The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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

Plaintiffs,

v.

JAY INSELEE, 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.

No. 3:18-cv-5005-RJB

BRIEF OF WESTERN STATES PETROLEUM ASSOCIATION AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND ABSTENTION

NOTE ON MOTION CALENDAR:
May 18, 2018

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INTEREST OF THE *AMICUS CURIAE*

Western States Petroleum Association ("WSPA") is a nonprofit mutual benefit trade association that represents more than 15 companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in Arizona, California, Nevada, Oregon, and Washington. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible. WSPA works to disseminate accurate information on industry issues and to provide a forum for the exchange of ideas on petroleum matters.

The proposed *amicus* has a significant interest in this case because Defendants' efforts to block fossil fuel exports threaten to exclude U.S. commodities from foreign markets in direct contravention of federal trade policy. Put simply, this case presents an unconstitutional overreach of local power that, if unchecked, would have devastating consequences. The energy industry, including oil and petroleum companies represented by *amicus* WSPA, could suffer irrevocable damage. And local governments would be empowered to obstruct foreign policy with which they disagree.

INTRODUCTION

Defendants' concerted scheme to thwart the export of commodities they disfavor threatens to disrupt the sale of U.S. energy resources to foreign allies and contravenes federal foreign policy favoring fossil fuel export. Plaintiffs have brought federal Constitutional claims challenging Defendants' systematic abuse of power. For the purpose of Defendants' motion, the facts alleged in Plaintiffs' Complaint *must* be taken as true. Thus, this Court must accept as true that Defendants denied (and will continue to deny) the Millennium Bulk terminal permits because of Defendants' hostility to fossil fuel and its export.

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U.S. Supreme Court and Ninth Circuit authority establishes that Plaintiffs are entitled to adjudicate their claims in federal court. In asking this Court to dismiss this case on abstention grounds, Defendants ignore the heavy presumption against abstention in the context of 42 U.S.C. § 1983, commerce cause, and foreign policy claims. *See Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (when a government regulation or practice "offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights"); *Harper v. PSC*, 396 F.3d 348, 355-56 (4th Cir. 2005) (the "commerce clause power itself justifies a narrower view of state interests in the abstention context"). Defendants have effectively established their own foreign policy against fossil fuel exports that contravenes and threatens to displace established federal foreign policy favoring exports. Because Defendants' actions impact areas of critical importance to the federal government—foreign commerce, interstate commerce, and foreign affairs—there is no basis for this Court to abdicate its obligation to adjudicate Plaintiffs' claims on the merits.

FACTUAL BACKGROUND

A. Defendants Have Prevented Coal Export From The Millennium Bulk Terminal.

For purposes of this motion, this Court must accept as true Plaintiffs' allegations that Defendants have blocked construction of a new coal export facility at the Millennium Bulk Terminal ("the project") based on their opposition to fossil fuel. Specifically, this Court must accept as true that:

- Defendants subjected the project to an environmental review that was unprecedented in scope. Plaintiffs' Complaint, Dkt. 1, ¶¶ 120-22, 124.
- Defendants ignored their own evidence of the project's favorable environmental effects. *Id.* ¶¶ 132-133.
- The Washington Department of Ecology withheld necessary approvals on unsupported, pretextual bases. *Id.* ¶¶ 161-166.

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- The Washington Department of Natural Resources revoked its consent to a standard sublease and refused to approve terminal improvements consistent with the terms of the existing lease. *Id.* ¶¶ 150-155, 173-176.

- Defendants have no intention of ever approving the project, as demonstrated by their many public statements stating their opposition to fossil fuel export. *Id.* ¶¶ 184-189.

B. Defendants' Actions Are Part Of A Broad Campaign To Thwart Fossil Fuel Exports From The West Coast.

Defendants' actions are not isolated events. State and local governments all along the West Coast have openly declared their intent to prevent the export of fossil fuels. Officials have abused the power of their offices to obstruct federal policy favoring fossil fuel exports by thwarting construction of fossil fuel processing and export facilities. The "success" of these attacks has been thoroughly documented by their proponents. For example, the Sightline.org website provides an interactive map tracking more than twenty delayed and defeated fossil fuel projects and a summary of local officials' actions against such projects.[1]

In Washington and Oregon, opposition to fossil fuels has come from the highest echelons of state government. Former Oregon governor John Kitzhaber repeatedly spoke out against fossil fuel exports.[2] Likewise, Defendant Inslee has repeatedly affirmed his goal of stopping fossil fuel exports, and his intent to use the power of his office and Washington agencies to accomplish that goal. *See* Plaintiffs' Complaint, Dkt. 1 ¶¶ 85-90. To that end, Defendant Inslee has collaborated with state actors from Oregon and California, including

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[1] *See* www.sightline.org/2017/06/20/mapping-the-thin-green-line/ (interactive map of proposed fossil fuel infrastructure projects, most of which are "dead"); De Place, *How Northwest Communities are Stopping Fossil Fuel Projects Before They Start*, SIGHTLINE (Apr. 23, 2018), www.sightline.org/2018/04/23/how-northwest-communities-continue-to-stop-fossil-fuel-projects-before-they-start/ (summary of local actions against fossil fuel infrastructure).

[2] *See e.g.*, Cassandra Profita, *Kitzhaber: It Is Time Once And For All To Say No To Coal Exports*, LAKE PEND OREILLE WATERKEEPER (Apr. 25, 2014), www.lakependoreillewaterkeeper.org/recent-news/archives/04-2014#WvXOFlgvwdU.

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through the Pacific Coast Collaborative (PCC). *See id.* ¶¶ 100-116. Defendants and other officials have used the PCC to "present united fronts" opposing new fossil fuel export facilities on the West Coast.[3]

At the city level, officials like Portland's former mayor Charlie Hales have misused the power of their office to thwart export of fossil fuels. In June 2016, Mayor Hales unilaterally defeated the Pembina Pipeline, a $500 million propane pipeline project, by refusing to take the proposal to the City Council.[4] He then championed an ordinance prohibiting fossil fuel terminals.[5] In July 2017, the Oregon Land Use Board of Appeals found that the ordinance violated the dormant Commerce Clause of the United States Constitution as an undue burden on interstate trade in fossil fuel.[6]

In Washington state, cities and counties have passed resolutions opposing oil trains and proposed fossil fuel terminals[7]; and at least four cities have passed ordinances restricting or even banning outright the construction or expansion of fossil fuel export facilities.[8]

To the detriment of local economies, U.S. foreign policy, and foreign customers of U.S. commodities, the efforts of West Coast lawmakers to thwart fossil fuel production

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[3] *See Inslee's Enviro Outsourcing: 5 Things We Learned from Jay Manning's Grant Proposals*, SHIFT WA (June 2, 2014), https://shiftwa.org/5-things-we-learned-from-jay-mannings-grant-proposals/.

[4] *See* Chris McGreal, *Portland Mayor Pulls Support for Fracked Gas Terminal Amid* Protests, GUARDIAN (May 13, 2015), https://www.theguardian.com/us-news/2015/may/13/portland-oregon-canada-fracking-gas-pembina; *Mayor Charlie Hales Withdraws Support for Pembina Propane* Terminal, WILLAMMETTE WEEK (published May 7, 2015, last updated Jan. 24, 2017), www.wweek.com/portland/blog-33181-mayor-charlie-hales-withdraws-support-for-pembina-propane-terminal-updated.html.

[5] *See* de Place, *supra* fn. 1.

[6] The Oregon Court of Appeals partially reversed the Land Use Board of Appeals decision in January 2018. In April 2018, WSPA, Columbia Pacific Building Trades Council, and Portland Business Alliance filed a Petition for Review with the Oregon Supreme Court challenging the Ordinance's Constitutionality. That review is still pending.

[7] *See* Resolutions and Statements, STAND UP TO OIL, http://www.standuptooil.org/resolutions-and-statements (compiling local resolutions and statements against oil).

[8] *See* de Place, *supra* fn. 1 (discussing ordinances passed in Tacoma, Whatcom County, Hoquiam, Aberdeen, and Vancouver).

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have succeeded. In recent years, local governments and allied groups have blocked or unduly delayed review of proposed coal export terminals, propane pipelines, and oil pipelines. These projects would have added long-term jobs and helped meet foreign demand for U.S. commodities, including coal, oil, and timber.

Blocked oil train facilities. In 2013, Vancouver Energy submitted an application for a crude oil terminal at the Port of Vancouver. The Tesoro Corp. and Savage Companies-backed terminal would have met significant local and international demand for oil.[9] As proposed, the terminal would have received approximately 360,000 barrels of North American crude oil a day destined for West Coast refineries. The project also would have brought much needed jobs to the area—an estimated 300 during the construction phase and hundreds of permanent jobs once the site was operational. Opposition to the project contributed to an astonishing four-year review process, exceeding by years the one-year completion timeline required by state law. In November 2017, after more than four years of review, the Washington State Energy Facility Evaluation Council took the unprecedented step of unanimously rejecting the proposal.[10] In January 2018, Defendant Inslee vetoed the project.[11] Oil train facilities in other parts of Washington have likewise been blocked. In 2014, the Aberdeen City Council voted to reject a proposed oil train facility in Hoquiam. It did so even though it had no regulatory authority to stop the project.[12]

Blocked coal expert terminals. In 2012, the city of Oakland passed ordinances specifically design to stop the development of a bulk cargo shipping terminal at a

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[9] Molly Solomon, *Washington Commission Turns Down Oil Terminal In Vancouver*, OPB (Nov. 29, 2017, 3:35 p.m.), https://www.opb.org/news/article/vancouver-oil-terminal-vote-down-council/.

[10] *Id*.

[11] *See* Phuong Lee, *Inslee rejects permit for oil-by-rail terminal in Vancouver*, SEATTLE TIMES (Jan. 29, 2018), https://www.seattletimes.com/seattle-news/politics/gov-inslee-rejects-permit-for-oil-by-rail-terminal-in-washington/.

[12] *See* de Place, *supra* fn. 1.

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decommissioned army base after it learned the developer was making plans to transport coal through the facility. The City Council responded with an ordinance banning coal operations, claiming they posed a substantial health or safety danger to the people of Oakland. A legal challenge by the developer followed, and the federal district court for the Northern District of California found the ordinance invalid based on the absence of evidence supporting the putative health concerns. In its Order, the court cited a litany of errors in the City's evidence supporting the adverse health finding, and concluded that "the gaps and errors in this record are so numerous and serious they render it virtually useless."[13]

In Oregon and Washington, several proposed coal export projects have failed, sometimes after years of review and tremendous investment from backers. For example, coal export terminals have been rejected in Hoquiam, Washington, Coos Bay, Oregon, and Clatskille, Oregon.[14]

Blocked propane pipelines. Local officials and their allies have also blocked proposed propane pipelines. One notable example, the Pembina Pipeline, would have brought infrastructure and jobs to the Portland, Oregon area, but was summarily defeated by mayoral fiat in the face of likely passage by the city council.[15]

C. The Attempted Embargo On Fossil Fuel Exports Conflicts With Federal Policy And Threatens To Disrupt Foreign Affairs And The Global Supply Chain.

As discussed in Plaintiffs' and Intervenor Plaintiffs' Complaints, the efforts of Defendants and their allies to block fossil fuel exports contravenes current U.S. foreign policy. *See* Dkt. 1 ¶¶ 195-198, Dkt. 22 ¶ 89. The U.S. federal government has announced

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[13] *See Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, Case No. 16-cv-07014-VC, Dkt. 249, Findings of Fact and Conclusions of Law (N.D. Cal. May 15, 2018).

[14] *See* de Place, *supra* fn. 1. As another example of a failed coal terminal, in 2017, SSA Marine terminated is application for a $500 million coal export terminal, filed six years prior, after the project was found to violate treaty rights of the Lummi nation. *See* Dave Gallagher, *Developers withdraw coal terminal applications, ending project*, BELLINGHAM HERALD (Feb. 19, 2017), www.bellinghamherald.com/news/local/article131783149.html.

[15] *See supra* fn. 4.

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and pursued a policy of aiding export of U.S. energy resources, including petroleum, to Asia. Indeed, the White House has identified supporting energy exports as a "Priority Action" of its "National Security Strategy."[16] The Strategy, which was updated in December 2017, states that "the United States will promote exports of our energy resources," including by "expanding our export capacity. . ."[17]

In complete disregard of U.S. foreign policy, Defendants and their allies are pursuing a de facto embargo on fossil fuel exports. Without access to ports on the West Coast, coal and oil cannot reach Asian countries, where there is high demand for American coal, oil, and timber. U.S. coal producers like plaintiff Lighthouse have contracts with Asian customers. Already, Lighthouse and peer companies require more export capacity to fulfill their contracts with Asian customers and meet market demand. The coordinated obstruction of construction of additional fossil fuel export capacity across the West Coast has caused great uncertainty and chaos for U.S. fossil fuel companies.

The collateral effects of the de facto embargo are far-reaching. The export facilities Defendants have thwarted would support not just coal exports, but also other commodities, including oil, *billions* of dollars of which are exported from Washington each year. In short, Defendants' violation of federal law has had and will continue to have severe economic consequences.

ARGUMENT

A. The Extraordinary Remedy Of Abstention Is Not Warranted: Plaintiffs' Commerce Clause And Foreign Affairs Claims Are A Matter Of Overwhelming Federal Interest.

Abstention is an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir. 1980) (citing *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959)).

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[16] WHITE HOUSE, NATIONAL SECURITY STRATEGY FOR THE UNITED STATES OF AMERICA at 23 (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

[17] *Id.*

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In advocating for abstention, Defendants ignore that Plaintiffs bring Section 1983 claims alleging violations of the Commerce Clause of the U.S. Constitution and the Foreign Affairs Doctrine, and disregard the presumption against abstention that applies to such claims. Where, as here, claims raise such "overwhelming federal interests," there is no basis for abstention. *See Procunier*, 416 U.S. at 405; *Harper*, 396 F.3d at 355-56 (the "commerce clause power itself justifies a narrower view of state interests in the abstention context").

B. Plaintiffs' Dormant Foreign Commerce Clause Claim Raises Issues Of Overwhelming Federal Interest That Should Be Heard On The Merits In Federal Court.

Courts have long recognized that the Commerce Clause of the U.S. Constitution constrains the power of states to regulate both interstate and foreign commerce, the so-called "dormant" aspect of the commerce clause. *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986) (where "the Federal Government has not affirmatively acted, it is the responsibility of the judiciary to determine whether action taken by state or local authorities unduly threatens the values the Commerce Clause was intended to serve"). Because "[t]he need for national uniformity in foreign affairs is important…state laws that burden foreign trade necessarily deserve closer scrutiny than those that burden only interstate commerce." *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 327-28 (1st Cir. 2012). State actions violate the dormant foreign commerce clause if they "(1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to speak with one voice in regulating commercial affairs with foreign states." *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006).

To determine whether a state action undermines the federal government's ability to "speak with one voice," courts look to whether the state action "*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).

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In considering Defendants' Motion to Dismiss, this Court must accept as true Plaintiffs' allegations that Defendants seek to undercut established U.S. policy on fossil fuel exportation. Defendants' actions undermining federal trade policy irreparably harms the federal government's ability to "speak with one voice" on coal exports, and thus violates the dormant foreign commerce clause.

Because Plaintiffs' claims strike at the core of the significant federal interest in speaking with one voice on coal export—and because allowing Defendants' conduct to go unchecked would severely undermine U.S. foreign policy—Plaintiffs' claims should be heard on the merits in federal court.

C. Defendants' Actions Also Violate The Dormant Interstate Commerce Clause.

State action violates the dormant interstate commerce clause if it "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect…unless it serves a legitimate local purpose, and this purpose could not be served as well by available nondiscriminatory means." *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013). Additionally, state action that is not facially discriminatory but has "incidental effects" on interstate or foreign commerce is valid only if the putative local benefits overwhelmingly outweigh the effects on interstate or foreign commerce. *Or. Waste Sys., v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Here, as discussed, Defendants' conduct severely threatens interstate commerce and impacts interested parties well beyond the border of Washington state. Further, Defendants have failed to demonstrate how their blockage of coal exports serves *any* local interest, let alone that such a local interest cannot be served by other, nondiscriminatory means.

D. Defendants' Concerted Actions To Thwart The Export Of Commodities Violate The Dormant Foreign Affairs Doctrine And Implicate Significant Federal Interests.

The foreign affairs doctrine derives from the constitutional mandate that the federal government has the exclusive authority to administer foreign affairs on behalf of the United

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States. U.S. Const. art. VI; art. II, § 2; art. I, § 8; *United States v. Pink*, 315 U.S. 203, 233 (1942) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states") (internal citation omitted). As a result, any state action that conflicts with this exclusively federal power is preempted. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012). The federal affairs doctrine not only covers state action that conflicts with an express federal foreign policy, but also state action that, even in the absence of an express federal foreign policy, "intrudes on the field of foreign affairs without addressing a traditional state responsibility." *Id*. In other words, "a state may violate the constitution by establishing its own foreign policy." *Deutsch v. Turner*, 324 F.3d 692, 709 (9th Cir. 2003). State action is an invalid exercise of power when a state "(1) has no serious claim to be addressing a traditional state responsibility and (2) [the state action] intrudes on the federal government's foreign affairs power." *Movsesian*, 670 F.3d at 1071. If state action has "more than some incidental or indirect effect in foreign countries," it violates the dormant foreign affairs doctrine. *Zschernig v. Miller*, 389 U.S. 429, 434 (1968).

Allowing Defendants' conduct to continue, unchecked, would not only disrupt private business and commercial interests, but would also upend the flow of U.S. energy resources to significant U.S. allies and potentially disrupt U.S. relationships with those foreign nations. Defendants' obstruction of fossil fuel exports is an establishment of their own foreign policy that has implications on foreign relationships and U.S. support of its close allies. *Cf. Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-51 (1st Cir. 1999) (Massachusetts law restricting businesses that traded with Burma "presents a threat of embarrassment to the country's conduct of foreign relations regarding Burma, and in particular to the strategy that the Congress and the President have chosen to exercise…[which] drives the conclusion that [the law] has more than an 'incidental or indirect effect'…into the foreign affairs power of the national government").

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Plaintiffs' challenge to Defendants' scheme to interfere with the federal government's exclusive domain over foreign policy raises crucial issues of federal interest that should be adjudicated in federal court. Abstention is not justified.

CONCLUSION

The Court should deny Defendants' motion for partial dismissal and abstention and proceed to adjudicate the Commerce Clause and Foreign Affairs claims.

Dated: May 15, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel on record in this matter.

Dated: May 15, 2018.

By: *s/Diana S. Breaux*

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