.[11]

The decline in domestic coal demand is expected to continue and will become more dramatic as coal-fired plants near the end of planned life cycles and are not replaced with new facilities.[12] It is expected that domestic coal consumption in 2019 will be the lowest it has been in forty years, and it will only continue to decline in 2020.[13]

Despite the decline in domestic demand, overseas markets are booming. Asian markets are expanding and have a distinct need and economic desire for the

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[9] Montana Department of Environmental Quality, Understanding Energy in Montana 2018, 74, https://perma.cc/5B83-XGZV.

[10] Wyoming Mining Association, *Wyoming Coal-September 2018 Concise Guide, 4.*

[11] *Ibid*.

[12] U.S. Energy Information Administration, *U.S. coal consumption in 2018 expected to be the lowest in 39 years* (December 4, 2018), https://perma.cc/C5VR-ZGMF.

[13] U.S. Energy Information Administration, *Short-Term Energy Outlook* (December 10, 2019), https://perma.cc/BB47-8RKA; *see also* U.S. Energy Information Administration, *Almost all U.S. Coal Production Is Consumed for Electric Power* (June 10, 2019) (noting that domestic coal production exceeds consumption), https://perma.cc/PL6Z-3X5V.

low-sulfur Powder River Basin coal in Montana and Wyoming.[14] Japan, Taiwan, South Korea, and China are expanding coal-fired power stations to increase their electric generating capacity to bring a higher quality of life to their populations.[15] Japan is particularly dependent on imports to supply the country's energy, especially following the Fukushima nuclear power plant accident. Japan is a signatory to the Paris Climate Agreement and has led the way in developing clean coal technology and research for carbon capture, but that technology requires low-sulfur coal.

Wyoming and Montana have engaged in major efforts to expand coal production to Asian markets. Governors of both States have visited Asian countries to promote their States' coal. In 2016, Wyoming entered a five-year agreement with the Japan Coal Energy Center.[16] The agreement contemplates the parties' cooperation in facilitating coal exports and sales, which may include the development of new U.S. coal export and Japanese coal import terminals and establishing sale contracts for Wyoming coal. The States are acutely aware that exporting to Asian

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[14] *See, e.g.,* Josh Galemore, *Japan Presents Opportunity for Powder River Basin Coal*, Casper Star Tribune (October 22, 2018), https://perma.cc/5665-RRPT.

[15] International Energy Agency, *Market Report Series-Coal 2018*, *Key Findings*, https://perma.cc/RXA2-3LSL.

[16] Wyoming Mining Association, *Wyoming Reaches Deal with Japan to Research Clean Coal*, (August 3, 2016), https://perma.cc/8X9U-MFXQ.

markets is vital to their economic security. But they cannot reach these markets without access to a coastal port.[17]

The harms caused by lack of port access are not theoretical. For example, private U.S. companies have successfully secured prospective export contracts with South Korea, but the lack of port access makes it impossible to supply the coal. As a result, South Korea has increasingly looked to other countries, specifically Russia, which has already increased its coal exports to Korea.[18] Foreign countries' reliance on imported coal means that, by necessity, they must either get clean-burning coal from Montana and Wyoming or high-sulfur coal from other countries.

III. The Present Controversy – Washington Blocks Montana and Wyoming from Exporting Coal.

To access foreign export markets for Wyoming and Montana coal, a private company proposed a loading facility called the Millennium Bulk Terminal in Cowlitz County, Washington. The proposal would convert a contaminated former aluminum smelter site into a

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[17] *See* Gabe Collins and Andrew Erickson, *Wyoming and Montana Could Become Major New Coal Suppliers to China and the Asian Market—If they Can Obtain Port Access*, China SignPost, (September 4, 2012) (noting that Montana and Wyoming are uniquely positioned to export coal to fill China's growing need for clean-burning coal), https://perma.cc/B559-EJ3L.

[18] *See* Press Release, *Mechel Signs Long-Term Coal Supply Contract with South Korea's STX Corporation*, (October 17, 2019), https://perma.cc/FL92-AVRH.

productive transloading facility that would provide the bridge between Montana's and Wyoming's Powder River Basin coal and the Asian markets hoping to import it. At full capacity, the Millennium Bulk Terminal would ship 44 million metric tons of coal per year, most coming from mines in the Powder River Basin in Montana and Wyoming.[19]

The State of Washington recognizes that it "is a gateway state, connecting Asian trade to the U.S. economy," and that "[m]any states are [] dependent on the ports in Washington to import and export freight."[20] Various portions of the Columbia River have been designated as "marine highways" by the Maritime Administration, an agency of the U.S. Department of Transportation.[21] This designation provides many benefits, including federal funding, a benefit Washington has often sought and obtained.[22] In addition to the federal investment that made its ports possible, Washington advertises that "ports in Washington have several significant advantages, including natural deep-water harbors on the coasts, a

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[19] Millennium Bulk Terminals-Longview, Final SEPA Environmental Impact Statement, 2-11, -23 (April 2017).

[20] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[21] Maritime Administration, *America's Marine Highway*, https://perma.cc/H7NC-37Z3.

[22] *See, e.g.,* Allison Frost, *Report Highlights Economic Benefits of Deeper Columbia*, Think Out Loud (July 6, 2015), https://perma.cc/9DXH-XWMW.

West Coast location close to Asian markets, and strong connections to Freight Economic Corridors."[23] Indeed, Washington relies heavily on those ports for its own economy. It is one of the most trade-dependent States in the Nation, with imports and exports valued at $126.8 billion in 2016 alone.[24]

The Millennium Bulk Terminal proposal was led by a coal energy supply chain company now called Lighthouse Resources. The permitting process for the facility began in February 2012. As part of this process, Lighthouse applied for what is known as a Section 401 Water Quality Certification, deriving from Section 401 of the Clean Water Act, 33 U.S.C. § 1341, which—in conjunction with Lighthouse's application for local permits—triggered an environmental review under the Washington State Environmental Policy Act (SEPA), Rev. Code Wash. 43.21C *et seq*. SEPA, in turn, required the Washington Department of Ecology and Cowlitz County to complete an Environmental Impact Statement ("EIS").

Washington state law explicitly requires that agencies assess the extraterritorial impact of products shipped from Washington ports when considering environmental impacts for permitting decisions. *See* WAC 197-11-060(4)(b) ("In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impact only to those

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[23] Washington State Department of Transportation, *2017 Washington State Marine Ports and Navigation Plan*, 1-2, https://perma.cc/6D7S-RC25.

[24] *Ibid*.

aspects within its jurisdiction, including local or state boundaries."); *see also* RCW 43.21C.030(1)(f) (requiring agencies to "[r]ecognize the worldwide and long-range character of environmental problems"). The State has justified a more rigorous scope of review for an EIS involving a terminal to export coal because "there is no speculation as to the end use of the exported coal; it will be combusted for thermal power" and because it will "increase[e] America's total export of coal." App. 92; *see also id.* at 89-93, 96-97.

Therefore, Washington insisted that the EIS assess the global impact, if any, of the Millennium Bulk Terminal, from mining coal in Montana and Wyoming, transporting and exporting it, through combustion in Asia.[25] Washington's insistence that the EIS expand its focus on coal's export to Asia and the global impact on greenhouse gas emissions caused the U.S. Army Corps of Engineers to reverse its decision to pursue a joint NEPA/SEPA EIS for the project. App. 83.

In 2017, after four years of review, the Washington Department of Ecology and Cowlitz County jointly published the EIS. The EIS identified nine potential environmental impacts that *could* result from construction and operation of the Terminal.[26] Co-lead on the EIS, the Cowlitz County Director of Building and Planning, stressed that these *potential* impacts

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[25] Millennium Bulk Terminals-Longview SEPA Environmental Impact Statement, SEPA Greenhouse Gas Emissions Technical Report, at 191-93, https://perma.cc/2HG5-APJA.

[26] EIS, Summary, § S.7, pp. S-41 to S-43, https://perma.cc/27DR-67UX.

could be mitigated or eliminated, and that the EIS described a fully permittable project. App. 52-55.

Importantly, the EIS concluded that "[t]here would be no unavoidable and significant adverse environmental impacts on water quality."[27] For all but one potential impact (air quality), the EIS recognized that mitigation or infrastructure improvements would resolve any potential problems. App. 52, 55. The air quality analysis was differentiated because it was a late addition to the EIS and Lighthouse had no opportunity to address mitigation. App. 56.

While the EIS concluded that water quality impacts were less than significant, the Washington Department of Ecology staff continued with its 401 Certification review to determine if Lighthouse's proposal complied with state water quality requirements. The Department of Ecology planned to follow its usual practice when water quality issues remain unresolved by the certification deadline, which was to deny the Certification "without prejudice." App. 1-5. Career staff prepared a draft letter to that effect, explaining the need for more time to review public comments and to further evaluate mitigation plans for water quality impacts. *Id.* The letter noted that denying the application "without prejudice would not in any way preclude Millennium from resubmitting a request for a [water quality certification] at a later date." *Id.* at 5. That letter was signed and ready to be mailed. Department of Ecology staff then emailed the prepared letter to the Governor's office for approval, advising

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[27] EIS, § 4.5.8; *see also* App. 60.

that the department intended to send the letter that day. App. 78.

At that point, political appointees commandeered the process. The draft letter was never sent. After staff met with Governor Inslee about the project (App. 80), Maia Bellon, the Governor's director of the Department of Ecology, drafted a new letter denying the Millennium Bulk Terminal proposal "*with prejudice*." App. 7. The denial with prejudice killed the project. The application could not be resubmitted, contrary to the Department's established practice, and the administrative review was prematurely terminated, though the Department was expecting additional information.

IV. Washington Denied the 401 Certification Because of Its Political Objection to Coal and Because of Its Own Economic Self-Interest.

Washington officials cited the potential environmental impacts identified in the EIS as reasons for denying the permit. App. 46-47. Those reasons included potential impacts from train traffic, vehicle congestion, noise and vibration, rail safety, and air quality. The denial was based on the Department's discretionary authority under SEPA. App. 46.

Dr. Elaine Placido, who was point on the project for the EIS co-lead, Cowlitz County, described those reasons as exaggerated and pretextual. App. 53. Her perspective was uniquely well-founded because, although she had worked on hundreds of environmental reviews with the Department of

Ecology, she had never seen another application treated so unfairly; Placido stated that she "witnessed Ecology treat Millennium more like an adversary than a permit applicant." App. 53-54, 60-61. (Para. 10, 12, 25, 26.) Based on her long and involved work on the EIS, the "project team openly agreed that each of the impacts *potentially* caused by the Terminal were avoidable and subject to reasonable mitigation." App. 52. (emphasis original). She and her staff believed that the Department of Ecology purposely "distorted" the findings to recast "multiple EIS potential impacts that 'could' occur as impacts that 'would' occur." App. 55-56. Her final assessment was blunt: "I believe that if Millennium proposed to ship anything other than coal, Ecology would have granted the Section 401 water quality certification." App. 55.

There is plenty of additional grist for the mill. Washington State officials, especially Governor Inslee, have consistently used port access for Montana and Wyoming coal as a wedge issue to advance personal political ambitions. Governor Inslee made opposition to coal exports a campaign priority starting with his first press conference as governor. He declared that "there are ramifications ultimately if we burn the enormous amounts of Powder River Basin coal that are exported through our ports," and he characterized the permitting decisions for those ports as the largest decision for the State during his lifetime.[28] In Governor

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[28] Jessica Goad, *Governor Inslee Calls Coal Exports "The Largest Decision We Will Be Making as a State from a Carbon Pollution Standpoint*," ThinkProgress (January 22, 2013), https://perma.cc/8GBE-QMVK.

Inslee's recent presidential campaign, his spokesperson boasted that the Governor led opposition to oil and coal export terminals for the Washington coast.[29] In fact, a centerpiece of his presidential campaign was to phase out all domestic coal energy generation within ten years.[30] And when Governor Inslee was asked if he felt "any sympathy for Montana and Wyoming who are trying to get an important product, coal, to market," he said "no" because "apple[s] [are] healthy, eating coal smoke [] is not."[31] Washington also actively worked to develop a strategy to subject coal export facilities to more rigorous environmental review than other projects. App. 67-69; *see also* App. 63 (Governor's talking points assuring Boeing that it would not be subject to the same environmental review as the coal port).

Governor Inslee is not alone. Coastal state political leaders have vigorously worked to prevent coal export from California and Oregon as well. For example, in Oakland, California, city officials prevented development of an export terminal and admitted that their opposition stemmed solely from the project's plan to export coal. One of the politicians responsible for blocking development of the terminal was unabashed:

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[29] Benjamin Storrow, *Is Inslee the climate choice? First he must pass something*, E&E News, (January 18, 2019), https://perma.cc/3ND6-M5SP.

[30] Jay Inslee for Governor, *Rejecting New Fossil Fuel Infrastructure*, https://perma.cc/68CV-AY9U.

[31] *See* Governor's Press Conference On Clean Power Plan, 29:48-30:23, https://perma.cc/HLF8-K4N6.

"As far as I can tell, nobody on the West Coast wants this coal."[32] The same official said that a cargo facility at the site would be fine, just not one that handles coal. *Ibid.* Even more recently the city council in Richmond, California passed an ordinance banning coal exports from a port located in the city after the mayor boasted that he would "like to get rid of coal worldwide."[33] And half a dozen other coal export proposals in California, Oregon, and Washington have collapsed in recent years because of similar political opposition that has successfully used permitting processes to kill the projects. *Ibid.*

In addition to the overt political motivation for the denial, Washington publicly admitted that it denied the Water Quality Certification to block competition with its own agricultural exports. One of the "Key messages" that Washington wanted to promote after denying the Millennium Bulk Terminal was that "Increased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products." App. 71. The Washington Department of Ecology defended the Section 401 Certification denial in part because the "Millennium proposal would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site." *Ibid.* The

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[32] Bill Lucia, *With West Coast States Blocking Coal Export Projects, Proponents Keep Pushing,* Route Fifty (November 19, 2019), https://perma.cc/MJ66-5BEA.

[33] Will Wade, *California City Bans Coal, Blocking Key Export Route to Asia*, Bloomberg News (January 14, 2020), https://perma.cc/7N8Z-MP24.

Department of Ecology argued that the Millennium Bulk Terminal would not boost Washington's agricultural exports, claiming that "[t]he opposite is probably true. The Millennium coal proposal could harm farmer's ability to get their commodities to market by increasing Washington's rail traffic on a line that would already be over capacity." App. 72-73 ("[c]oal and apples don't mix. Millennium's proposal would only ship coal. There is no 'apples to coal' comparison here"); App. 65 (Governor's policy director noting that the Washington-based aerospace industry brings jobs, while coal export does not).

Following the 401 Certification denial, Lighthouse Resources sued Governor Inslee in federal district court, based in part on the Commerce Clause. *Lighthouse Resources v. Inslee*, No. 3:18-cv-05005-RJB (W.D. Wash. January 3, 2018). Neither Montana nor Wyoming were parties.[34] After fifteen months of litigation and hundreds of docket entries, the federal district court abstained from deciding the Commerce Clause issues while litigation involving other issues proceeded in a Washington state court.[35] In short, Washington successfully killed the project based on politics and economic self-interest, knowing that it left Montana and Wyoming with no option to serve foreign markets and no judicial recourse. Washington's actions have had an enormous impact on interstate commerce,

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[34] The States joined an amicus brief in support of Lighthouse's Commerce Clause challenge.

[35] That abstention order is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit Court, docket no. 19-35415.

and especially on Montana and Wyoming, yet Washington has dodged any Commerce Clause challenge to its discriminatory actions in denying port access for coal exports.

ARGUMENT

This Court has original jurisdiction over cases and controversies between the States. U.S. Const. art. III, § 2, cl. 2. That jurisdiction has been exclusive since the First Congress adopted the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81 (1789), (codified at 28 U.S.C. § 1251(a)). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Original jurisdiction was meant to provide States with a means of peaceful resolution of problems such as "trade barriers, recriminations, [and] intense commercial rivalries [that] had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945) (citations and internal footnote omitted).

In deciding whether to grant leave to file a complaint in a dispute arising under the Court's original jurisdiction, the Court examines two factors: (1) "the interest of the complaining State, focusing on the seriousness and dignity of the claim"; and (2) "the availability of an alternative forum in which the issue tendered may be resolved." *Mississippi v. Louisiana,* 506 U.S. 73, 77 (1992) (citation and quotation marks

omitted). Here, both factors weigh in favor of the Court exercising its original jurisdiction.

"The model case for the invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi*, 506 U.S. at 77 (citations omitted). *Casus belli* is "[a]n act or circumstance that provokes or justifies war." *Black's Law Dictionary* 231 (8th ed. 2004). That is *precisely* the situation here. Frederic Bastiat is credited with saying: "When goods do not cross borders, soldiers will." This Court has also recognized that an embargo "may be, and often is, used as an instrument of war[.]" *Gibbons v. Ogden*, 22 U.S. 1, 192 (1824). Here, Washington has imposed a de facto embargo on Montana and Wyoming coal. Therefore, the *casus belli* that this Court looks for exists. Accordingly, this Court should exercise its exclusive and original jurisdiction to remedy this inequitable and unconstitutional embargo, which can be settled in no other forum.

I. The Seriousness and Dignity of Montana's and Wyoming's Claims Warrants Exercise of the Court's Original Jurisdiction.

The seriousness and dignity of Montana's and Wyoming's claims weigh heavily in favor of the Court's exercise of original jurisdiction. The State of Washington's restraint of Montana's and Wyoming's legitimate economic activity plainly implicates important sovereign interests that are essential to the proper functioning of the Union. "[T]he right to engage in interstate commerce is not the gift of a state," and it is not for coastal states to ordain for their landlocked

neighbors which of their industries may access the stream of commerce. *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 260 (1911). If one State had such power "embargo may be retaliated with embargo, and commerce will be halted at state lines." *Id.* at 255. This Court alone can ensure fair access to international waters for each of the several States.

In fact, the Court has previously entertained several cases among States involving Commerce Clause claims, especially in cases involving the transportation or taxation of natural resources. *See, e.g., Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (enjoining enforcement of a West Virginia law prohibiting transportation of natural gas to other states); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (invalidating Louisiana use tax on offshore gas processed within Louisiana but moving to other states); *Wyoming,* 502 U.S. 437 (invalidating an Oklahoma statute that required electric-generating plants to burn a mixture of coal containing at least ten percent Oklahoma-mined coal). This case similarly warrants the Court's review.

As with its original jurisdiction, the Court judiciously exercises its appellate jurisdiction, but in so doing, it has not hesitated to strike down State-erected barriers to the fundamental infrastructure of interstate and international commerce. *See, e.g., Pennsylvania,* 262 U.S. 553 (enjoining a state statute prohibiting the interstate transport of natural gas); *Gibbons*, 22 U.S. 1 (enjoining a state statute granting the exclusive right of navigation); *Bowman v. Railway Co.*, 125 U.S. 465 (1888) (holding invalid a state statute forbidding any

common carrier from transporting liquor into Iowa without first receiving a certificate that the recipient was authorized to sell liquor in the county). Interstate and international highways, railways, waterways, and seaports are the instrumentalities of commerce, and this Court should be particularly vigilant to ensure that the parochial political concerns of one State do not prevent their fair use.

Notably, this Court has exercised original jurisdiction in cases with lesser constitutional insult than Washington has inflicted on Montana and Wyoming. For example, the Court exercised original jurisdiction where one State merely *reduced* another State's ability to collect tax revenues, as opposed to the total blockage Washington caused here. *See Wyoming*, 502 U.S. at 451. When Oklahoma affected Wyoming's "ability to collect severance tax revenues, an action undertaken in its sovereign capacity," this Court described it as "beyond peradventure" that Wyoming raised "a claim of sufficient seriousness and dignity" to exercise original jurisdiction. *Ibid.* Because Oklahoma was causing Wyoming to lose severance tax from coal extraction, "Wyoming's challenge under the Commerce Clause precisely 'implicate[d] serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction.'" *Ibid.* (quoting *Maryland*, 451 U.S. at 744.

This case presents an even bolder attack on constitutional values because Washington has completely barred Montana's and Wyoming's access to an international shipping port. Washington's discrimination was carried out at the highest level –

Governor Inslee's office hijacked the permit process and forced a denial of Section 401 Certification. This action was a departure from customary practices and based on improper justifications. This Court should intervene to address not only the loss of Montana's and Wyoming's rights but the loss of millions of dollars each year in severance tax and other coal production revenue caused by Washington's political opposition to coal. Moreover, the future of both State's coal production, with the critical benefits it provides to the citizens of those States, is in substantial doubt without reliable access to foreign markets. *Wyoming*, 502 U.S. at 446 (recognizing that "loss of any market cannot be made up by sales elsewhere.").

Left unchecked, other coastal States will likely follow Washington's lead at the expense of their landlocked neighbors. Washington, Oregon, and California have already erected unreasonable barriers to coal exports. Without this Court's intervention, these States will be free to take additional discriminatory actions against Montana and Wyoming. While it is coal that is disfavored today, it will assuredly be another commodity tomorrow. After all, a century ago, this Court applied the Commerce Clause to prevent States from discriminating against imported liquor. *See Granholm v. Heald,* 544 U.S. 460, 476-486 (2005) (summarizing cases). Just as it did in those cases, the Court must intervene to stop States from interfering with interstate commerce by imposing their own political and moral judgments on their neighbors.

When examining "the seriousness and dignity of the claim," this Court must naturally look to the merits of

the arguments advanced by the movant States. *See Mississippi*, 506 U.S. at 77 (citation and quotation marks omitted). Montana and Wyoming present this Court with a serious controversy supported by arguments that easily clear the "dignity" bar. The arguments advanced by Montana and Wyoming show that this Court's exercise of original jurisdiction in this case is warranted, and Montana and Wyoming should be granted leave to file their Bill of Complaint.

A. Washington's Embargo of Montana and Wyoming Coal is *Per Se* Invalid Under the Dormant Commerce Clause.

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although the Clause does not expressly limit a States' ability to regulate commerce, this Court has interpreted the Clause to include a "dormant" limitation preventing States "from adopting protectionist measures." *Tennessee Wine and Spirits Retailers Assoc. v. Thomas,* 139 S. Ct. 2449, 2459 (2019). This case implicates the core reasons that the Dormant Commerce Clause exists: ensuring the free-flow of goods across State lines, preventing a single State from dictating the terms of interstate commerce based on its own political and extraterritorial interests, and preventing economic protectionism.

The Commerce Clause was the Framers' cure for the "economic Balkanization that had plagued relations among the Colonies" and was born from the premise that the federal government "alone has the gamut of powers necessary to control of the economy," and that

"the states are not separable economic units." *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 98–99 (1994) (quotations and citations omitted).

Protecting landlocked States from the whims of States with port access was an especially important motivation for the Framers, who were concerned about "the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors." James Madison's Preface to Debates in the Convention of 1787, *reprinted in* Records of the Federal Convention of 1787 (M. Farrand ed. 1966); *see also* Letter from James Madison to Professor Davis, *reprinted in* The Founders' Constitution, Volume 2, Article 1, Section 8, Clause 3, Document 21 ("The condition of the inland States is of itself a sufficient proof that it could not be the intention of those who framed the Constitution to *substitute* for a power in Congress to impose a protective tariff, a power merely to permit the States individually to do it." (emphasis in original)). This principle is not unique to the United States. *See Right of Access of Land-Locked States to and from the Sea and Freedom of Transit*, United Nations Convention on the Law of the Sea, Part X, Articles 124-132; *id.* at Article 125 ("land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport").

The Commerce Clause and its implicit restrictions on the States were key reasons for the Constitution's adoption. The Court described that "[o]ne of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional

Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283 (1976). "By prohibiting States from 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*, 575 U.S. 542 (2015) (citations omitted). The Court long ago described that "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Gibbons*, 22 U.S. at 199–200.

1. Washington's Obstruction of Port Access to Benefit Its Own Economic Interests at the Expense of Other States Violates The Dormant Commerce Clause.

Washington publicly stated that it denied the Section 401 Certification permit to protect its own agricultural interest. This is clearly unconstitutional.

The Dormant Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors." *Wyoming*, 502 U.S. at 454 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)); *see also Tennessee Wine & Spirits*

Retailers Ass'n, 139 S. Ct. 2449, 2460 (2019) ("[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law."). One of the clearest signs that a State has violated the Dormant Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc.*, 511 U.S. at 99. This Court has "laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949). "[L]aws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" *Granholm*, 544 U.S. at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Washington's treatment of the Section 401 Certification is constitutionally offensive because it "directly regulates or discriminates against interstate commerce or . . . its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citations omitted). Washington publicly proclaimed the reasons it denied the Section 401 Certification and chief among these was protecting its own economic interests (*see*, *supra*, Statement, Section IV). Thus, this case presents "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). Washington officials were clear that, in addition to politics, what motivated the

decision to deny the permit was that "[i]ncreased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products" and reminding people that the "Millennium proposal would only ship coal, there would be no [Washington] apples." App. 11.; *see also* App. 65 ("Aerospace brings thousands of jobs with those emissions; coal export doesn't.")

Washington's pursuit of self-interested economic protectionism runs afoul of the Commerce Clause and this Court's decisions interpreting the Clause. Washington's actions benefit its own economic interest while burdening the interests of Montana and Wyoming. This is a constitutional violation, and this Court should exercise original jurisdiction to resolve this dispute among States.

2. Washington's Obstruction of Port Access Based on Political Discrimination Violates the Dormant Commerce Clause.

While the Dormant Commerce Clause most often prohibits economic protectionism, it is equally concerned with the "practical effects" of state actions on interstate commerce. *Brown-Forman Distillers Corp.*, 476 U.S. at 583. "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power[.]'" *S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-80 (1945) (citations omitted).

The Dormant Commerce Clause prohibits a coastal State from blocking port access for certain commodities or products simply because it does not like them or gains political capital by opposing them. Coastal State and local governments in California and Oregon have joined Washington in a vigorous and coordinated effort to kill West Coast port access for coal export. *Lucia*, *supra* note 41, *With West Coast States Blocking Coal Export Projects*. That newly-developed strategy to block coal exports from interior States is rooted in political opposition to the commodity that States like Montana and Wyoming are trying to get to market. *See, e.g.*, *Cascadia Law Group PLLC*, *Reducing Impacts from Fossil Fuel Projects Report to the Whatcom County Council*, February 12, 2018 (proposing strategy to erect regulatory barriers to coal and other fossil fuel exports).

When Washington bars access to a port, it appoints itself a gatekeeper of the national economy. That conduct is improper because maintaining the free flow of national commerce is precisely what the Commerce Clause was designed to protect. Whether it is political motivation or a tariff based on economic protectionism, the result is the same. The "action of the State would 'neutralize the economic consequences of free trade among the states'" and fundamentally undermine the Commerce Clause's goal to unify commerce "upon the theory that the peoples of the several states must sink or swim together." *H.P. Hood & Sons*, 336 U.S. 525, 532-33 (1949) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). No State has "the power to retard, burden or constrict" the flow of commerce,

especially when it is based on raw political motive. *H.P. Hood & Sons*, 336 U.S. at 533.

Washington's *with prejudice* permit denial was motivated by political machinations, namely, Governor Inslee's political campaign to control global greenhouse gas emissions. The Governor's appointees commandeered the permitting process from career staff to ensure that the project would be denied "with prejudice." Washington treated the Millennium Bulk Terminal permitting process differently, and less favorably, than in-state projects from Washington companies, such as Boeing. The Governor appears to have assured Washington-based Boeing that Boeing's projects would not face the same degree of scrutiny as the Millennium Bulk Terminal proposal, stating: "Let me be clear that the next generation of 777x wings is a very different commodity than coal. Based on what we know about the 777x at this time, we would expect a much different SEPA approach would apply to a proposed 777x project." App. 63.

Washington killed the Millennium Bulk Terminal due to purported concern about greenhouse gas emissions outside Washington's borders. *Supra*, Statement, Section IV. Indeed, Washington law explicitly requires that agencies consider the product's end use and the impact that use has beyond the State's borders. WAC 197-11-060(4)(b); *see also* RCW 43.21C.030(1(f). Just as a State's economic protectionism is unconstitutional, the Commerce Clause prevents a State from interfering with interstate commerce based on extra-territorial concerns. *See C & A Carbone, Inc. v. Town of*

Clarkstown, N.Y., 511 U.S. 383, 393–94 (1994). For a State to deny a permit based on factors "it might deem harmful to the environment" is illegitimate and "would extend the [State's] police power beyond its jurisdictional bounds." *Id*. at 393 (citing *Baldwin*, 294 U.S. 511). A State cannot shut off interstate commerce because it has concerns about speculative impacts beyond its borders. *See Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989).[36]

The advancement of Governor Inslee's political ambitions was ultimately the nail in the coffin of the Section 401 process. Political ambition is not a constitutionally benign motive. Even if the motive could positively be attributed to Washington's desire to protect its own citizens, that motive would not save Washington's actions from infirmity under the Dormant Commerce Clause, because "[t]o give entrance to [the] excuse" of benefiting local interests "'would be to invite a speedy end of our national solidarity.'" *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 206 (1994) (quoting *Baldwin,* 294 U.S. at 522-523). Manipulating a State's environmental review process over energy producing resources, to serve political ends, falls squarely within that admonition.

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[36] Washington's assumption that the Terminal would increase greenhouse gas emissions was wrong. Research by Professor Dr. Frank Wolak, who directs Stanford's Program on Energy and Sustainable Development, reached the same conclusion. He concludes that opening a west coast port for coal exports to Asia would reduce greenhouse gas emissions. *See* Frank Wolak, *Assessing the Impact of the Diffusion of Shale Oil and Gas Technology on the Global Coal Market*, Stanford.edu (November 7, 2017), https://perma.cc/H25K-W7GG.

The fact that Washington's efforts to block coal export resulted from a permitting decision rather than State statute makes it even more constitutionally repugnant. This Court has already recognized that the Dormant Commerce Clause's protections are not limited to statutes or regulations and can be triggered by specific State actions like permit or license denials. *See H.P. Hood & Sons*, 336 U.S. at 526-28. That approach only makes sense. A permit or licensing denial based on political or economic discrimination is no less offensive to the Dormant Commerce Clause because it was at the direction of one political official. Indeed, it is worse because, as here, the action can be based on the motivations of a lone State actor, unchecked by the deliberative process of the State Legislature. That discriminatory motive could extend to any commodity that falls out of favor with a State's political regime, be it coal, non-organic produce, or ethanol-based fuels. The free-flow of interstate commerce cannot hang on whether an ambitious politician can score political points for opposing another State's product or commodity.

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman [and miner] shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them." *H. P. Hood & Sons*, 336 U.S. at 539. Washington's discriminatory embargo of Montana and Wyoming coal thus implicates the core purposes that underlie the Dormant Commerce Clause and constitutes a clear violation of the Constitutional

provision that enabled the Union.[37] This Court should grant leave to file the Bill of Complaint so that this dispute among the States can be resolved.

B. The Foreign Commerce Clause Requires Heightened Scrutiny When States Impact Foreign Trade in Contravention of U.S. Foreign Policy.

Washington's actions also offend the Foreign Commerce Clause. A close counterpart to the Dormant Commerce Clause, the Foreign Commerce Clause provides that Congress has the power to "regulate Commerce with foreign nations." U.S. Const. art I, § 8, cl. 3. This clause refers both to attempts to regulate the conduct of foreign companies and attempts to restrict the actions of American companies overseas. *Nat. Foreign Trade Council v. Natsios*, 181 F.3d 38, 79 (1st Cir. 1999) (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 317 (1851)). The Court applies an analysis similar to its Interstate Commerce Clause jurisprudence, but with even more force.

This Court has recognized that "Foreign commerce is pre-eminently a matter of national concern" that requires the Nation to speak with "one voice." *Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 448–49 (1979) (citations omitted). There is a special need for federal uniformity in issues involving foreign trade. *Id.* at 446, 453–54. As a result, "state restrictions burdening foreign commerce are subjected to a more

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[37] Montana and Wyoming also assert that Washington's embargo fails the balancing test articulated in *Pike v. Bruce Church, Inc*, 397 U.S. 137, 142 (1970).

rigorous and searching scrutiny." *South-Central Timber Development, Inc., v. Wunnicke*, 467 U.S. 82, 100 (1984); *see also Kraft Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71, 79 (1992) (recognizing that prohibition of state regulation of foreign commerce is "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated"); Laurence H. Tribe, American Constitutional Law § 6-21, at 469 (2d ed. 1988) ("[i]f state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than the case of interstate commerce").

State action violates the Foreign Commerce Clause 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) (emphasis original). Washington's policy of denying permits to prevent the construction of a coal port does both.

The unambiguous foreign policy of the United States is to support coal export. The federal government has made its position clear: exporting coal to Asia and other global markets is key to boosting the American economy and protecting our national security, thus, the current Administration's policy is to "export American energy all over the world."[38] Advancing this foreign policy, President Trump issued

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[38] Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), https://perma.cc/HS43-Z9PK.

Executive Order 13783 in 2017, articulating that natural resource development is crucial to "ensuring the Nation's geopolitical security."[39] The U.S. Secretary of Energy subsequently requested a strategy to assess opportunities to advance U.S. coal exports to international markets.[40] The resulting report indicated that there was great opportunity to export coal, especially from the Powder River Basin, to foreign markets, which would improve the U.S. balance of trade, support key allies, and boost the U.S. economy.[41] The report recommended that developing West Coast terminal capacity was critical to the United States' strategy to expand coal exports, and noted that, on "the West Coast, the limited capacity of export terminals has greatly limited the ability to export western U.S. coals."[42]

A strong export market for coal is not only the current Administration's foreign policy. President Obama also recognized the importance of coal exports, especially to Asia, which peaked at over 125 million tons in 2012.[43] Recognizing the country's export

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[39] Executive Order 13783 (March 28, 2017).

[40] Letter from Rick Perry to Greg Workman, (January 7, 2018), https://perma.cc/P993-YA6U.

[41] *Advancing U.S. Coal Exports*, National Coal Council, 2-10 (October 22, 2018), https://perma.cc/MR7C-RJE7.

[42] *Id.* at 6, 10.

[43] U.S. Energy Information Administration, Annual Coal Report 2017, Table 36.

potential for coal, President Obama called the United States "the Saudi Arabia of coal."[44]

Part of the United States National Security Strategy is to help allies become more energy independent. Thus, a key component of the National Security Strategy is to boost energy exports through coastal terminals like Millennium Bulk Terminal:

> The United States will promote exports of our energy resources, technologies, and services, which helps our allies and partners diversify their energy sources and brings economic gains back home. We will expand our export capacity through the continued support of private sector development of coastal terminals allowing increased market access and greater competitive edge for U.S. Industries.[45]

Washington's unilateral decision to block Montana and Wyoming—the largest coal producers in the United States—from accessing those foreign markets, frustrates both landlocked States and Asian allies, prevents the United States from speaking with "one voice," and contravenes clear federal directive. This outcome alone is sufficient reason for this Court to grant leave to file the Bill of Complaint.

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[44] David Farenthold and Michael Shear, *As Obama Visits Coal Country, Many Are Wary of His Environmental Policies*, Washington Post (April 25, 2010).

[45] *Advancing U.S. Coal Exports An Assessment of Opportunities to Enhance U.S. Coal*, National Coal Council, https://perma.cc/L9CV-L5PA.

II. Montana and Wyoming Have No Alternative Forum.

Under the second jurisdictional factor, this Court examines whether there is another forum where "there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972). Here, there is no other forum where these elements exist. Montana's and Wyoming's sovereign interests in being free from Washington's discrimination against their economic well-being are at stake here. Those interests can be litigated only in this Court, satisfying the second factor that the Court considers in determining whether to exercise its original jurisdiction. *See Mississippi*, 506 U.S. at 77.

Congress vested this Court with "original and *exclusive* jurisdiction of all controversies between two or more States." *Ibid.* (emphasis original) (quoting 28 U.S.C. § 1251(a)). Thus, while the private parties in the litigation in the Western District of Washington raised a Commerce Clause challenge to Washington's denial of the Section 401 Water Quality Certification, Congress' description of this Court's jurisdiction as exclusive for cases between States "necessarily denies jurisdiction of such cases to any other federal court," including the Washington district courts. *Id.* at 77–78. Furthermore, that litigation is not active so there is "no pending action" that raises the same issue or provides a forum to challenge Washington's actions under the Dormant Commerce Clause. *See Wyoming*, 502 U.S. at 452.

This Court previously found the exercise of original jurisdiction proper "without assurances, notably absent here, that a State's interest under the Constitution will find a forum for appropriate hearing and full relief." *Ibid.* Of note, this Court granted leave in *Wyoming* even though the private mining companies impacted by the law could have sued elsewhere because "[e]ven if such action were proceeding, however, Wyoming's interests would not be directly represented." *Ibid.*

The interests of Montana and Wyoming, specifically, cannot be directly represented anywhere but in this Court. There is no opportunity, much less assurance, that any other court will reach the Dormant Commerce Clause claims at issue in this case and it is certain that Wyoming and Montana will not receive *any* direct relief, let alone "full relief." Jurisdiction in this Court is even more critical in this case because of the important foreign policy interests of the United States at stake.

CONCLUSION

For the foregoing reasons, this Court should grant the Motion for Leave to File the Bill of Complaint.

Respectfully submitted,

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JANUARY 21, 2020

APPENDIX

APPENDIX

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APPENDIX A

Exhibit 299
Sally D. Toteff
1/11/2019

[Not Sent]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47775 • *Olympia, WA 98504-7775* • *(360) 407-6300*
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

September 6, 2017

Mr. Bill Chapman
Millennium Bulk Terminals-Longview
4029 Industrial Way
Longview, WA 98632

Ms. Kristin Gaines
Millennium Bulk Terminals-Longview
4029 Industrial Way
Longview, WA 98632

RE: U.S. Army Corps of Engineers (Corps) Reference #201001225
Status of Application for Section 401 Water

Quality Certification for the Millennium Bulk Terminal Longview Project

Dear Mr. Chapman and Ms. Gains:

As the timeframe for the decision on the Section 401 Water Quality Certification (WQC) for the Millennium Bulk Terminal-Longview (Millennium) coal export proposal is nearing (September 30, 2017), I am contacting you both to express concern regarding some of the remaining substantial gaps in the application package.

While the Millennium Team and the Department of Ecology (Ecology) Team are in frequent communication about gaps and needed information, the deadline is just weeks away. Given our experience with other complex projects and preparation of those WQCs, it does not appear there is adequate time for Millennium to provide the complete, necessary information in a timeframe that would allow for Ecology's review. It is Ecology's common practice to be transparent and proactively reach out to raise awareness with applicants in similar situations.

In review of the WQC application to date, the application was submitted July 18, 2016, to Ecology. It has been augmented by an Environmental Impact Statement issued April 28, 2017, as well as by reports, data, maps and other information requested by Ecology. On June 23, 2017, you withdrew Millennium's WQC, and then re-applied. In response, Ecology issued a second public notice regarding the WQC, and received an unprecedented 200,000 comments which are still being reviewed, considered and in some cases have

raised new concerns regarding potential impacts to water quality.

I appreciate that since late spring after the final Environmental Impact Statement was issued, Ecology's permit manager and Millennium's environmental manager or consultants have frequently communicated through telephone calls, meetings, electronic mail and site visits. During these communications, Ecology has identified the need for missing or updated reports, data and other information that provide absent technical details regarding the proposed construction, operation and maintenance of your proposal. Although submissions of new or updated information continue to be provided by Millennium to Ecology, key information to ensure water quality standards will be met is still pending submission and review.

As of this writing, the key pending pieces of missing information include, but are not limited to: (1) assurance of an appropriate dredge material disposal site for both the initial and maintenance dredge materials, (2) a wetland credit/debit analysis and boundary verification, (3) responses to our specific questions regarding the wetland mitigation plan, and (4) sufficiently detailed information and analyses necessary to understand, evaluate, and condition wastewater and stormwater discharges needed to assure compliance with Washington State water quality standards (or alternatively a NPDES waste discharge permit). Without complete information such as noted above, Ecology will not have reasonable assurance that the project will meet water quality standards. As our project manager has emphasized

from initial conversations and throughout the process, Ecology must have reasonable assurance to issue -- and ultimately defend -- a WQC.

Numerous construction, operation and maintenance activities will impact water quality and could potentially violate Washington State water quality standards. The impacts associated with the Millennium coal expert proposal exceed typical WQC requests in size and magnitude. For example, the proposal would remove 24 acres of wetlands, involve a number of in-water activities (including the new construction of over a thousand feet of two additional industrial docks, dredging and disposal of up to 350,000 cubic yards of river bottom, and discharging stormwater collected from the site that includes 80 acres of coal stock piles), and the project would involve continuous loading of coal into ships which has the potential for spills to the Columbia River. In addition to these impacts, the concurrent cleanup of the former Reynold's site adds another layer of complexity to the WQC for the Millennium proposal.

Thorough information regarding these activities is a necessary prerequisite for preparation of a comprehensive and defensible WQC. Because of the exceptionally large number of comments on the public notice, we anticipate this WQC analysis for your project will be closely scrutinized for gaps or flaws and have high likelihood of being legally appealed.

I want to assure you the priority for our Ecology Team is continuing to review incoming information and to identify options for the WQC decision that is due on September 30. If information, data or analyses --

particularly the items identified above -- are still lacking as of that date, Ecology will be unable to certify that the proposal will meet water quality standards. Accordingly, in that circumstance we would deny without it prejudice the WQC. As you may be aware, receipt of a denial without prejudice would not in any way preclude Millennium from resubmitting a request for a WQC at a later date. In our years of experience working on complex proposals, it is not unusual for an applicant to do this because of information gaps that were unable to be filled within the necessary timeframe.

As the Millennium Team and Ecology Permit Team continue working through the review process, please let me know if you would like to discuss the concerns identified within this letter or the WQC process. I would be happy to set up a conference call.

Sincerely,

/s/Sally Toteff
Sally Toteff
Southwest Region Director

By certified mail: #91 7199 9991 7037 0278 3355

cc: Danette Guy, U.S. Army Corps of Engineers
Glenn Grette, Grette Associates LLC

ecc: Polly Zehm, Ecology, Deputy Director
Rob Duff, Office of Financial Management
Loree' Randall, Ecology, Shorelands and Envionrmental Assistance Program
Brenden McFarland, Shorelands and Envionrmental Assistance Program

App. 6

Gordon White, Shorelands and Envionrmental Assistance Program
James DeMay, Ecology, Industrial Section

APPENDIX B

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

September 26, 2017

Millennium Bulk Terminals-Longview, LLC
ATTN: Ms. Kristin Gaines
4029 Industrial Way
Longview, WA 98632

RE: Section 401 Water Quality Certification Denial (Order No. 15417) for Corps Public Notice No. **2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

Dear Ms. Gaines:

The Washington State Department of Ecology (Ecology) has reached a decision on the Millennium Bulk Terminals-Longview request for a Section 401 Water Quality Certification for the proposed coal export terminal near Longview. After careful evaluation of the application and the final State Environmental Policy

Act environmental impact statement, Ecology is denying the Section 401 Water Quality Certification with prejudice.

The attached Order describes the specific considerations and determinations made by Ecology in support of this decision to deny the Certification with prejudice. Your right to appeal this decision is described in the enclosed denial Order.

Sincerely,

/s/Maia D. Bellon
Maia D. Bellon
Director

Enclosure

By certified mail [91 7199 9991 7034 8935 6995]

cc: Muffy Walker, U.S. Army Corps of Engineers
Danette Guy, U.S. Army Corps of Engineers
Glenn Grette, Grette Associates, LLC

APPENDIX C

ORDER# 15417
Corps Reference #NWS-2010-1225
Millennium Bulk Terminals-Longview, LLC
Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

[Dated September 26, 2017]

IN THE MATTER OF DENYING	)
SECTION 401 WATER QUALITY	)
CERTIFICATION TO	)
Millennium Bulk Terminals-Longview, LLC in accordance with 33 U.S.C. §1341 (FWPCA § 401), RCW 90.48.260, RCW 43.21C.060, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC	)

TO: Millennium Bulk Terminals-Longview, LLC
Attention: Ms. Kristin Gaines
4029 Industrial Way
Longview, Washington 98632

On February 23, 2012, Millennium Bulk Terminals-Longview, LLC (Millennium) submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) requesting a Section 401 Water Quality Certification to construct a coal export terminal in Longview, Washington. Then on

January 28, 2013, Millennium sent a letter to the U.S. Army Corps of Engineers (Corps) and Ecology in which Millennium withdrew the request for the Section 401 Certification. Millennium stated that it would submit a new request when the Environmental Impact Statement (EIS) process concluded. In addition, on February 6, 2013, Millennium submitted an Ecology Water Quality Certification Processing Request form stating that it wished to withdraw its request and would resubmit near the end of the EIS process.

On July 18, 2016, Millennium submitted a new JARPA and request for Section 401 Water Quality Certification. A notice regarding this request was distributed as part of a Corps joint public notice on September 30, 2016. On June 22, 2017, Ecology received a withdrawal/reapply form from Millennium, which triggered another public notice that was issued on June 27, 2017.

Millennium proposes to construct and operate a coal export terminal (Project) in and adjacent to the Columbia River (at approximately river mile 63) that would transfer up to a nominal 44 million metric tons per year (MMTPY) of coal from trains to ocean-going vessels. The completed coal export terminal would cover approximately 190 acres of the approximately 540-acre property. The Project would consist of two docks, ship loading systems, stockpiles and equipment, rail car unloading facilities, an operating rail track, rail storage tracks to park up to eight trains, associated facilities, conveyors, and necessary dredging. The Project would be constructed in two stages over several years.

- Stage 1 of the Project would consist of facilities to unload coal from trains, stockpile the coal on site, and load coal into ocean-going vessels at one of the two new docks. During Stage 1, Millennium would construct two docks (Dock 2 and 3), one ship loader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, Project site ground improvements, and associated facilities and infrastructure. Once Stage 1 is completed, the Project would be capable of a throughout capacity of a nominal 25 MMTPY.
- During Stage 2, MBTL would construct an additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughout by approximately 19 MMTPY, to a total nominal throughput of 44 MMTPY.

The main elements of Stage 1 development would include:

- Rail bed.
- Rail loop with arrival and departure tracks to include one operating track (turn around track) and eight rail storage tracks.
- One tandem rotary unloader (capable of unloading two rail cars) for operations, and one tandem rapid discharge unloader to be used during startup and maintenance.
- Two coal stockpile pads, Pads A and B.

- Two rail-mounted luffing/slewing stackers and associated facilities for Pads A and B.
- Two rail-mounted bucket-wheel reclaimers and associated facilities for Pads A and B.
- Two shipping docks (Dock 2 and Dock 3), with one ship loader and associated facilities on Dock 2.
- Conveyors, transfer stations, and surge bin from the stockpile pads to the ship loading facilities.
- In-bound and out-bound coal sampling stations.
- Support structures, electrical transformers, switchgear and equipment buildings, and process control systems.
- Upland facilities, including roadways, service buildings, water management facilities, utility infrastructure, and other ancillary facilities.

The main elements of Stage 2 development would include:

- Associated conveyors and transfer stations to the stockpile Pads C and D from the rail receiving station.
- Two additional coal stockpile pads, Pads C and D.
- Two additional rail-mounted luffing/slewing stackers and associated facilities.
- Two additional rail-mounted bucket-wheel reclaimers and associated facilities.
- One additional ship loader and associated facilities on Dock 3.
- Conveyors, transfer stations, and surge bins from stockpile Pads C and D to the ship loading facilities.

The Project proposes impacting over 32 acres of wetlands (24 acres of which will be new impacts) and almost 6 acres of ditches. To offset these impacts Millennium has proposed to construct a wetland mitigation site that encompasses approximately 100 acres. The Project will also have 4.83 acres of new overwater coverage, and includes constructing an off-channel slough mitigation site to address those impacts.

I. AUTHORITIES

In exercising its authority under 33 U.S.C. § 1341, RCW 43.21C.060, and RCW 90.48.260, Ecology has examined this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pre-treatment effluent limitations as provided under 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306, and 307).

2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. § 1313 and by Chapter 90.48 RCW, and with other applicable state laws.

3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

4. Conformance with applicable State Environmental Policy Act (SEPA) policies under RCW 43.21C.060 and WAC 173-802-110.

Pursuant to the foregoing authorities and in accordance with 33 U.S.C. § 1341, RCW 90.48.260, RCW 43.21C.060, Chapter 173-200 WAC, Chapter 173-201A WAC, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC, as more fully explained below, Ecology is denying the Millennium Bulk Terminals-Longview request for Section 401 Water Quality Certification with prejudice.

II. STATE ENVIRONMENTAL POLICY ACT (SEPA)

The Final Environmental Impact Statement (FEIS) issued by Cowlitz County and Ecology on April 28, 2017, identified nine areas of unavoidable and significant adverse impacts that would result from the construction and operations of the Project. As analyzed in the FEIS, the detrimental environmental consequences related to these impacts cannot be reasonably mitigated. Further, the adverse impacts to the built and natural environments conflict with Ecology's SEPA policies found in WAC 173-802-110. These policies state:

> (1)(a) The overriding policy of the department of ecology is to avoid or mitigate adverse environmental impacts which may result from the department's decisions.
>
> (b) The department of ecology shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(i) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(ii) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(iv) Preserve important historic, cultural, and natural aspects of our national heritage;

(v) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(vi) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(vii) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The department recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(d) The department shall ensure that presently unquantified environmental amenities and

values will be given appropriate consideration in decision making along with economic and technical considerations.

A. Significant Unavoidable Adverse Impacts

1. Air Quality. The FEIS found a significant increase in cancer risk for areas along rail lines and around the Project site in Cowlitz County where diesel emissions primarily from trains would increase. The study found that residents in some areas in Cowlitz County, including those living in portions of the Highlands neighborhood, would experience an increase in cancer risk rate up to 30 cancers per million. These levels of increased risk exceed the approvability criteria in WAC 173-460-090 for new sources that emit toxic air pollutants. Although WAC 173-460 only applies to stationary sources, the health risks from mobile sources in this case, primarily locomotives, would be considered significant using the same approvability criteria. Thus, the FEIS concluded the emission of diesel particulate primarily from train locomotives would be a significant unavoidable adverse impact. As the FEIS explained, this impact could be mitigated, but not eliminated, by use of cleaner burning Tier 4 locomotives. However, use of such locomotives is outside the control of Millennium and may not occur for decades because use of older locomotives is currently allowed under federal law. Other mitigation measures identified in the FEIS related to air quality, such as use of best management practices and compliance with permits, would not

reduce diesel emissions from Project related locomotives.

The increased cancer risk associated with the Project is a significant adverse unmitigated impact that is inconsistent with the following substantive SEPA policies in WAC 173-82-110:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

2. Vehicle Transportation. 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 crossings in Cowlitz County. With current track infrastructure on the Reynolds Lead and BNSF Railway (BNSF) spur, Project-related trains in 2028 would increase the total gate downtime by over 130 minutes during an average day at the six crossings listed below. Project-related trains would cause these crossings to operate at

Level of Service E or F[1] if one Project-related train traveled during peak traffic hours through the following crossings:

- Project area access opposite 38th Avenue
- Weyerhaeuser access opposite Washington Way
- Industrial Way
- Oregon Way
- California Way
- 3rd Avenue

Millennium and BNSF may make track improvements to the Reynolds Lead and BNSF spur that would allow trains to travel faster through these intersections and thereby reduce gate downtimes. However, even with these planned track improvements to the Reynolds Lead and BNSF Spur, the Project at full build out in 2028 would still adversely impact and add delays at four crossings, and cause the following crossings to operate at Level of Service E or F if two proposed Project-related trains traveled through them during peak traffic hours:

- Project area access opposite 38th Ave

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[1] "Level of Service" is a report card rating based on the delay experienced by vehicles at an intersection or railroad crossing. Level of Service A, B, and C indicate conditions where traffic moves without substantial delays. Level of Service D and E represent progressively worse operating conditions. Level of Service F represents conditions where average vehicle delay has become excessive and demand has exceeded capacity.

- Weyerhaeuser access opposite Washington Way
- 3rd Avenue
- Dike Road

On the BNSF main line in Cowlitz County, the increased Project-related trains at full build out in 2028 could adversely impact vehicle transportation at two crossings during peak traffic hours. The following crossings would operate Level of Service E if two Project-related trains travel during the peak hours:

- Mill Street
- South River Road

Delay of emergency vehicles at rail crossing would also increase because of additional Project-related trains.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these impacts. These measures include funding crossing gates at the intersection of Industrial Way, holding safety review meetings, and notifying agencies about increases in operations on the Reynolds Lead. However, these measures will not reduce or eliminate the vehicle delays identified in the FEIS. Vehicle delays could be reduced by further improvements to rail and road infrastructure, however, it is currently unknown when or if such improvements would occur. Therefore, when the Millennium Project is at full operation in 2028, unavoidable and significant adverse impacts would occur on vehicle

transportation at certain crossings in Cowlitz County including delays of emergency vehicles. This impact is inconsistent with the following substantive SEPA policies:

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.
- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

3. Noise and Vibration. The FEIS found that there would be significant unavoidable adverse impacts to residences near four public at-grade crossings along the Reynolds Lead and BNSF spur from train-related noise. Train-related noise levels would increase from train operations and locomotive horn sounding intended for public safety.

Residences near the at-grade crossings at 3rd Avenue, California Way, Oregon Way, and Industrial Way would experience increased daily noise levels that would exceed applicable noise criteria per Federal Transportation Administration/Federal Rail Administration guidance.

Approximately 229 residences would be exposed to moderate noise impacts, and approximately 60 residences would be exposed to severe noise impacts. Although these impacts would be reduced near the Industrial Way and Oregon Way crossings if a grade-separated intersection is constructed there as currently proposed, the proposal has not yet received permits and its completion date is unknown.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these train-related noise impacts. These measures include funding two "quiet crossings" at Oregon Way and Industrial Way grade crossings by installing crossing gates, barricades, and additional electronics. This proposed "quiet crossing" is not the same as a Quiet Zone, which requires the approval of the Federal Railroad Administration. The reduction of noise pollution from the proposed "quiet crossing" is unknown because Millennium trains may still be required to sound their horns at the intersections. Other measures include requiring Millennium to work with the City of Longview, Cowlitz County, Longview Switching Company, the affected community, and other applicable parties to apply for and implement a Quiet Zone that would include the 3rd Avenue and California Avenue crossings. However, as a Quiet Zone requires the approval of the Federal Railroad Administration, it is beyond the control of Millennium and it is unknown if it will ever be implemented. Consequently, Quiet

Zones are not considered an applicable mitigation measure.

The FEIS states that, if the Quiet Zone is not implemented, Millennium would fund a sound-reduction study to identify ways to mitigate the moderate and severe impacts from train noise. However, it is unknown who would fund, implement, and maintain recommendations to mitigate moderate and severe noise impacts identified in the sound noise reduction study. The study itself does not mitigate the impacts. The Project's significant adverse impacts from noise are inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

4. Social and Community Resources. The FEIS found that social and community resources would be significantly and adversely impacted by increased noise, vehicle delays, and air pollution. Impacts from the construction and operation of the

Project would impact minority and low-income populations by causing disproportionately high and adverse effects. Impacts from noise, vehicle delay, and diesel particulate matter inhalation risk would affect the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington.

a. Adverse Health Impact from Increased Cancer Risk Rate: Project-related trains and other operations would increase diesel particulate pollution along the Reynolds Lead, BNSF Spur, and BNSF mainline in Cowlitz County at levels that would result in increased cancer risk rates. The modeled cancer risk rate in the FEIS found a majority of the Highlands neighborhood would experience an increased cancer risk rate, varying from 3% to 10%. Use of Tier 4 locomotives, which produce less diesel pollution, by BNSF would reduce but not eliminate diesel particulate matter emissions and the associated potential cancer risk in the Highlands neighborhood. However, requiring Tier 4 locomotives is outside the control of Millennium and may not occur for decades. Therefore, the Project's disproportionately high adverse effects related to increased cancer risk rates from diesel particulate matter inhalation on minority and low-income populations would be unavoidable.

b. Adverse Noise Impact: The Project would add 16 trains per day on the Reynolds Lead and increase average daily noise levels, which would exceed applicable criteria for noise impacts and

cause moderate to severe impact to 289 residences in the Highlands neighborhood. Approval, funding, and construction of Quiet Zones for four highway and rail intersections would reduce noise levels. However, there is no sponsor(s) identified to apply for, fund, and maintain Quiet Zones that would reduce noise levels at the four rail crossings. Quiet Zones are outside the control of Millennium and require approval from the Federal Railroad Administration. Therefore, Project-related trains would cause significant adverse unavoidable impacts to portions of the Highlands neighborhood and cause a disproportionately high adverse effect on minority and low-income populations.

c. Adverse Vehicle Traffic Impact: Project-related trains would increase vehicle delays at highway and rail intersections within the Highlands neighborhood. With the current track infrastructure on the Reynolds Lead, a Millennium-related train traveling during the peak traffic hours would result in a vehicle-delay impact at four public at-grade crossings in or near the Highlands neighborhood by 2028. This would constitute a disproportionately high adverse effect on minority and low-income populations. If planned improvements to the Reynolds Lead are made, the adverse impacts related to vehicle delay could be reduced but not eliminated. However, rail improvements have not received permits and their completion is unknown. Therefore, Millennium's disproportionately high adverse effects to vehicle traffic on minority and low-income populations would be unavoidable.

5. Rail Transportation. The FEIS found that the Project would cause significant adverse effects on rail transportation that cannot be mitigated. At full build out of the Project, 16 trains a day (8 loaded and 8 empty) would be added to existing rail traffic. Three segments on the BNSF main line routes in Washington (Idaho/Washington State Line–Spokane, Spokane–Pasco, and Pasco–Vancouver) are projected to exceed capacity with the current projected baseline rail traffic in 2028. Adding the 16 additional Millennium-related trains would contribute to these three segments exceeding capacity by 2028, based on the analysis in the FEIS and assuming existing infrastructure. As described in the FEIS, Millennium would mitigate some of the impacts by notifying BNSF and Union Pacific (UP) about upcoming increases in operations at the Millennium site. This proposed mitigation measure is informational and does not commit BNSF or UP to take action to increase capacity.

BNSF and UP could make necessary investments or operating changes to accommodate the rail traffic growth, but it is unknown when these actions would be taken or permitted. Improving rail infrastructure is outside the control of Millennium and cannot be guaranteed. Under current conditions Millennium-related trains would contribute to these capacity exceedances at three rail segments on the main line and could result in an unavoidable and significant adverse impact on rail transportation, including delays and congestion.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

6. Rail Safety. 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. As described in the FEIS, Millennium would notify BNSF and UP about upcoming increases in operations at the Millennium site. However, this notification measure does not commit BNSF or UP to take action or make changes that would reduce accident rates.

To reduce some of the impacts to rail safety, the Longview Switching Yard, BNSF, and UP could improve rail safety through investments or operational changes, but it is unknown when or whether those actions would be taken or permitted. Improving rail infrastructure to increase rail safety is outside the control of Millennium and cannot be guaranteed. Therefore, the 22 percent increase to the rail accident rate over baseline conditions attributable to Millennium would result in

unavoidable and significant adverse impacts on rail safety.

This impact is inconsistent with the following substantive SEP A policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

7. Vessel Transportation. The FEIS found that the Project would have significant adverse effects on vessel transportation that cannot be mitigated. Millennium would add 1,680 ship transits to the current 4,440 ship transits on the Columbia River per year, for a total of 6,120 at full build out. Thus, the Project would be responsible for over one quarter of the traffic in the Columbia River.

Based on marine accident transportation modeling, the FEIS found the increased vessel traffic would increase the frequency of incidents such as collisions, groundings, and fires by approximately 2.8 incidents per year. While the chance that an incident would result in serious damage or spill is low, if a spill were to happen, the impacts to the

environment and people would be significant and unavoidable.

An increase in vessels calling at the proposed new docks increases the risk of vessel-related emergencies, such as fire or vessel allision. An increase in vessels calling at the new docks also increases risk of spills from refueling ships at berth, although Millennium has stated there would be no refueling at the new docks. The FEIS proposes a mitigation measure that if refueling at the docks were to start, the company would notify Cowlitz County and Ecology. Another mitigation measure in the FEIS involves Millennium's attending at least one Lower Columbia Harbor Safety Committee meeting per year.

Although these proposed mitigation measures would support communication and awareness, they would not reduce environmental harm or the impact of an incident.

If a Millennium-related vessel incident such as a collision or allision were to occur, impacts could be adverse and significant, depending on the nature and location of the incident, the weather conditions at the time, and whether any oil were discharged. Although the likelihood of a serious Millennium-related vessel incident is low, the consequences would be severe and there are no mitigation measures that can completely eliminate the possibility of an incident or the resulting impacts. *See* WAC 197-11-794(2) (an impact may be significant if its chance of occurrence is not great

but the resulting environmental impact would be severe if it occurred).

This adverse impact is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

8. Cultural Resources. The FEIS found that construction of the coal export terminal would demolish the Reynolds Metals Reduction Plant Historic District, which would be an unavoidable and significant adverse environmental impact. Construction of the Project would demolish 30 of the 39 identified resources that contribute to the historical significance of the Historic District. The anticipated adverse impacts on these resources would diminish the integrity of design, setting, materials, workmanship, feeling, and association that make the Historic District eligible for listing in the National Register of Historic Places.

A Memorandum of Agreement is currently being negotiated among the Corps, Cowlitz County, the Washington Department of Archaeologic and Historic Preservation, the City of Longview, the

Bonneville Power Administration, the National Park Service, potentially affected Native American tribes, and Millennium in a separate federal process. The Memorandum may resolve this impact in compliance with Section 106 of the National Historic Preservation Act of 1966. However, there is no indication when or if this Memorandum will be signed by all parties. Without the Memorandum, the impacts to the Reynolds Metal Reduction Plant Historic District are considered adverse, significant, and unavoidable.

Demolition of historic properties without mitigation is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.

9. Tribal Resources. The FEIS found that construction and operation of the Millennium coal export terminal could result in unavoidable indirect impacts on tribal resources. Tribal resources refer to tribal fishing and gathering practices and treaty rights. These resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.

Construction activities such as building new docks, river bottom dredging, and pile driving would cause physical and behavioral responses in fish that could result in injury, and would affect aquatic habitat.

Fish stranding associated with wakes from the additional 1,680 vessel trips per year would also cause injury. Eulachon would potentially be impacted by the initial and maintenance sediment dredging.

Fugitive coal dust particles generated by the Millennium operations and additional trains would enter the aquatic environment through movement of coal into and around the Project area and during rail transport. Fugitive coal dust and potential spills would increase suspended solids in the Columbia River.

These impacts could reduce the number of fish surviving to adulthood and returning to Zone 6 of the Columbia River, and could affect the number of fish available for harvest by Native American Tribes.

The increase in 16 additional Millennium-related trains per day travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes would restrict access to 20 tribal fishing sites set aside by the U.S. Congress above Bonneville Dam in the Columbia River. There are additional access sites that are not mapped that would also be impacted.

To reduce impacts to tribal resources from construction, Millennium could be required to minimize underwater noise during pile driving, conduct advance underwater surveys for eulachon prior to in-water work, and conduct fish monitoring prior and during dredging.

These mitigation steps are inadequate because although noise impacts from construction would be reduced, they would not be eliminated, and fish behavior could be altered and affect the number of fish available for harvest by Native American Tribes.

Improving rail infrastructure for access to tribal fishing sites along the Columbia River above Bonneville Dam is outside the control of Millennium. The additional Project-related trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes could restrict access to tribal fishing areas in the Columbia River. Because other factors besides rail operations affect fishing opportunities, such as number of fishers, fish distribution, and the timing and duration of fish migration periods, the extent to which Project-related rail operations would affect tribal fishing is difficult to quantify. However, SEPA policies state that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Consistent with this policy, Ecology concludes that Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources.

Impacts to tribal resources are inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.

- Preserve important historic, cultural, and natural aspects of our national heritage.
- The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

III. SECTION 401 WATER QUALITY CERTIFICATION

Pursuant to Section 401 of the Clean Water Act, in order for Ecology to issue a water quality certification it must have reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law. Consequently, an applicant must submit adequate information regarding a project for agency review before Ecology can determine compliance with the state water quality standards and other applicable regulations. Millennium's current application and supplemental documents fails to demonstrate reasonable assurance in the following areas:

A. Wetlands Impacts and Mitigation

The Project would impact (fill) 32.31 acres of wetlands, 8.1 acres of which occurred prior to Millennium's tenancy of the site, and 0.11 of which would be impacted at the mitigation site. The impacts include 28.32 acres of Category III wetlands and 3.99 acres of Category IV wetlands. For the reasons stated below, Millennium failed to demonstrate that the impacts and mitigation associated with the wetlands within the Project area will comply with Washington State water

quality standards. Thus, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

1. Mitigation Plan. The draft wetland mitigation plan is inadequate and does not demonstrate that the proposed mitigation will offset the Project's wetland impacts. Millennium submitted a conceptual mitigation plan to Ecology on June 8, 2017 (*Millennium Coal Export Terminal, Longview, Washington Coal Export Terminal including Docks 2 and 3 and Associated Trestle Conceptual Mitigation Plan—Wetlands and Aquatic Habitat,* dated May 25, 2017). In response to Ecology's questions, Millennium submitted additional information on September 20, 2017. However, the submitted information continues to be deficient because it lacks an adequate credit/debit analysis, a boundary verification, and adequate hydrologic information regarding the mitigation site.

2. Wetland Boundaries at the Impact Site. Millennium has not demonstrated that the boundaries of the wetlands to be impacted have been verified by the Corps. There is no jurisdictional determination (JD) from the Corps stating whether the wetlands are waters of the United States or whether the Corps agrees with the boundaries as shown in the delineation report (Millennium Coal Export Terminal, Longview, Washington, Coal Export Terminal Wetland and Stormwater Ditch Delineation Report – Parcel 619530400, dated September 1, 2014). Millennium's

application therefore does not adequately quantify the extent of the wetland impacts and does not adequately demonstrate that the proposed mitigation will offset those impacts.

3. Credit-Debit Analysis. This analysis is needed to determine whether proposed mitigation would adequately offset the Project's wetland impacts. It is especially important for a project of this scale, and where the impacted wetlands were rated using what is now an outdated version of the wetland rating system. The credit-debit analysis Millennium submitted to Ecology on September 20, 2017, did not include scoring forms for any of the wetlands to be impacted. Without these forms, Ecology cannot evaluate the credit-debit analysis. Millennium has not provided a complete analysis to Ecology, thereby failing to demonstrate that the proposed mitigation would be adequate.

4. Hydrologic and Soil Investigations. The conceptual mitigation plan states that: "The nature of this surface water will be further investigated as part of planned hydrologic investigations to support final Site design." The plan further states that "hydrologic data are being collected." The plan also states that: "Additional, site-specific soil investigations are planned at the Mitigation Site to inform final mitigation design." Millennium has not provided the results of these hydrologic and soil analyses to Ecology. In its September 20, 2017, responses to Ecology's questions about the proposed mitigation site, Millennium stated that it is still in the process of collecting hydrologic and soil data

and that it will submit a technical report once compilation of the data has been completed. Because Millennium has not submitted detailed information supported by data about the hydrologic and soil conditions at the proposed mitigation site, Millennium has not demonstrated that the site is suitable and can provide adequate mitigation.

B. Stormwater and Wastewater

Sufficiently detailed information and analyses necessary to understand, evaluate, and condition wastewater and stormwater discharges are needed to assure compliance with Washington State water quality. Without complete information such as that noted below, Ecology does not have reasonable assurance that the Project will meet water quality standards.

1. Wastewater Characterization. Wastewater characterization information is necessary for Ecology to evaluate the impact of discharges from the Project on the receiving water (surface water, ground water, and sediments) and to determine the need for effluent limits, monitoring requirements, and other special conditions to ensure that the Project will meet state water quality standards. This information is typically required in an application for a National Pollutant Discharge Elimination System (NPDES) permit (WAC 173-220-040 and 40 C.F.R. § 122.21).

In response to Ecology's requests, Millennium submitted additional information on September 20, 2017. However, the submittals still do not provide

detailed information to adequately characterize process wastewater and stormwater that will be generated at the site, including:

- Sources of wastewater (points of generation).
- Estimated wastewater volumes.
- Estimated pollutant concentrations.

2. All Known, Available and Reasonable Methods of Prevention, Control and Treatment (AKART) and Engineering Reports. AKART is required by three state statutes dealing with water pollution and water resources (Chapter 90.48 RCW, Chapter 90.52 RCW, and Chapter 90.54 RCW) and the state NPDES regulations that implement these laws (WAC 173-220). These laws and regulations state that in order to ensure the purity of all waters of the state and regardless of the quality of the waters of the state, discharges must be treated with all known, available, and reasonable methods of prevention, control, and treatment.

Chapter 173-240 WAC requires submittal of engineering reports and plans for new and modified industrial wastewater conveyance, discharge, and treatment facilities. Industrial wastewater includes contaminated stormwater. Ecology uses the information in the engineering report to determine whether AKART is being met and to ensure that effluent from the Project will meet applicable effluent limitations to protect aquatic life.

Millennium's submittals, including the submittal of September 20, 2017, did not provide sufficient

information to determine whether AKART will be met for both process wastewater and stormwater generated from the Project. The following is a list of information deficiencies:

- The current AKART analysis does not address the wastewater generated during construction and operation of the Project (i.e., the current AKART analysis addresses only existing Millennium operations).
- Specific best management practices (BMPs) for stormwater management on site, at and near rail lines, and for rail car unloading were not provided.
- Engineering reports were not submitted for the following:
  - Stormwater collection and treatment facilities (including dock and trestle).
  - The new wastewater treatment system.
  - Any proposed modifications to the existing wastewater treatment system.
  - Changes to hydraulic loading through the existing wastewater treatment system and through the conveyance and outfall structures.

3. Mixing Zone. Ecology may authorize a mixing zone to meet water quality criteria once it has been determined that AKART has been met (WAC 173-201A-400). Water quality criteria must be met at the edge of a mixing zone boundary. Ecology uses the dilution factors determined for each mixing zone in analyzing the potential for

violation of water quality standards and to derive effluent limitations as necessary.

Millennium's submittals did not provide updated mixing zone information, which Ecology would need in order to determine potential to violate water quality standards. Missing information includes a new mixing zone analysis to evaluate changes in dilution factors due to changes in the final effluent at Outfall 002A and updated receiving water information.

4. Construction. Contaminated stormwater and ground water will be generated during construction of the Project. Ecology needs sufficient information to evaluate the impact of construction activities and the discharges from these activities on waters of the state. This is information that is necessary for reasonable assurance and to demonstrate AKART as discussed above.

Millennium's submittals provided very little information concerning the unique construction of the Project. Missing information includes the following:

- How compaction of soils will potentially impact groundwater and surface water.
- Specific construction BMPs.
- Construction stormwater and groundwater characterization information, including estimated volumes and pollutant concentrations.
- Whether construction wastewater will be adequately treated.

5. Antidegradation. The Clean Water Act requires that state water quality standards protect existing uses by establishing the maximum levels of pollutants allowed in state waters. The antidegradation process helps prevent unnecessary lowering of water quality. Washington State's antidegradation policy follows the federal regulation guidance and has three tiers of protection. Tier II (WAC 173-201A-320) is used to ensure that waters of a higher quality than water quality criteria are not degraded unless such lowering of water quality is necessary and in the overriding public interest. A Tier II analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body.

Millennium's submittals did not include a detailed Tier II analysis for process wastewater and stormwater to determine whether the Project has the potential to cause measurable degradation at the edge of the chronic mixing zone.

Ecology notified Millennium during various meetings, conference calls, and site visits during 2017 (June 8, June 19, June 28, August 16, August 29, and September 8, 2017) that detailed information regarding the stormwater and process wastewater would need to be submitted to Ecology in order to provide reasonable assurance that the discharges from the Project would meet state water quality standards.

C. Water Rights

The Millennium proposal includes operational descriptions for ongoing reuse of stormwater for industrial dust control. If storm water is collected and reused for a beneficial use, a water right permit would be required in accordance with Chapter 90.03 RCW.

The Millennium property formerly supported the Reynolds aluminum smelter. During the operations as an aluminum smelter, Reynolds had three water right claims and six water right certificates with a combined total annual quantity (Qa) of 31,367 acre-feet per year at a withdrawal rate of 23,150 gallons per minute (Qi). The Reynolds smelter closed in 2000.

These claims and certificates are now owned by Northwest Alloys, who purchased the property from Reynolds in the early 2000s. No information has been provided to Ecology that documents continued beneficial use of water since about the early 2000s.

In December 2016, Ecology met with Millennium and requested records and other relevant information to document what the current and recent water uses have been on the Millennium property. To elate, Millennium has not provided this information. If these water rights have been partially or fully relinquished, Millennium would need to apply for and obtain the necessary water rights to legally put water to beneficial use at the Project site for its proposed operations.

As of September 26, 2017, no information has been provided by Millennium to Ecology in order to quantify the extent and validity (or continued beneficial use) of the existing water rights that are appurtenant to the

property, and no water right application(s) have been received by Ecology requesting any new use of water or change in beneficial use(s) of water.

Without a water right, Ecology does not have reasonable assurance that Millennium will be able to legally carry out its proposal.

D. Toxics Cleanup

The proposed location for the Project is the former Reynolds Metals aluminum smelter site. This is a Model Toxics Control Act cleanup site. The principal contaminants are fluoride, polycyclic aromatic hydrocarbons (PAHs), cyanide, and total petroleum hydrocarbons (TPHs). Millennium and Northwest Alloys (a subsidiary of Alcoa) are potentially liable persons (PLPs) for the site. Alcoa owns the property. Millennium leases the property from Alcoa. The PLPs have been working to define the extent of the contamination at the site and evaluate the potential cleanup alternatives. Public notice of a draft cleanup action plan outlining the proposed cleanup was issued in March 2016. Ecology has been working with the PLPs to provide additional sampling along the Columbia River to address comments received on the draft cleanup action plan. To date, the cleanup action plan and consent decree have not been finalized.

Portions of the Project's infrastructure are located on contaminated soil and a historic landfill at the site. The majority of the site contains contaminated ground water. Proposed construction and operation of the Project would likely alter the migration of contaminated ground water at the site. The ballast that

will be used during construction could force ground water to the surface with potential for discharge to the Columbia River.

Millennium's submittals do not provide sufficient information to evaluate the impact of the potential discharge of contaminated storm water and ground water during the construction and operation of the Project. As a result, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

YOUR RIGHT TO APPEAL

You have a right to appeal this Denial Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Denial Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the elate of receipt of this Order:

- File your appeal and a copy of this Denial Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Denial Order on Ecology in paper form–by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

ADDRESS AND LOCATION INFORMATION

Street Addresses	**Mailing Addresses**
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503 **Pollution Control Hearings Board** 1111 Israel RD SW, Suite 301 Tumwater, WA 98501	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608 **Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

/s/Maia D. Bellon
Maia D Bellon, Director
Department of Ecology

9/26/17
Date

APPENDIX D

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

October 23, 2017

Kristin Gaines
Millennium Bulk Terminals–Longview, LLC
4029 Industrial Way
Longview, WA 98632

RE: Point of Contact for Communication between Millennium Bulk Terminals-Longview and Washington State Department of Ecology

Dear Ms. Gaines:

This letter responds to recent requests the Department of Ecology (Ecology) has received regarding technical assistance for additional permit applications for the Millennium Bulk Terminal-Longview (Millennium) proposed coal export terminal. One request came from Millennium's consultant at American Multinational Engineering Firm related to an air quality permit application, and the other request was from the

Millennium team related to a National Pollutant Discharge Elimination System permit application.

As you know, on September 26, 2017, Ecology denied the Section 401 Water Quality Certification requested by Millennium. The denial of this permit was based on the Clean Water Act and the State Environmental Policy Act.

In considering future permit requests from Millennium for the proposed coal export terminal, Ecology would be required to follow all relevant underlying laws. Specifically, the State Environmental Policy Act would require consideration of the findings of the April 28, 2017, Final Environmental Impact Statement (EIS) prepared by Cowlitz County and Ecology. The EIS identified the following nine unavoidable, un-mitigatable and adverse impacts related to the Millennium proposal:

- Increases of train-related noise to residences near four public at-grade crossings along the Reynolds Lead and BNSF Railway spur.
- Vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County.
- An increase in cancer risk for areas along rail lines near the project site and in Cowlitz County from increased diesel emissions primarily from trains.
- Impacts to the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington from increases of noise, vehicle delays, and

inhalation cancer risk from diesel particulate matter.

- Exceedances of rail line capacity at three rail segments on the main line from adding 16 trains a day to Washington rail traffic.
- An increase to the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington from Millennium-related trains.
- Increases to vessel related emergencies and vessel accidents from Millennium-related vessels.
- Demolition of the Reynolds Metals Reduction Plant Historic District.
- Delayed access to 20 managed tribal fishing sites along the Columbia River from increased rail traffic, and impacts to tribal resources from the construction and operation of the proposed facility on aquatic resources.

Although Ecology cannot prevent Millennium from filing future permit applications for the proposed coal export terminal, these EIS findings likely preclude Ecology from approving such applications. Therefore, at this time, Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal.

If you have any questions regarding future permit applications, please direct those questions through your attorneys to Mr. Tom Young at the Washington Attorney General's Office. Additionally, Mr. Young will serve as Ecology's point of contact in regard to the legal challenge that Millennium has indicated it will file

against Ecology, regarding the denial of the Section 401 Water Quality Certification.

Sincerely,

/s/Maia D. Bellon
Maia D. Bellon
Director

cc: Tom Young, Attorney General's Office

APPENDIX E

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHING TON
AT TACOMA

NO. 3:18-cv-05005-RJB

[Dated February 28, 2018]

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,	)
Plaintiffs,	)
and	)
BNSF RAILWAY COMPANY,	)
Plaintiff-Intervenor,	)
vs.	)
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,	)
Defendants,	)
and,	)
WASHINGTON ENVIRONMENTAL COUNCIL, COLUMBIA RIVERKEEPER, FRIENDS OF THE COLUMBIA GORGE, CLIMATE SOLUTIONS and, SIERRA CLUB,	)
Defendant-Intervenors.	)

DECLARATION OF ELAINE PLACIDO, DIRECTOR OF COMMUNITY SERVICES, COWLITZ COUNTY

I, Elaine Placido, pursuant to 28 U.S.C. § 1746, do hereby state and declare as follows:

1. My name is Elaine Placido, and I am the Director of Community Services at the Department of Building and Planning for Cowlitz County, Washington. I am over the age of 18 years and competent to testify in all respects.

2. I have worked in permitting and environmental review for eight years. I have worked at the Cowlitz County Department of Building and Planning since 2011, and I have been the Director since July 2013. Prior to my role as Director, I was the Operations Manager at the Cowlitz County

Department of Building and Planning. I have a doctorate in Public Administration from Valdosta State University.

3. As Director, I led or co-led preparation of three Environmental Impact Statements for projects in Cowlitz County. I routinely review and issue a variety of state and local permits including shoreline permits, conditional use permits, and critical areas permits. I'm familiar with state and local impact evaluation, mitigation, and permit decision-making processes, including State Environmental Policy Act (SEPA) review. I've led, co-led, or participated in hundreds of SEPA reviews. I also routinely work with the Washington State Department of Ecology (Ecology) on permitting and environmental review.

4. I am very familiar with the proposed Millennium Bulk Terminals-Longview (Millennium) coal export terminal (the "Terminal") and have been personally involved with the environmental review and permitting of the Terminal since 2013. When I became Director in 2013, Cowlitz County and Ecology had just started work, as co-lead agencies, on a SEPA Draft Environmental Impact Statement (DEIS) for the Terminal. As Director, and as the Cowlitz County (the County) SEPA responsible official, I was directly involved in the process of drafting and approving the DEIS, which was published for public comment on April 30, 2016, and the subsequent Final Environmental Impact Statement (FEIS), which was published on April 28, 2017. I worked directly with Ecology and ICF International, Inc. (ICF), the

environmental consulting firm contracted to help prepare the DEIS and FEIS for the Terminal.

5. I was personally involved with virtually all of the important documents, communications, meetings, and decision-making associated with the DEIS, FEIS, and environmental review of the Terminal.

6. During the DEIS and FEIS process, Millennium was responsive, timely, and engaged. They provided requested information quickly and if they couldn't, they worked with the Co-Leads to explain why and provide what they could, when they could.

7. Based on my experience working on the DEIS and the FEIS, the Ecology project team openly agreed that each of the impacts *potentially* caused by the Terminal were avoidable and subject to reasonable mitigation.

8. Under Ecology's instruction, in many respects the DEIS and FEIS documents present worst-case scenario analyses. It is therefore misleading for Ecology in its 401 decision to point to the FEIS as presenting findings that *would* occur if the Terminal were built, as opposed to presenting those findings as ones that *could* occur.

9. Also, insofar as Ecology's decision to deny Millennium a 401 water quality certification (the 401 Denial) relies on the FEIS, the decision is inconsistent with the FEIS and Ecology's agreements to the findings in the FEIS. For example, the FEIS described "potential" rail transportation, rail safety, and vehicle transportation impacts that "could" occur because Ecology, the County, and ICF deliberately decided that

language–and not something else–appropriately describes the uncertainty of the described impacts.

10. Based on my experience working on the FEIS, I can only conclude that those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit denial is to further unstated State policy preferences. 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. I believe that if these indirect impacts were truly significant and not mitigable, then state and local agencies would be forced to deny all manner of port, shipping, and transportation permits.

11. The FEIS uses a very conservative approach which overstates the potential environmental impacts caused by the Terminal. For the Terminal's SEPA review, Ecology was the "co-lead" with Cowlitz County. In actual practice, however, Ecology and their partner state agencies dominated the lead role, the SEPA process, and the decision making regarding the "significance" findings in the FEIS (that is, whether potential environmental impacts were significant, avoidable, or able to be mitigated), especially in areas where they claimed a statewide interest. Ecology routinely sidelined the County during meetings and decision-making, including on the significance findings. Ecology also ignored issues I raised about overly broad impact review, held meetings with tribal groups and the Defendant-Intervenors without inviting any County representatives, and directed ICF work without first

consulting me or my staff, particularly on areas of statewide interest.

12. I also witnessed Ecology disagree with ICF staff members such as Linda Amato and Darren Muldoon, who were the former ICF leads on the DEIS and FEIS for the Terminal, and who were responsible for the team that conducted the technical analyses supporting the DEIS and FEIS. In those instances, ICF personnel disagreed with Ecology over the significance findings that Ecology wanted to draw in the chapters of the FEIS. Sally Toteff, the SEPA responsible official for Ecology, eventually pushed the County and ICF to replace Ms. Amato as project manager after several heated discussions between her and Ms. Amato regarding the DEIS. Ecology ultimately deemed that it alone would make significance findings, though in some instances after ICF personnel disagreed with those findings, Ecology changed them. I witnessed Ecology treat Millennium more like an adversary than a permit applicant throughout the environmental review process, and especially as it drew to a close and moved into the permitting phase.

13. Ecology did not consult the County before denying Millennium's section 401 certification application with prejudice. As co-author and co-lead of the FEIS, I did not expect Ecology to deny Millennium's 401 certification request. Despite regular County-Ecology meetings after publication of the FEIS, Ecology never consulted the County about the 401 Denial. When I signed the FEIS on behalf of Cowlitz County, my analysis and my staff's analysis was that the FEIS describes a project that satisfies all applicable state

and local laws. I was surprised that Ecology denied the 401 certification request with prejudice, and I believe that if Millennium proposed to ship anything other than coal, Ecology would have granted the Section 401 water quality certification. In short, my staff's analysis and my analysis is that the FEIS describes a fully permittable project.

14. In the 401 Denial, Ecology distorts the FEIS findings. To deny a permit under SEPA, a proposal must be *likely* to result in significant adverse environmental impacts—identified in an environmental impact statement–for which reasonable mitigation measures are insufficient to mitigate those impacts. The FEIS, which I signed with Ecology, does not make those kinds of findings. The 401 Denial discounted the expected, planned, and likely mitigation available for potential environmental impacts and interpreted the FEIS findings to make it appear that the FEIS had determined that certain environmental impacts, including indirect impacts outside the control of the applicant, were definitively significant and unavoidable when they were not.

15. More specifically, the 401 Denial recasts multiple FEIS potential impacts that "could" occur as impacts that "would" occur. These are unjustified changes from language that even Ecology previously agreed upon. This is an after-the-fact re-write of the FEIS. Throughout the DEIS and FEIS process, the County emphasized to Ecology that it was only comfortable describing the impacts as the FEIS does: emphasizing their contingent and uncertain nature. "Would" describes the impacts far more certainly than

the Co-Leads intended and does not accurately describe the FEIS's analysis. Impacts that "could" "potentially" occur are very different than impacts that "would" occur. This is a material difference. There was, to my knowledge, no post-FEIS investigation, analysis, or additional fact-gathering that supports the 401 Denial's conclusions. Had Ecology sought to describe the FEIS impacts as the 401 Denial does, I would not have signed the FEIS.

16. The FEIS's conservative, over-stated, worst-case scenario air quality analysis does not describe reasonably likely impacts. Ecology finalized the FEIS's new air quality findings—which radically departed from the DEIS findings—largely independent of ICF and the County. Further, because Ecology finalized the updated air quality analysis shortly before release of the FEIS, as part of the FEIS process, Millennium did not have a legitimate opportunity to present types of mitigation available for this potential impact caused by project-related locomotives. Neither Millennium nor BNSF were made aware of this new FEIS impact analysis before release of the document.

17. As another example, the 401 Denial's vehicle transportation findings depart from the FEIS's findings. The FEIS appropriately determined that vehicle transportation impacts *could* result, but are not likely because of planned improvements. By ignoring these "planned," reasonably likely improvements, Ecology's 401 Denial reaches a wholly different conclusion than the FEIS. The FEIS does not describe reasonably likely vehicle transportation impacts that "would" occur.

18. Another example is that Ecology's 401 Denial noise and vibration findings also depart from the FEIS findings the County signed. The FEIS found that significant and adverse noise impacts would occur *only if a quiet zone is not implemented.* As the FEIS says, the County plans on working with Millennium to establish a quiet zone, and Millennium would fund the necessary infrastructure to establish a quiet zone. 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. Ecology altered the FEIS findings on noise and vibration in its 401 Decision. The FEIS states that the Terminal is not reasonably likely to create significant and adverse noise and vibration impacts that cannot be mitigated.

19. Ecology's 401 Denial misrepresents the FEIS's rail transportation analysis, too. In the 401 Denial, Ecology states that the Terminal "would" result in significant rail transportation impacts. This is inconsistent with the FEIS. As the FEIS states, it is "expected" that BNSF will make improvements to rail infrastructure that will mitigate these potential impacts. No facts were developed in the FEIS process to suggest otherwise. The Terminal is not reasonably likely to result in significant and adverse rail transportation impacts that cannot be mitigated.

20. Nor do the FEIS and 401 Denial rail safety analyses align. Ecology fully discounts FEIS mitigation findings and recasts key language. During the environmental review process, the Co-Leads commissioned a worst-case scenario analysis to learn

the potential accident rates that could occur in the event that the Terminal were built. During that analysis, we 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. That finding is reflected in the FEIS, which as a result, determined that significant adverse impacts "could" occur in light of the conservative, worst case scenario-type analysis and the unlikely event that BNSF, UP, or LVSW somehow were prevented from completing the improvements. But the 401 Denial departs from the FEIS's analysis, instead stating that the Terminal "would" negatively impact rail safety. This is inconsistent with the FEIS. The analysis does not show that adverse rail safety impacts "would" occur.

21. Ecology's vessel transportation finding is also inconsistent with the FEIS. The FEIS found that the risk of a serious vessel-related incident is "very low" but no mitigation measures can "completely eliminate the possibility of an incident." This describes any and every vessel-related project in Washington State. But the 401 Decision refashions the FEIS's vessel transportation findings, changing the FEIS's conclusion that the risk of a serious vessel accident is "very low" to simply "low." Yet the FEIS found that vessel-related incidents are exceptionally unlikely; for example, the FEIS concludes the likelihood of a project-related allision is one every *39 years*. The FEIS intentionally describes vessel-related risks as "very low," and not merely "low." In no case does the FEIS support a finding of a significant, unavoidable, unmitigable adverse impact caused to vessel transportation. Had

Ecology insisted on this significant change during the FEIS process, I would not have agreed to it.

22. The 401 Denial's cultural resources analysis, too, does not accurately reflect the FEIS or local reality. Development of the Terminal would redevelop the Reynolds Metals Reduction Plant Historic District, but Ecology did not consider the conclusion that "the Corps *expects* a Memorandum of Agreement [(MOA)] will be signed" that would mitigate this impact. No facts were developed during the DEIS or FEIS process that demonstrated that the MOA would not be signed. It did not occur to me that the MOA would not be signed. The area on which the Terminal would be built is an underutilized brownfield area more than a historic district. And as Ecology is undoubtedly aware, the Corps would require resolution of cultural resource impacts as a condition of any Clean Water Act Section 404 permit. It is surprising that Ecology would deny a permit because Millennium proposes to remediate a derelict brownfield site retaining little, if any, of its former historic character, the impacts of which were being further studied in a separate NEPA analysis. The FEIS does not describe reasonably likely cultural resource impacts.

23. The FEIS also does not describe a significant, tribal resource impact. The FEIS explicitly avoided making a determination of significance for tribal resources. And I am unaware of any post-FEIS investigation or analysis that justifies Ecology's departure from the FEIS in this area. In any event, tribal resources are more appropriately analyzed in the

federal National Environmental Policy Act review process.

24. Ecology's decision to deny the 401 water quality certification request was especially surprising to me and my staff because the FEIS unequivocally found no unavoidable and significant adverse impacts–potential or otherwise–on water quality. Based on the FEIS, there is no question the company can satisfy all local and state water quality standards. That is what the FEIS concluded.

25. Ecology ignored or discounted mitigation that, as co-author and co-lead of the FEIS, I believe would very likely mitigate or eliminate the impacts identified in the 401 Denial. In my years of experience, I am unaware of any regulatory agency, Ecology included, denying a permit because the regulatory agency argued that expected or planned mitigating circumstances were less than 100 percent certain. Likewise, I am unaware of any regulatory agency rejecting mitigation because it requires an applicant to work with other agencies, obtain additional permits, or contract with a third party. In my experience, many types of mitigation are less than 100 percent certain, and require working with third parties. For example, wetlands mitigation requires identifying available third-party mitigation sites and contracting with those third-parties to obtain mitigation credits. And Ecology accepted Millennium's fish impact mitigation, despite it requiring the company to work with third-parties to conduct studies and implement monitoring with non-Ecology agencies.

26. Ecology's stance on mitigation also extended to not giving Millennium the usual and customary treatment that other applicants receive; that is, mitigation is usually built into permits that issue. This is the first time in my career I've seen any regulatory agency wholly exclude an applicant from mitigation discussions. Mitigation is usually the product of the various permit review and approval processes. Air quality mitigation, for example, is usually included in air quality permits, not water quality permits. Here, the County could have addressed Ecology's purported concerns by requiring mitigation in one of the local permits yet to issue for the Terminal. Ecology did not give Millennium the opportunity that usually is provided to other applicants.

27. Based on the above, the 401 Denial for the project is not consistent with the FEIS.

I declare under penalty of perjury that the foregoing is true and correct

Executed on 2/28/18 in Kelso, Washington.

By: /s/Elaine Placido
Elaine Placido

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TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

APPENDIX F

To: Phillips, Keith (GOV) [Keith.Phillips @gov.wa.gov]; Heuschel, Mary Alice (GOV) [MaryAlice.Heuschel@gov.wa.gov]; Postman, David (GOV)[David.Postman@gov.wa.gov]; van der Lugt, Lisa (GOV)[lisa.vanderlugt@gov.wa.gov]
Cc: Tichenor, Stacey (GOV) [Stacey.Tichenor @GOV.WA.GOV]
From: Kerins, Aisling (GOV)
Sent: Wed 7/24/2013 10:35:09 PM
Subject: RE: For Gov's call with Boeing on July 25

I'm not sure who is point on this call, and don't see it on his calendar tomorrow. Adding Stacey - can you advise?

From: Phillips, Keith (GOV)
Sent: Wednesday, July 24, 2013 3:22 PM
To: Heuschel, Mary Alice (GOV); Postman, David (GOV); Kerins, Aisling (GOV); van der Lugt, Lisa (GOV)
Subject: For Gov's call with Boeing on July 25

Here are the draft talking points from Ecology, with a few initial tweaks from me, for the Gov's call with Boeing tomorrow.

Who's on point for the call, to make sure these are included?

The scope of environmental review for Gateway terminal will be announced next Wednesday, July 31.

Ecology's review will include a detailed analysis of rail and vessel impact within the state and more general analysis out of the state.

Ecology also will assess the impacts associated with the burning of coal to be shipped through the terminal. They decided on this scope for the draft Environmental Impact Statement because:

- It is responsive to public comment, including recommendations from local and federal air experts;
- The scale and nature of this project appears to be significant: for example, we know the amount of coal to be burned annually could generate more greenhouse gas pollution than all current sources in Washington State combined;
- State law discourages greenhouse gas pollution and coal power.

Let me be clear that the next generation of 777x wings is a very different commodity than coal.

Based on what we know about the 777x at this time, we would expect a much different SEPA approach would apply to a proposed 777X project.

With what we know today, greenhouse gas pollution would not likely be considered a significant impact or require a full EIS, neither with emissions from the production (based on past state permitting of facilities

over recent years), or even if plane operations themselves were assessed under SEPA.

Furthermore, we understand the new wings will increase fuel efficiency. These more fuel efficient planes are anticipated to displace older less fuel efficient fleets and thus we assume likely to reduce greenhouse gas pollution consistent with state law.

~~~

Josh Baldi | Regional Director, Northwest Office | WA Department of Ecology | 425.649.7010 d | 425.647.3581 m
~~~

To: Phillips, Keith (GOV) [Keith.Phillips @gov.wa.gov]
From: Sturdevant, Ted (GOV)
Sent: Mon 3/4/2013 1:56:37 AM
Subject: RE: ghg emission triggers

None of these lines are going to be very relevant or helpful. I see the "I know it when I see it" metric being preferable to a number. Aerospace brings thousands of jobs with those emissions; coal export doesn't.

Ted Sturdevant, Executive Director
Legislative Affairs & Policy
Office of the Governor
360-902-4111
Ted.sturdevant@gov.wa.gov

www.governor.wa.gov
Twitter: @GovInslee@WaStateGov
www.facebook.com/WaStateGov

From: Phillips, Keith (GOV)
Sent: Saturday, March 02, 2013 8:28 AM
To: Sturdevant, Ted (GOV)
Subject: FW: ghg emission triggers

So ... we already have a growing body of regulatory lines for ghg emissions, including an Ecology internal line for SEPA. See below.

10 K tons/year ... 25 K ... 75 K ...

CEQ draft NEPA guidance says 25 K.

These numbers are much smaller than the number Ecology estimated for the direct and indirect footprint

of airplane manufacturing: over 62 M tons/yr (or 62,000 K)

From: Clark, Stuart (ECY)
Sent: Saturday, March 02, 2013 8:17 AM
To: Phillips, Keith (GOV)
Subject: Re: ghg emission triggers

25K tons/year is EPA ghg reporting threshold; WA is 10K. In our internal SEPA guidance we are using 25K as the point where we engage. I think the SEPA folks do ok for industrial and subdivision type development using this but are struggling with things like export terminals that may not emit directly but have or could have substantive indirect emissions
Tailoring rule for PSD permitting is I believe 75K for new or modified sources.
Should probably confirm the tailoring number
Sent from my iPhone
On Mar 1, 2013, at 8:16 PM, "Phillips, Keith (GOV)" <Keith.Phillips@gov.wa.gov> wrote:

> So ... CEQ has draft NEPA guidance that calls for environmental review of projects with greater than 25,000 pounds ghg/year ... does that sound right?
>
> What other existing, or proposed, state and federal triggers are there for ghg review, permitting, etc? What level did the tailoring rule propose?
>
> Just looking for some references ...
>
> Thanks.

APPENDIX G

Governor-Elect Inslee Meeting Memo
Upd. [DATE\@ "M/d/yyyy h:mm am/pm"]

FROM: James Paribello **PHONE:** 360-402-8405

EVENT:	**MEETING WITH THE WASHINGTON STATE PORTS ASSOCIATION**
DATE/TIME:	February 6th, 2013, 2:00PM – 2:30PM
LOCATION:	Governor's Conference Room
ATTACHMENTS:	WPPA 2013 Economic Development Agenda
STAFFING:	James Paribello

MEETING OVERVIEW: YOU will speak Eric Johnson, Executive Director of the Washington Public Ports Association, and other WPPA staff, regarding their 2013 Legislative Agenda.

DESIRED MEETING OUTCOME: YOU will establish a relationship between the Governor's Office and the WPPA and identify potential areas of collaboration in their 2013 Legislative Agenda, particularly relating to job creation and economic development.

TOP THREE TALKING POINTS:

- Washington State's transportation network supports over 1.5 Million freight dependent jobs

and produces over $130 Billion in gross domestic product.

- We must support the maintenance of our inland ports and waterways, and protect Washington's maritime industrial cores and working waterfronts.
- On coal terminals, **YOU** have an opportunity to express a shared interest with the Ports in drawing a line between how we evaluate the climate impacts of coal export facilities and how we evaluate other future projects with lesser impact on climate.

ATTENDEES:

- Eric Johnson, Executive Director, WPPA
- Jerry Oliver, WPPA President and Commissioner Port of Vancouver
- Tom Albro, WPPA Vice-President and Commissioner Port of Seattle
- Roy Keck, WPPA Secretary and Commissioner Port of Benton (which is Richland/Prosser)
- JC Baldwin, WPPA Past-President and Commissioner Port of Chelan County
- Scott Walker, WPPA Past-President and Commissioner Port of Bellingham
- Don Meyer, Commissioner and President of Port of Tacoma Commission

ADDITIONAL BACKGROUND:

YOU delivered the keynote at the Opening Day Luncheon of the WPPA's Spring Meeting on May 16th, 2012.

Attached is a summary of the WPPA's Economic Development Agenda, which will be the focus of this meeting.

REGULATORY REFORM

- Our state's regulatory policies can be improved. They are often too slow, and can result in "high expenditure, low return" situations. For example, maritime terminal ports are facing substantial investments in stormwater facilities that will divert investments in job-creating infrastructure to very little environmental gain.

COAL TERMINALS

- The Ports have been very nervous about the federal/state environmental review on the coal export facilities … and the precedents that might be set for how the climate impacts of future port, export/import and transportation projects are addressed. They are likely to welcome any steps that distinguish the coal export facilities from other port projects
- **YOU** have an opportunity to express a shared interest with the Ports in drawing a line between how we evaluate the climate impacts of coal export facilities and how we evaluate other future projects with lesser impact on climate.

WPPA 2013 Legislative Agenda

- Maintain funding for CERB (Community Economic Revitalization Board) with a fund target of $20 Million for the upcoming biennium–and allow the board more flexibility to fund rural job creation opportunities.

- Build a fair and balanced transportation package that funds our most pressing freight mobility needs (Our transportation network supports over 1.5 Million freight dependent jobs and produces over $130 Billion in gross domestic product).
- Full funding for Model Toxics Control Act. Governor Gregoire's recent budget proposal included $71.5 Million to pay for remedial action grants.
- Support for legislation to clarify that the question of modifying port commissioner terms from four to six years should appear on the ballot at the next general election, in order to help control costs.
- Public Records Act reform to develop tools to help limit the level of resources committed to meeting demands from "serial requesters." These tools include court injunctions as well as a statutory clarification that would limit resource expenditures.

APPENDIX H

DRAFT KEY MESSAGES/Q&A
Millennium Bulk Terminal-Longview

Debunking the myth that coal proposal would boost ag exports

Key messages

- The Millennium proposal would only ship coal, there would be no apples. No agricultural products from Washington would be handled at the site.
- Millennium proposes operation of a terminal that ships coal. The proposal does not include building more railroad tracks outside the footprint of the terminal.
- Increased coal trains from the Millennium proposal would compete with rail shipments of other goods, including Washington's important agricultural products.
- The proposal would add 16 coal trains a day to the rail lines that would already be over capacity. Adding more trains increases congestion and slow down the system.
    - By 2028 the facility and other future traffic would cause the already strained rail lines from Spokane to Vancouver to

be at almost double their intended capacity.

Communications Tactics

Date	Action	Who
December 2	Talking points document	Dave
Early December	Coordination with sister agencies	Diane, Sally
Opportunistic	Update elected officials and other leaders as opportunity presents itself	Denise, RDs, Kelly and Maia
As needed	Reactive media relations	Dave

Questions and answers

Q: If approved, would the Millennium coal proposal boost Washington's Ag exports?
A: No. The opposite is probably true. The Millennium 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. The proposed terminal doesn't build new rail and the increase of 16 trains a day adds to an already clogged system. Adding 16 trains a day is a big increase. WSDOT looked and saw future probs. Adding 16 trains daily adds to that.

Q: Would the export facility, itself, help boost Ag exports?
A: No. Coal and apples don't mix. Millennium's

proposal would only ship coal. There is no "apples to coal" comparison here.

Q: How do you know this would happen?
A: We've seen what happens when rail line capacity is a problem. In 2014 when there was an increase in crude oil being transported by trains, one of the major shippers for Washington fruits and field crops stopped their shipments to the Midwest and East Coast. The delays increased and farmers had to use trucks instead. The Cold Train Express from Quincy was shut down.

Supporting Articles
[HYPERLINK "http://crosscut.com/2014/08/oil-coal-trains-blamed-shutdown-big-agricultural-s/"]
[HYPERLINK "http://old.seattletimes.com/html/businesstechnology/2024172633_columbiatrainsxml.html"]

Q: Is there anything about the proposal that would help support Washington agriculture?
A: Rail capacity is already a big problem for many areas of Washington. The fact that we are talking about the state's limited rail capacity, and how the Millennium coal proposal might affect farmers is a good discussion to have and supports agriculture's position as an important economic driver in the state.

- The bottom line is adding rail capacity is up to the railroads. Building more capacity would take time and money to plan, permit and build.

Contacts

- David Bennett, SWRO Communications Manager, 7-6239
- Diane Butorac, SWRO Planner, 7-6594
- Sally Toteff, SWRO Director, 7-6307

APPENDIX I

To: Toteff, Sally (ECY)[STOT461@ECY.WA.GOV]; Baldi, Josh (ECY)[JBAL461@ECY.WA.GOV]; Pfeifer, Grant D. (ECY)[GPFE461@ECY.WA.GOV]; Park, Sage (ECY)[SUEB461@ECY.WA.GOV]; Clifford, Denise (ECY)[decl461@ECY.WA.GOV]
Cc: Butorac, Diane (ECY)[dbut461@ECY.WA.GOV]; Bennett, Dave (ECY)[dben461@ECY.WA.GOV]; Terpening, Dustin (ECY)[DTER461@ECY.WA.GOV]
From: Peck, Sandi (ECY)
Sent: Wed 11/30/2016 6:33:09 PM
Importance: Normal
Subject: RE: "apples to coal" comparison
Received: Wed 11/30/2016 6:33:10 PM

Thanks, Sally. Adding Dustin to the loop here as an FYI since Josh mentioned it to both of us this morning. Curious to see what you come up with. Glad Dave is our communications manager on this one.

From: Toteff, Sally (ECY)
Sent: Wednesday, November 30, 2016 10:25 AM
To: Baldi, Josh (ECY) <JBAL461@ECY.WA.GOV>; Pfeifer, Grant D. (ECY) <GPFE461@ECY.WA.GOV>; Park, Sage (ECY) <SUEB461@ECY.WA.GOV>; Clifford, Denise (ECY) <decl461@ECY.WA.GOV>; Peck, Sandi (ECY) <spec461@ECY.WA.GOV>
Cc: Butorac, Diane (ECY) <dbut46l@ECY.WA.GOV>; Bennett, Dave (ECY) <dben46l@ECY.WA.GOV>
Subject: "apples to coal" comparison

Hi folks -- There are several more editorials and media stories circulating around the state giving inaccurate facts about how building the Millennium coal export terminal would boost Washington ag exports.

Coal and apples don't mix. The proposed coal export terminal under review would exclusively handle coal. Adding 16 additional trains a day into Washington's rail traffic would further strain existing rail capacity.

As you may have conversations with folks in the agricultural industry this topic could come up over upcoming months.

I'lm working with my team to create key messages for your hip pocket use. We'll describe what the company is proposing for the site -- handling and export of 44 million metric tons of coal per year. There's not an "apples to coal" comparison here.

Regulations on new Longview Rail Terminal
AgInfo.net, November 29, 2016
I'm Bob Larson. A proposed rail terminal at the Port of Longview that would boost volume and efficiency of Ag exports is being threatened with overregulation by the Department of Ecology.
Source: http://www.aginfo.net/index.cfm/event/report/id/Washington-State-Farm-Bureau-Report-35799

Editorial: Wrap up review of Longview coal terminal
HeraldNet, November 25, 2016
Those numbers explain the support in that region for the Millennium Bulk Terminal in Longview, a project to clean up and repurpose the site of the former Reynolds Aluminum smelter, expanding its facilities as a export terminal for coal and other bulk products, such as wheat, timber, alumina and apples.
Source: http://www.heraldnet.com/opinion/editorial-wrap-up-review-of-longview-coal-terminal/

Madi Clark: Regulatory grip too tight for proposed terminal
The Spokesman-Review, November 23, 2016
For example, officials at the Department of Ecology have recommended unprecedented oversight in their environmental impact statement (EIS) for the proposed Millennium Bulk Terminal, a modern high-volume export facility planned at the Port of Longview. One of the main beneficiaries of the new terminal will be Washington farmers and our entire economy.
Source: http://www.spokesman.com/stories/2016/nov/23/madi-clark-regulatory-grip-too-tight-for-proposed-/

APPENDIX J

To: Phillips, Keith (GOV) [Keith.Phillips @gov.wa.gov]
From: Duff, Robert (GOV)
Sent: Wed 9/6/2017 9:12:28 PM
Subject: FW: Please read -- For your information
MBTL 401 letter Aug 2017 draft.pdf

..... notice to MBTL that information submitted to date on the WQ Cert is not sufficient and there is likely not enough time for Ecology to adequately review any new info. It notes that this circumstance would lead to a denial without prejudice.

OK to send?

Rob

Robert Duff
Senior Policy Advisor – Natural Resources and Environment | Office of Governor Jay Inslee
Policy Office | Desk: 360.902.0532
www.governor.wa.gov | robert.duff@gov.wa.gov

From: Toteff, Sally (ECY)
Sent: Wednesday, September 6, 2017 7:38 AM
To: Duff, Robert (GOV) <robert.duff@gov.wa.gov>

Cc: McFarland, Brenden (ECY) <bmcf461 @ECY.WA.GOV>; Randall, Loree' (ECY) <lora461@ECY.WA.GOV>
Subject: Please read -- For your information

Hi Rob,
Attached is a draft letter to MBTL regarding the Section 401 Water Quality Certification process, and upcoming deadline for a decision.

The goal is to send today, Wednesday Sept 6.

Please let us know if you have questions, or would like to discuss information in the letter.

Thank you,
Sally

APPENDIX K

Message

From: Randall, Loree' (ECY) [lora461 @ECY.WA.GOV]
Sent: 9/7/2017 8:57:15 PM
To: Toteff, Sally (ECY) [STOT461 @ECY.WA.GOV]; McFarland, Brenden (ECY) [bmcf461@ECY.WA.GOV]
Subject: RE: Your Upcoming Briefing with Governor ... we have a couple updates that we'll be sending later today

FYI - I let Polly know that it was on hold till tomorrow.
Thanks
Loree'

From: Toteff, Sally (ECY)
Sent: Thursday, September 07, 2017 1:01 PM
To: Randall, Loree' (ECY) <lora461@ECY.WA.GOV>; McFarland, Brenden (ECY) <bmcf461@ECY.WA.GOV>
Subject: FW: Your Upcoming Briefing with Governor ... we have a couple updates that we'll be sending later today

FYI

From: Duff, Robert (GOV)
Sent: Thursday, September 07, 2017 12:45 PM
To: Toteff, Sally (ECY) <STOT461@ECY.WA.GOV>
Subject: Re: Your Upcoming Briefing with Governor ... we have a couple updates that we'll be sending later today

Meeting with Gov tomorrow AM .... probably why Keith is holding of on comment..... makes sense to wait until then.

Call me tomorrow at noon.

Rob

Sent by Robert Duff
Governor's Policy Office
from a handheld device

On Sep 7, 2017, at 9:59 AM, Duff, Robert (GOV) <robert.duff@gov.wa.gov> wrote:

.... pinged Keith ..... will check again today.

Robert Duff
Senior Policy Advisor – Natural Resources and Environment | Office of Governor Jay Inslee
Policy Office | Desk: 360.902.0532
www.governor.wa.gov | robert.duff@gov.wa.gov
<image001.png><image002.png><image003.png><image004.png><image005.png><image006.png>
Email communications with state employees are public records and may be subject to disclosure, pursuant to Ch. 42.56 RCW.

From: Toteff, Sally (ECY)
Sent: Thursday, September 7, 2017 9:57 AM
To: Duff, Robert (GOV) <robert.duff@gov.wa.gov>
Subject: RE: Your Upcoming Briefing with Governor ... we have a couple updates that we'll be sending later today

We do after all have a couple small updates to add to the talking points

Will get those to you in the afternoon as soon as we can

Any comments on the letter?

Thanks,
Sally

Sally Toteff

Regional Director | Southwest and Olympic Office | Department of Ecology
360-407-6307 | 360-789-9500 cell | Sally.Toteff@ecy.wa.gov

Executive Assistant: Tracy Martin
360-407-6308 | Tracy.Martin@ecy.wa.gov

APPENDIX L

To: Bellon, Maia (ECY)[maib461 @ECY.WA.GOV]
From: Estok, Bruce A Col NWS
Sent: Fri 8/16/2013 12:52:56 AM
Subject: Meeting Ref Bulk Commodity Terminal NEPA/SEPA Process/Products (UNCLASSIFIED)

GPT SCOPE OF ANALYSIS (9 JUL 2013).pdf
2013-19738.pdf
20111024 mou jointreview.pdf
20121011 mou colead.pdf

Classification: UNCLASSIFIED
Caveats: NONE

Maia,

I apologize in advance for this being our initial communication, but want to provide some preparatory information for our meeting tomorrow afternoon. Know our staffs have been talking a lot this week. I am looking forward to meeting you & our discussion about the future of our collaborative efforts on joint NEPA/SEPA Process & Products for the Gateway/BNSF & Millennium EISs.

First & foremost, do want to assure you that we are committed to continued collaboration, information, sharing, and cooperation. However, now that the Corps and State have published their respective scopes of analysis for Gateway, it is apparent they are widely

disparate. While respectful of the State's ability to define its broader scope of analysis, the Corps must execute our federal decision-making process on the basis of the focused scope of analysis consistent with federal and agency authorities and regulations. Consequently, while the Corps remains committed to collaboration & a JOINT PRCOCESS, we have determined we will need a SEPARATE FEDERAL PRODUCT (i.e. stand-alone separate federal NEPA EIS), as opposed to a single joint EIS, for both the Gateway and Millennium proposals. To date, I have discussed the need and concept for a revision to this approach with the permit applicants, as well as Whatcom County & Cowlitz County who hold the respective contracts with CH2MHill & ICF for the Gateway/BNSF & Millennium proposals. While there are many details to work out, to include revising the existing joint MOUs & revising contract scopes of work, the applicants and counties are willing to support this Joint Process/Separate Products approach, which I have summarized below:

*****SUMMARY - "FORMAL JOINT PROCESS - SEPARATE PRODUCT UNDER CURRENT CONTRACTS WITH WHATCOM AND COWLITZ COUNTIES" - This entails work by the current consulting contractors, who would use common information sources to prepare two separate EISs (rather than one joint EIS). One EIS document would meet the federal scope of analysis (would only list federal lead & cooperating agencies on the cover; would not be "Vol 1 of 2" etc), & one would meet the state scope of analysis. The federal NEPA EIS would not be connected with, include reference to, nor contain any

information that exceeds the federal scope of analysis and identified direct/indirect/cumulative effects as delineated in PAR 4 & PAR 7 respectively of the attached 9 JUL MFR "USACE Scope of Analysis & Extent of Impact Evaluation For NEPA EIS" for Gateway, & the scope of analysis in PAR 4 of the attached Notice of Intent (plus direct/ indirect/cumulative effects TBP upon completion of scoping process) for Millennium. The Corps of Engineers would need to be designated as providing exclusive technical direction for the separate federal NEPA EISs. The State &/or County would be free to adopt by reference the federal documents as common products to the extent the documents support their decision-making processes. This approach entails retaining the joint MOUs (attached) but modifying them in the immediate future to retain the JOINT PROCESS while reflecting the SEPARATE PRODUCTS. This would also entail a modification of the Counties' contracts, along with a revision to the 14 AUG federal register notice for Millennium to reflect this approach and an approach to the public scoping meetings that would retain the existing dates of scoping meetings, while providing a separation between the federal NEPA and state SEPA comment functions. This separation of the comment function might occur via different agendas, times, rooms, site locations, number of meetings at which federal government participates, etc that our staffs, the County, and the contractor would work out in the immediate future.

In my meeting with you, we will seek WA State's willingness to also support this approach. I believe

there are many benefits to our continued collaboration, even though we may be looking at different scopes. Foremost, we want to provide maximum clarity to the public, efficiency in time/cost to our applicants and the public, and consistent information at those points where federal and state regulations and authorities overlap. While the Separate Product/Joint Process is our preferred alternative moving forward, there are other options should we not arrive at a mutually agreeable view on this. After learning of your perspective and concerns, and working to address them to the extent possible, I plan to publicly communicate the revised approach the federal NEPA EIS will follow next week. We will further pre-coordinate any specifics of that communication as we achieve clarity on the way ahead.

Thanks & look forward to the discussion

Colonel Bruce Estok
Commander and District Engineer
U.S. Army Corps of Engineers Seattle District
Office: (206) 764-3690
Blackberry: (206) 697-2651

Classification: UNCLASSIFIED
Caveats: NONE

APPENDIX M

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 •
(360) 407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

August 22, 2013

The Honorable Doug Ericksen
The State Senate
42nd Legislative District
PO Box 40442
Olympia, WA 98504-0442

RE: **Authority and Rationale for Gateway Pacific Terminal Environmental Review**

Dear Senator Ericksen:

Thank you for your letter of August 1, 2013, asking for details about the direction the Washington Department of Ecology recently provided to its contractor regarding the preliminary scope of environmental review for the proposed Gateway Pacific Terminal (GPT) in Whatcom County. My staff and I put considerable thought into developing the scope of this environmental review.

Ecology is taking the first step in the State Environmental Policy Act (SEPA) process – conducting the analysis needed to issue a draft environmental impact statement (EIS). Ecology is not making final SEPA decisions or permitting decisions at this time. Further, Ecology is not making a determination for or against the GPT proposal. The cornerstone of SEPA is the requirement that agencies be fully informed of and consider the environmental impacts of proposed actions before making final agency determinations (RCW 43.21C.030). I truly believe that Ecology is fulfilling that cornerstone requirement.

Ecology's primary goal has been – and will continue to be – overseeing a fair, objective, and rigorous environmental review of the impacts related to the proposed GPT project. Ecology is also committed to doing this work in a timely, transparent, and efficient manner.

As part of the process for initiating work on the EIS, we developed a preliminary scope of review. This preliminary scope is subject to change based on information learned during the process. We developed the preliminary SEPA scope based on the agency's assessment of the probable, significant, adverse environmental impacts associated with the specifics of the GPT proposed project, consistent with SEPA.

Following an anticipated two-year process to develop a draft EIS, the public will have the opportunity to review and comment on that document. Ultimately, Ecology must issue a final EIS that is informative for decision makers and the public, as well as legally sound.

As requested, below is more detail on the authorities and rationale for the direction Ecology provided its contractor regarding the scope of the EIS for the GPT proposal. We hope these details are helpful to you. You asked about four specific topics. We address each in turn.

Statutory Authority

The first question asks about the authority under SEPA to consider the environmental impacts associated with a proposal where those impacts may occur, in part, from actions that occur outside of Washington State.

As you know, SEPA articulates broad policy goals for the protection of the environment and Washingtonians. To accomplish this, agencies must prepare an EIS to assess the probable, significant, adverse environmental impacts of proposed actions (RCW 43.21C.031)

SEPA analysis is case-by-case based on the facts associated with each individual proposal. This limits a responsible official's ability to make predictions about addressing a proposal that is not yet before an agency. A "threshold determination" process is used to evaluate the environmental consequences of a proposal and determine whether it is likely to have any "significant adverse environmental impact." This determination is made by the lead agency and is documented in either a determination of nonsignificance or a determination of significance.

EISs are prepared when the lead agency determines a proposal will have probable, significant, adverse environmental impacts (i.e., a determination of

significance). The EIS provides an impartial discussion of these environmental impacts, reasonable alternatives, and mitigation measures that would avoid or minimize adverse impacts.

"Probable," "significant" and "adverse" impacts are the key components in determining what impacts need to be included in any SEPA analysis. More specifically, under SEPA, the Legislature has directed the State and its agencies to:

> "[U]se all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:
>
> (a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (b) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
>
> (c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (d) Preserve important historic, cultural, and natural aspects of our national heritage;
>
> (e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (f) Achieve a balance between population and resource use which will permit high

> standards of living and a wide sharing of life's amenities; and
> (g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." (RCW 43.21C.020[2]).

These broad policy statements overlay the Legislature's recognition that "each person has a fundamental and inalienable right to a healthful environment. . . ." (RCW 43.21C.020[3]).

RCW 43.21C.030(1)(f) directs agencies to "[r]ecognize the worldwide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of the world environment. . . ." Since 1984, Ecology's SEPA regulations have echoed this statutory directive. State regulations provide:

"In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries . . ." This is WAC 197-11-060(4)(b).

Finally, several Washington court cases have similarly emphasized that lead agencies should not limit their consideration of environmental impacts to impacts within their jurisdictional boundaries. *See SAVE v. Bothell*, 89 Wn. 2d 862, 871 (1978); *Cathcart v. Snohomish County*, 96 Wn. 2d 201, 209 (1981; *Miller v.*

City of Port Angeles, 38 Wn. App. 904, 912 (1984). Ecology directed its consultant to evaluate greenhouse gas emissions from terminal operations, rail and vessel traffic, and end-use coal combustion. This direction regarding the scope of analysis for this project was based on a number of factors, including:

- Responsiveness to public comment, including recommendations from local air quality agency experts and the U.S. Environmental Protection Agency to study coal and disclose information about combustion impacts;

- That, over the past decade, Washington State has adopted several laws and an executive order on limiting greenhouse gas emissions that applies to all business sectors (RCW 70.235), and a law discouraging coal power (see session law findings codified as footnote to RCW 80.80.010 and coal transition requirements codified at RCW 80.80.040); and,

- Specific details known about the GPT proposal including:

    1. It is a large facility with potentially complex and far reaching impacts for Washington's citizens, communities, and environment. GPT would be the nation's largest coal export facility, increasing America's total export of coal by some 40 percent.

    2. There is no speculation as to the end use of the exported coal; it will be combusted for thermal power.

3. The projected 48 million metric tons of coal to be exported annually through GPT, combined with the transportation emissions of the project, would generate an estimated 118 million metric tons of greenhouse gas, thereby exceeding all current greenhouse gas pollution produced in Washington combined on an annual basis (Greenhouse Gas Sources in Washington, Washington Department of Ecology, page 4. December 2012).

Washington is experiencing impacts from climate change, ocean acidification, and toxic air pollution. Ecology understands climate and ocean acidification science as telling us that greenhouse gas emissions that occur across the globe have the potential to contribute to global atmospheric temperature increases that are associated with impacts occurring here in Washington.

It was these combined factors that led Ecology to determine the scope of environmental study for the proposed GPT terminal.

Applicability of SEPA Scoping

Your second question asks whether, in SEPA review for other projects, Ecology will consider greenhouse gas emissions potentially associated with the end use of products that are manufactured in, or transported through, Washington.

Before addressing the main part of this question, I note that the question as stated in your letter seemed to suggest that the scoping announcement amounted to a "permitting standard." The SEPA scoping

announcement does not change any underlying permit requirements or standards, nor does it make any permitting decisions. The GPT project has not yet entered the permitting phase. The project is currently in the environmental assessment portion of the process.

Ecology's permitting requirements for projects are well established under State law and rule. For the GPT project, when the project enters the permitting stage, the "co-lead" agencies (Army Corps of Engineers, Whatcom County, and Ecology) and other agencies (local air pollution authority, Department of Fish and Wildlife, Department of Natural Resources, etc.) will each apply their respective requirements in making individual permit decisions. Ecology's permitting responsibilities include stormwater, wetlands, water quality, and shoreline standards.

The EIS process is a tool for identifying and analyzing probable, significant, and adverse environmental impacts, reasonable alternatives, and possible mitigation. This EIS process will inform the permitting process, and may include conditions to address and mitigate significant adverse impacts.

I now turn specifically to the heart of the second question: Whether, in SEPA review for other projects, Ecology will consider greenhouse gas emissions potentially associated with the end use of products that are manufactured in, or transported through, Washington.

It is important to note that the scope of environmental analysis under SEPA (either in an Environmental Checklist or in an EIS) is determined by the specific

impacts potentially associated with the specific project undergoing review. As a result, there is no "rule" or "standard" that leads to an identical scope of review for different projects. Consequently, when Ecology conducts an EIS under SEPA, we must do so on a case-by-case basis. However, the specific facts of each proposal determine the scope of review. In every case, the scope of review is determined by the extent of the proposal's probable, significant, adverse environmental impacts.

For GPT, Ecology concluded this scope should include study of the greenhouse gas emissions associated with end use of the coal, for the reasons described above in response to question number one (including the fact that there is no speculation as to the end use of the exported coal). However, Ecology's or another lead agency's scoping decision might be different in the context of a different proposal involving other projects or other exported products.

For example, exporting airplane parts from an existing and/or expanding industrial facility may trigger environmental review, but the lead agency may decide not to pursue an in-depth analysis of emissions from the end use of the airplanes based on factors specific to the proposal. Among other possibilities, the lead agency may determine that an increase in emissions is speculative, and/or the projected amount of emissions is not "significant."

A specific case example is helpful to illustrate this point. As part of Ecology's role in the Boeing 777X Permit Streamlining Task Force, Ecology considered how SEPA would likely apply in the context of that

project. Because, at this time, no specific 777X proposal has been made, we are unable to make definitive conclusions at this stage. However, based on what we know of the expected proposed Boeing facility at this time, Ecology believes it would be likely that a lead agency would determine that greenhouse gas emissions associated with production at the plant would be determined to be insignificant (note that the SEPA lead agency for the 777X will be a local government). We also expect a lead agency would be unlikely to perform an in-depth analysis of potential greenhouse gas emissions associated with the finished product (plane operations) for a variety of reasons, including:

- An expectation that improved efficiency of this particular commodity (i.e., lighter airplane parts) will use less fuel than existing parts. Assuming this sort of information is available when SEPA review is undertaken, it could support a lead agency conclusion that emissions from the new product would not be significant.
- Life-cycle analyses of component parts and processes associated with a finished product would likely require more assumptions than a single-purpose commodity such as coal. Additional assumptions about the commodity could support a lead agency conclusion that more in depth analysis is speculative.
- Uncertainty about what fuel the planes will use (i.e., possible transition to biofuels). Assuming information regarding the fuel type expected to be used is unavailable when SEPA review is undertaken, this lack of information could

support a lead agency conclusion that more in-depth analysis is speculative.

- Uncertainty about whether the wings will be installed in planes that are additive to the fleet or displace older, less efficient models. Assuming information regarding the relationship between new and existing planes is unavailable when SEPA review is undertaken, this lack of information could also support a lead agency conclusion that more in-depth analysis would be speculative.

Taking a step back, the 777X, like many emerging products in Washington, is designed to increase fuel efficiency and decrease greenhouse gas emissions consistent with State law. In sum, the environmental review process applied to GPT is case-by-case and thus is the same process applied to other proposals. The conclusions reached in the case of GPT were determined by the application of SEPA principles to the specific facts of the GPT proposal. A different proposal with different facts would likely lead to different conclusions regarding the scope of SEPA analysis. When it comes to SEPA, it is fair to say that there is no such thing as an "apples to apples" comparison, because each analysis is determined by the facts of each individual proposal.

SEPA Scoping is Case-By-Case

The third question asks whether Ecology is applying a new standard to this project, and if so, what criteria the agency intends to use when applying such new standards.

As discussed above, Ecology applies SEPA review on a case-by-case basis. Without a specific project proposal in hand, Ecology cannot speculate on the most appropriate scope of review. Thus, it is not possible to identify a set of "industry groups" or set of specific projects that may trigger a broad or narrow scope of environmental review under SEPA. The criteria to be applied are the same in every case: namely, what are the probable, significant, adverse environmental impacts from the proposal.

Ecology has considered other projects and commodities in a manner and process consistent with our preliminary assessment for GPT. In addition to the Boeing 777X facility example discussed above, Ecology recently issued SEPA decisions for two different facility expansions of so-called "crude by rail" proposals in Grays Harbor. Ecology served as a co-lead agency with the City of Hoquiam on the Westway Terminal Tank Farm Expansion Project (Westway) and the Imperium Bulk Liquid Terminal Facility (Imperium). Although separate, these two projects both involve constructing additional storage tanks and rail infrastructure. These projects will allow storage of crude oil and transfer of the oil from rail cars to vessels for shipment elsewhere.

In comparison to GPT, the Westway and Imperium proposals are significantly different in terms of CO□ emissions and impacts on wetlands, shorelands, cultural resources, transportation, and communities – among others. The SEPA review was guided by the specific factors of each proposal. Ecology, along with the City of Hoquiam, did not require an EIS for either of these proposals because in both cases:

- No in-water work is necessary (docks already exist).
- The potential impacts of the respective projects are addressed by the 26 different permits, approvals, licenses, or plans required by local, state, or federal agencies.
- Each applicant offered to carry out additional voluntary measures that became requirements of the threshold determination.
- Ecology and Hoquiam placed additional mitigation requirements on the threshold determination to further reduce potential impacts.

Consequently, Ecology and Hoquiam concluded neither the Westway nor Imperium projects would produce significant, adverse environmental impacts, and issued what is called a Mitigated Determination of Nonsignificance.

In sum, both the preliminary assessment of the 777X and the SEPA decisions we made for the recent Westway and Imperium proposals affirm our belief that applying SEPA on a case-by-case basis according to the facts of each project is consistent with existing law. These examples also tell us that the scope of SEPA analysis will vary depending on the specifics of the proposals. Thus, in making our decision on the GPT project, we did not set or establish a new regulatory threshold or standard – we applied the standards of SEPA to the project proposal.

CO2 Analysis for GPT is Project Specific

The fourth question asks what criteria Ecology expects to use for calculating CO□ emissions from the end use of other Washington products. As explained above, Ecology is not applying a new standard to its SEPA analysis for GPT. As a consequence, Ecology is not developing criteria "*for calculating end use CO□ production for Washington exports.*" In the case of GPT, as discussed above, we will be calculating the CO2 emissions from combustion of the exported coal as part of the EIS process. To do so, we will work with our consultant, CH2M HILL, and experts in the field to select the best methods to calculate CO□ emissions.

As we are at the outset of the environmental review process, the study methods that will be used to evaluate CO□ – like all the methodologies in the EIS (e.g., wetlands, water quality, air quality, land use, transportation, cultural resources, aesthetics, public services and utilities, health and safety, and others) – are currently in draft form. The study methods will be refined over the course of the environmental review process by the CH2M HILL consulting team. The draft EIS will include the study methods and will be available for public review and comment.

As Ecology and other lead agencies evaluate future proposals and determine whether the end use of a product associated with that particular proposal may result in probable, significant, adverse impacts, we would expect the lead agency to utilize standard methods of identifying impacts. (For air quality permitting, typical methodologies may include

approved dispersion models, emission factors, and emissions inventories.)

In closing, I understand the direction we provided to our consultant regarding the GPT preliminary EIS scope raises questions about how SEPA will be applied in other settings. I appreciate the opportunity to further clarify our SEPA scoping approach for the GPT project. Ecology will assess and report on the likely impacts from the proposed GPT project, remain impartial, and follow adopted law.

I understand that communities, businesses, and Washingtonians expect us to conduct a fair, objective, and rigorous environmental review. My staff and I plan to meet this expectation.

Please let me know if you have any follow-up questions regarding my response.

Sincerely,

s/_____

Maia D. Bellon
Director