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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,

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.

NO.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 1 OF 53

()

[4822-5378-3084]

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I. INTRODUCTION

1
2 1. From the framing of the Constitution, the federal government has
3 enjoyed supreme authority to regulate foreign and interstate commerce.
4

5 2. In giving the federal government this authority, the Constitution
6 necessarily prohibits individual states from discriminating against, or unreasonably
7 burdening the free flow of, such commerce.

8 3. Plaintiff Lighthouse Resources Inc. and its subsidiaries are filing this
9 action because the Defendants are actively preventing coal mined in other states from
10 moving in foreign and interstate commerce.

11 4. In particular, the Defendants have unreasonably delayed and denied a
12 number of permits and approvals for a port facility that would enable the export of coal
13 to U.S. allies and trading partners in Asia.

14 5. Those Asian trading partners want the United States to help them meet
15 their coal demands. They have specifically identified coal from the Powder River Basin
16 in Wyoming and Montana as having ideal characteristics, including for the next
17 generation of high efficiency, low emissions coal-fired power plants.
18

19 6. The United States, which possesses the largest coal reserves in the world,
20 wants to supply coal to its Asian allies, and is aggressively pursuing a national policy
21 that facilitates coal exports to Asia.

22 7. Lighthouse Resources Inc. (Lighthouse) and its subsidiaries are working
23 to meet Asian coal demand. They have already contracted for delivery of coal to
24 customers in Asia. But Lighthouse cannot address Asian demand or fulfill its contracts
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1 with Asian customers unless additional economic coal export capacity opens on the
2 West Coast.

3 8. To address this capacity deficit, one of Lighthouse's subsidiaries is
4 proposing a new coal export facility at the existing Millennium Bulk Terminal in
5 Longview, Washington. That facility would directly generate numerous jobs, grow tax
6 revenues for state and local governments, attract further investment, and support
7 thousands of additional jobs throughout the country.
8

9 9. The Defendants oppose coal exports on policy grounds. So they have
10 unreasonably delayed and denied a number of permits and approvals needed to
11 construct the proposed new coal export facility at the Millennium Bulk Terminal. And
12 they have ceased processing other pending permits for the proposed facility, without
13 basis in law.

14 10. The Defendants' delays and denials are not consistent with normal
15 permitting procedures. They have, among other things, improperly expanded the
16 scope of their environmental review, arbitrarily and capriciously declined to approve a
17 sublease, and illegally refused to grant a Clean Water Act section 401 water quality
18 certification based on alleged effects that are exclusively within federal jurisdiction.
19

20 11. The Defendants' actions have both the intent and effect of discriminating
21 against and unduly burdening foreign and interstate commerce, in violation of the
22 United States Constitution's dormant commerce clause, the federal ICC Termination
23 Act, and the federal Ports and Waterways Safety Act.
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II. JURISDICTION AND VENUE

12. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983 because this controversy arises under the Constitution and laws of the United States, and involves the deprivation, under state law, of rights and privileges secured by the United States Constitution and acts of Congress.

13. This Court also has jurisdiction pursuant to its inherent equitable powers to enforce federal law and to enjoin state actions that are preempted by federal law.

14. The requested relief is proper under 28 U.S.C. §§ 2201 and 2202.

15. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

III. PARTIES

16. Lighthouse is a privately held company headquartered in Salt Lake City, Utah. Lighthouse’s wholly owned subsidiary companies include the parent company of entities owning or leasing coal mining rights, and operating two coal mines (one in Montana and one in Wyoming); the parent company of entities that have proposed to develop port facilities in Oregon and Washington to export coal from Wyoming, Montana, Utah, and Colorado, including the company that has proposed an export terminal in Longview, Washington; and an entity that contracts with rail carriers, ports, and customers in Asian markets for delivery of coal and is currently seeking additional port capacity to export coal through terminals with economic access to foreign markets.¹

¹ Lighthouse was previously known as Ambre Energy North America, Inc. In 2014, Ambre Energy North America, Inc. separated from its Australian parent company, Ambre Energy Limited, when it recapitalized. Ambre Energy North America, Inc. announced that it had changed its name to Lighthouse Resources, Inc. in April 2015.

1 17. LHR Coal, LLC (LHR Coal) is a wholly owned subsidiary of Lighthouse.
2 LHR Coal, through its subsidiaries, is in the business of owning and operating
3 upstream production and mining assets, including coal mines. LHR Coal's subsidiaries
4 own or lease coal mining rights, coal loading and rail infrastructure, and operate
5 existing coal mines in Montana and Wyoming.
6

7 18. LHR Infrastructure, LLC (LHR Infrastructure) is a wholly owned
8 subsidiary of Lighthouse. LHR Infrastructure, through its subsidiaries, is in the
9 business of identifying and developing infrastructure projects, including coal export
10 facilities, to connect downstream demand to upstream supply. LHR Infrastructure's
11 subsidiaries own or lease assets to develop marine terminals for transloading bulk
12 products, including coal, from rail to marine vessels.

13 19. Millennium Bulk Terminals-Longview, LLC (MBT Longview) is a wholly
14 owned subsidiary of LHR Infrastructure and operates an existing bulk product marine
15 terminal in Longview, Washington. MBT Longview has proposed a coal export
16 terminal at that site to receive coal from Lighthouse and other third party customers
17 for loading and shipment to customers in northeast Asia, presently including Japan
18 and South Korea.
19

20 20. Lighthouse Products, LLC (LHP) is a wholly owned subsidiary of
21 Lighthouse. LHP markets, sells, and delivers products to its customers. It is in the
22 business of supplying Lighthouse products to meet downstream demand. LHP delivers
23 coal mined by LHR Coal subsidiaries in Montana and Wyoming to Asian customers at
24 the point of sale, which is usually free-on-board (FOB) an ocean-going vessel at a coal
25 export terminal on the Pacific Coast.
26

1 21. Jay Inslee is the current governor of the state of Washington, an office he
2 assumed in January 2013. He is being sued in his official capacity.

3 22. Maia Bellon is the current director of the Washington Department of
4 Ecology. She has served in that role since she was appointed by Governor Inslee in
5 February 2013. She is being sued in her official capacity.

6 23. Hilary S. Franz is the current Washington Commissioner of Public Lands.
7 She was elected to that position in November 2016 and sworn in on January 11, 2017.
8 She is being sued in her official capacity.

9
10 **IV. FACTUAL BACKGROUND**

11 **A. Asian demand for coal**

12 24. The top five coal-importing countries in the world are located in Asia.
13 Together these countries accounted for 63% of global coal imports in 2014.

14 25. Japan and South Korea, both of which are among the world's top five coal
15 importers, have each signed the Paris Accord.

16 26. Despite having the largest coal reserves in the world, the United States
17 has historically supplied less than five percent of Asia's demand for imported thermal
18 coal. The United States accordingly has pursued a policy of facilitating coal exports to
19 Asia.
20

21 27. Japan in particular has limited domestic energy resources.² Following the
22 Fukushima nuclear power plant accident, Japan imports more than 90% of its primary
23 energy.
24

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26 ² Limited land mass limits Japan's options. *The Footprint of Energy: Land of U.S. Electricity Production*, STRATA (June 2017), <https://www.strata.org/pdf/2017/footprints-full.pdf>.

1 28. Japan is installing new, clean coal plant technologies to meet
2 environmental targets.³ Overall, “Japanese companies plan to develop about 45
3 additional coal power plants, adding more than 20 GW of capacity in the next
4 decade.”⁴

5 29. Japan has specifically identified Powder River Basin (PRB) coal from the
6 United States as having the quality characteristics that are desirable for Japan’s next
7 generation of high efficiency, low emissions coal-fired power plants.⁵

8 30. South Korea—the world’s ninth-largest energy consumer in 2015—lacks
9 domestic energy reserves, making it one of the top energy importers in the world.
10

11 31. In recent years, South Korea has also scaled back its long-term reliance
12 on nuclear power and increased its coal imports from 131 million short tons in 2010 to
13 149 million short tons in 2015.⁶

14 32. South Korea is the fourth-largest importer of coal in the world. Coal
15 accounts for 28% of South Korea’s installed electricity generating capacity, and 20 new
16 coal-fired power plants are scheduled to enter service by 2022. South Korean energy
17 companies also seek additional U.S. coal imports to diversify the sources of their coal
18 supply.
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22 ³ See METI, Clean Coal Technology in Japan (Sept. 6, 2017),
<http://www.jcoal.or.jp/event/upload/15.%20Clean%20Coal%20Technology%20in%20Japan.pdf>.

23 ⁴ *Japan: Overview*, U.S. ENERGY INFO. ADMIN. (Feb. 2, 2017),
<https://www.eia.gov/beta/international/analysis.cfm?iso=JPN>.

24 ⁵ Yoshiyuki Wakabayashi, *Clean Coal Technologies for IGCC Power Plants*, MITSUBISHI HITACHI POWER
25 SYSTEMS (Sept. 6, 2017),
<http://www.jcoal.or.jp/event/upload/16.%20Clean%20Coal%20Technologies%20for%20IGCC%20Power%20Plants%20%28Mr.%20Wakabayashi%29%20new.pdf>.

26 ⁶ *Korea, South*, U.S. ENERGY INFO. ADMIN. (Jan. 19, 2017),
<https://www.eia.gov/beta/international/analysis.cfm?iso=KOR>.

1 33. Increasing its U.S. coal imports would also allow South Korea to diversify
2 away from its dependence on imports from Indonesia and the Russian Federation.

3 34. Japan, South Korea, and other U.S. allies in Asia want stable and secure
4 energy supplies for their economies and stability in the region, especially in light of the
5 threat from North Korea and the growing international activism of China and the
6 Russian Federation.
7

8 **B. Lighthouse's coal supply chain**

9 35. Since 2009, Lighthouse and its affiliated companies have responded to
10 Asian demand by pursuing a strategy to secure port capacity and deliver U.S. coal to
11 Asia.

12 36. Lighthouse, through its subsidiaries, operates a coal energy supply chain
13 company. That means that Lighthouse manages or arranges the mining of coal, the
14 transfer of coal from rail to ocean-going vessels, and the sale of coal to end users.

15 37. Since 2011, Lighthouse subsidiary LHR Coal has owned and leased coal
16 mining rights, maintained coal loading infrastructure, and operated coal mines in
17 Montana and Wyoming through its own subsidiary companies. These mining
18 properties were acquired primarily to meet current and projected demand from Asian
19 customers.
20

21 38. Under federal regulations, LHR Coal's subsidiaries are obligated to seek
22 the maximum economic recovery for minerals mined on federal lands. Lighthouse's
23 efforts to export coal to Asia are part of its effort to seek maximum economic recovery.
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1 39. One of LHR Coal's subsidiaries owns and operates the Decker Coal Mine
2 in southern Montana. The Decker mine, which has been in operation since the early
3 1970s, is on the northern corridor of the BNSF railroad.

4 40. The Decker mine has two load out facilities, each of which can handle up
5 to 14 million tons of coal per year. The mine has over 60,000 acres of mineral and
6 surface rights under lease from federal, state, and private mineral owners.

7 41. Coal from the Decker mine is in high demand from overseas customers.
8 Reserves at Decker are approximately 241 million tons, with additional resources
9 estimated at over 1.2 billion tons.

10 42. Another one of LHR Coal's subsidiaries owns a 50% interest in, and
11 operates, the Black Butte mine in Wyoming. The Black Butte mine, which has been in
12 operation since the 1970s, is on the Union Pacific railroad.

13 43. The Black Butte mine has a rail load out facility capable of handling up to
14 14.5 million tons of coal per year. Reserves at Black Butte are over 50 million tons, with
15 additional resources estimated at over 90 million tons.

16 44. LHR Coal's subsidiary Big Horn Coal Company also has rights to
17 approximately 40 million tons of recoverable coal leased from the State of Wyoming.

18 45. LHP is party to an amended ten-year contract with a customer in South
19 Korea that was originally executed on May 11, 2012 to deliver two million metric tons
20 per year with the option for the customer to elect to receive an additional one million
21 metric tons per year (Contract #1).

22 46. LHP is party to another amended contract with a second customer in
23 South Korea, originally executed as a ten-year contract on June 5, 2012, to deliver one
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1 million metric tons per year with the option for the customer to purchase an additional
2 one million tons per year (Contract #2).

3 47. LHP also sold a trial shipment of coal to other potential Japanese
4 customers, but is unable to execute long-term contracts for larger volumes until it
5 secures more coal export capacity and can be more certain about when deliveries can
6 be made.

7 48. Other customers in South Korea, Japan, and Taiwan have expressed
8 interest in purchasing coal from Lighthouse and its subsidiaries.

9 49. The lack of sufficient economic west coast coal export capacity has
10 prevented delivery of the coal volumes specified in both Contract #1 and Contract #2.
11 As a result, the contracts had to be amended in December 2015 to make both subject to
12 termination for failure to deliver.

13 50. At present, LHP supplies coal to its Asian customers by shipping coal out
14 of a Canadian port. That port has not contracted sufficient capacity to LHP to fulfill the
15 contracts to which LHP is a party and is approximately 250 miles farther from the
16 mines than the Millennium Bulk Terminal, resulting in increased shipping costs.

17 51. LHP needs additional economic coal export capacity to fulfill its
18 contracts and meet market demand.

19
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21 **C. Lighthouse's efforts to secure coal export capacity**

22 52. Given that there is not sufficient economic coal export capacity for
23 Lighthouse and its subsidiaries to fulfill existing contracts and meet increasing Asian
24 market demand, Lighthouse and predecessor entities have been working to identify,
25 contract with, and/or develop new coal export facilities on the West Coast since 2009.
26

1 53. In 2010, Lighthouse investigated over two dozen potential coal export
2 locations, including 14 potential sites in Washington, 5 in Oregon, 4 in California, and
3 4 in British Columbia.

4 54. Based on this thorough investigation, Lighthouse concluded that the
5 Millennium Bulk Terminal brownfield site in Longview, Washington (the Terminal)
6 was the preferred site for coal exports. It entered into an asset purchase and sale
7 agreement that ultimately resulted in its acquisition of substantially all Terminal
8 assets.

9 55. In July 2010, Washington State offered potential tax abatement, rail
10 infrastructure improvements, assistance to streamline permitting, and job training
11 incentives to redevelop the Terminal into a bulk products facility that included coal
12 exports.

13 56. While it sought to acquire and permit the Millennium Bulk Terminal
14 facility, LHP continued searching for other coal export capacity.

15 57. Starting in 2011, Lighthouse—through LHR Infrastructure and its
16 subsidiaries Coyote Island Terminal, LLC and Pacific Transloading, LLC—proposed to
17 construct the Morrow Pacific Project, a coal export facility at the Port of Morrow near
18 Boardman, Oregon.

19 58. The Port of Morrow is the second-busiest port in Oregon, and has more
20 than 12,000 acres of land that is used and available for a variety of industries. Oregon
21 law (ORS 777.250) gives the port very broad operational authority, including for
22 “storing, warehousing, distributing, or selling or servicing any products of agriculture,
23 mining or industry”
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1 59. After taking two and one-half years to review it, the Oregon Department
2 of State Lands denied Coyote Island Terminal’s application for a removal-fill permit to
3 construct an industrial dock. Despite the heavy commercial use and industrial purpose
4 of the Port, the Department asserted that the Port of Morrow’s busy waters were best
5 used for fishing. That decision effectively blocked U.S. coal exports through Oregon.
6

7 **D. The proposed Millennium Bulk Terminal coal export facility**

8 60. The proposed Millennium Bulk Terminal coal export facility would
9 provide sufficient capacity to enable Lighthouse’s subsidiaries to economically fulfill
10 existing and new contracts with Asian customers by shipping coal from Montana and
11 Wyoming through the Terminal and onto ocean-going vessels bound for Asia.

12 61. The Terminal has been an active industrial site since 1941, with an active
13 industrial dock that was used for decades before MBT Longview acquired it in 2011 with
14 the goal of expanding it into a state-of-the-art coal export facility.

15 62. At present, the Terminal receives coal by rail weekly, which is then
16 loaded onto trucks for distribution. The Terminal also maintains readiness to unload
17 shiploads of alumina imported primarily from Australia for transportation by rail to an
18 aluminum smelting facility in Wenatchee, Washington.

19 63. A 2008 Aquatic Lands Lease between the State of Washington and
20 Northwest Alloys, Inc. (the Aquatic Lands Lease) expressly allows coal to be handled
21 over and across the Terminal’s existing dock and two new planned docks.
22

23 64. The Aquatic Lands Lease further specifies that the “State believes that
24 this Lease is consistent with the Public Trust Doctrine” and makes clear that approval
25 of a sublease “shall not be unreasonably conditioned or withheld.”
26

1 65. MBT Longview acquired the Terminal assets and executed a ground lease
2 with Northwest Alloys, Inc. (the “Ground Lease”) in 2011. At the same time, MBT
3 Longview agreed to certain performance obligations (including but not limited
4 environmental remediation) for the property, including on the aquatic lands, the
5 uplands of the proposed coal export terminal, and the uplands of the existing bulk
6 terminal.
7

8 66. Lighthouse is a guarantor of MBT Longview’s performance under the
9 Ground Lease. MBT Longview and Northwest Alloys, Inc. further intended that MBT
10 Longview would become a sublessee under the Aquatic Lands Lease.

11 67. The Terminal is connected to the existing national rail freight network,
12 already receives common carrier service from BNSF, and is capable of receiving trains
13 from Union Pacific.

14 68. The Terminal is on the Columbia River, which has been designated by
15 the U.S. Department of Transportation Maritime Administration as a Marine Highway
16 for the transportation of commerce. The river was deepened pursuant to an Act of
17 Congress—at a cost exceeding \$180 million—so it could handle more cargo and
18 facilitate growth.
19

20 69. At full build-out the Terminal would be capable of exporting 44 million
21 metric tons of coal, which would both satisfy the export requirements of Lighthouse
22 and its subsidiaries and provide export capacity to third party shippers.

23 70. MBT Longview began the permitting process for the proposed Terminal
24 coal export facility in February 2012. That process requires MBT Longview to acquire
25 roughly two dozen separate federal and state plans, permits, and approvals.
26

1 **E. Benefits of the Millennium Bulk Terminal**

2 71. The Millennium Bulk Terminal has been underutilized for more than 15
3 years. Lighthouse's and MBT Longview's plans would redevelop it into a world-class
4 port facility.

5 72. In part due to underutilization of facilities like the Terminal, Cowlitz
6 County has faced economic challenges that have left it lagging behind state averages
7 for employment. The proposed coal export facility at the Terminal is expected to add
8 over 1,300 construction jobs and approximately 135 family-wage jobs.⁷

9 73. The Terminal would generate substantial direct tax receipts at the state
10 and local levels.⁸ A 2012 economic study estimated that the Terminal would generate
11 \$146 million in tax revenues over a 30-year period, with approximately 26% of this
12 revenue going to the County, 54% to the State, and 20% to special purpose districts.⁹

13 74. Investment in the Terminal would also attract further investment to
14 improve infrastructure around Cowlitz County, resulting in upgrades to rail and other
15 methods of transportation. Improved freight transportation along the Columbia River
16 would increase the value and attractiveness of other industrial properties,¹⁰ including
17 the Port of Longview's proposed port development at Barlow Point, which is adjacent
18 to the Millennium Site.
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23 ⁷ COWLITZ CTY. & WASH. DEP'T ECOLOGY, MBT Longview SEPA Final Environmental Impact Statement 2-
24 2 (Apr. 28, 2017), <http://millenniumbulkeiswa.gov/sepa-eis.html>.

25 ⁸ *Id.* at 2-1.

26 ⁹ BERK, ECONOMIC & FISCAL IMPACT OF MILLENNIUM BULK TERMINALS LONGVIEW 25 (Apr. 12, 2012),
<http://millenniumbulk.com/wp-content/uploads/2014/10/Economic-Study-Full-Report.pdf>.

¹⁰ *Id.* at Executive Summary.

1 75. In addition to the local jobs in Cowlitz County, the Terminal at full
2 build-out would support thousands of direct and indirect jobs throughout the
3 country,¹¹ and bring substantial benefits to the economies of Washington's sister states,
4 including Montana and Wyoming.

5 76. In 2015, Montana coal sales generated nearly \$115 million in federal and
6 state revenue, much of which funds schools, state parks, libraries, and local
7 infrastructure.¹² Because Montana holds about one-fourth of America's demonstrated
8 coal reserves, coal export is essential to the state's economy.¹³

9 77. Likewise, coal production and export is a cornerstone of Wyoming's
10 economy.¹⁴ The majority of the coal mined in Wyoming is exported by rail out of state
11 or out of the country.¹⁵ In 2012, coal accounted for 14% of gross state product, 9.3% of
12 total labor income, and 5.9% of total employment in Wyoming.¹⁶

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¹¹ See ERNST & YOUNG, U.S. COAL EXPORTS: NATIONAL AND STATE ECONOMIC CONTRIBUTIONS 8-9, 68 (May 2013), <http://www.uscoalexports.org/data/National-and-State-Economic-Contributions-5-22-13.pdf>.

¹² See Dep't of Interior, *Explore Data: Montana*, NAT. RESOURCES REVENUE DATA, <https://revenue.data.doi.gov/explore/MT/#revenue> (last visited Dec. 19, 2017). An average train load of coal in Montana is assessed approximately \$30,800 in federal, state and local taxes. *Working for the Coal Industry in Montana*, MONTANA COAL COUNCIL, <http://www.montanacoalouncil.com/> (last visited Dec. 19, 2017).

¹³ See *Montana*, U.S. ENERGY INFO. ADMIN. (Jan. 19, 2017), <https://www.eia.gov/state/analysis.php?sid=MT>.

¹⁴ See State of Wyoming Mot. for Summ. Determination 5, Coyote Island Terminal LLC, OAH Case No.: 1403883 (May 6, 2016), https://drive.google.com/file/d/0B_4EQ9PebvQIdmx6NHhBemkwYkU/view (Wyoming produced 401,457,074 tons of coal in 2012, which represented 39 percent of the entire nation's coal production).

¹⁵ *Id.*

¹⁶ ROBERT GODBY ET AL., CTR. FOR ENERGY ECON. & PUB. POLICY, THE IMPACT OF THE COAL ECONOMY ON WYOMING 4 (Feb. 2015), https://www.uwyo.edu/cee/_files/docs/wia_coal_full-report.pdf.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 15 OF

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1 78. The Terminal also has the potential to increase annual U.S. coal exports
2 by 44 million metric tons, increasing the annual value of U.S. exports by more than
3 \$2.5 billion and shrinking U.S. trade deficits with Asian trading partners.¹⁷
4

5 79. At the same time, the Terminal will provide Asian markets greater access
6 to coal mined under U.S. laws and regulations, giving Asian customers the alternative
7 they seek to achieve their energy policy objectives, including by meeting their
8 environmental commitments.

9 **F. Defendants' opposition to coal and coal exports**

10 80. The Defendants have all expressed unyielding opposition to coal and coal
11 exports.

12 81. Defendant Inslee co-authored a 2007 book titled *Apollo's Fire: Igniting*
13 *America's Clean Energy Economy* in which he opines that coal is "killing us."¹⁸ More
14 specifically, he claims that "[s]hould we fail to restrain the growth of CO₂ emissions"
15 from coal, "all six billion of us on this little spaceship are at risk"¹⁹
16

17 82. In the same part of his book, Defendant Inslee claims that "[c]oal is in a
18 race with cars to be the greatest danger to our climate."²⁰ He also specifically points to
19 the growth of coal use in Asia as a looming threat to the environment.²¹
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22 ¹⁷ 48 million short tons x \$57.87 per short ton = \$2.7 billion, using Platt's North East Asian Thermal Coal
23 Index Netback Price at Vancouver BC, dated November 24, 2017.

24 ¹⁸ JAY INSLEE & BRACKEN HENDRICKS, *APOLLO'S FIRE: IGNITING AMERICA'S CLEAN ENERGY ECONOMY* 199
(2008).

25 ¹⁹ *Id.* at 200.

26 ²⁰ *Id.*

²¹ *Id.* at 201.

1 83. In November 2012, following Defendant Inslee’s election as Governor of
 2 Washington, an article reported that state and national environmental groups viewed
 3 him as “their best chance to block the coal ports [in Washington].”²² According to the
 4 article, environmental groups believed that Defendant Inslee “could push rigorous
 5 environmental reviews that could slow and complicate the permitting process or
 6 impose so many conditions that it would be difficult for developers to build the
 7 terminals.”²³

8 84. During his first inaugural address as the Governor of Washington,
 9 Governor Inslee proclaimed that he would not “consciously accept the dangers of
 10 climate change” and described Washington State as the “first responders” who must
 11 help “solve this global problem.”²⁴

12 85. During his first press conference as Governor, Defendant Inslee
 13 discussed his concerns about the “ramifications” of “burn[ing] the enormous amounts
 14 of Powder River Basin coal that are exported through our ports.” He called permitting
 15 those exports “the largest decision we will be making as a state . . . certainly during my
 16 lifetime and nothing comes close to it.”²⁵

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22 ²² Maria Gallucci, *Will Washington’s Super Green Governor Take Up the Fight Against Coal Exports?*,
 INSIDE CLIMATE NEWS (Nov. 26, 2012), <https://insideclimatenews.org/news/20121119/washington-state-coal-export-terminals-northwest-governor-jay-inslee-clean-energy-economy-oregon-california-epa>.

23 ²³ *Id.*

24 ²⁴ Jay Inslee, Governor of Wash., 2013 Inaugural Address: The World Will Not Wait (Jan. 16, 2013),
http://www.governor.wa.gov/sites/default/files/speeches/20130116_Inaugural.pdf.

25 ²⁵ Jessica Goad, *Governor Inslee Calls Coal Exports “The Largest Decision We Will Be Making as a State
 26 from a Carbon Pollution Standpoint,”* THINKPROGRESS (Jan. 22, 2013, 7:56 PM),
<https://thinkprogress.org/governor-inslee-calls-coal-exports-the-largest-decision-we-will-be-making-as-a-state-from-a-carbon-9c73e7ba1079/>.

1 86. In May 2014, Defendant Inslee, speaking at a “Climate Solutions”
2 fundraiser, touted his view that Washingtonians could be “leaders” by taking
3 advantage of Washington’s “attributes as a state”—meaning that states on “the West
4 Coast” could fight climate change by preventing coal exports.²⁶

5
6 87. Following the 2016 U.S. presidential election, Defendant Inslee claimed
7 that President Trump “has made it clear that he wants to go backwards on our efforts
8 to fight climate change,” and promised that Washington would continue its “aggressive
9 effort to fight climate change.”²⁷ He went on: “No matter what happens in Washington
10 D.C., Washington State is going to fight climate change, and we’re going to win”²⁸

11 88. In October 2017, while speaking at Climate Change Town Hall meeting,
12 Inslee indicated that “you don’t want to lock yourself into infrastructure that is going
13 to be there 50 years to essentially expand fossil fuel. We do not want to get into that
14 mindset for making that kind of decision.”²⁹

15 89. In another Climate Change Town Hall meeting, Defendant Inslee again
16 referenced Millennium, warned against “build[ing] an infrastructure that locks us into
17 fossil fuels,” and asserted that Washington State will “do some great things to reduce
18 our carbon pollution from all sources wherever it is, so we can reduce carbon whether
19 it is produced in China, or Montana, or Brazil”³⁰

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21
22 ²⁶ See Climate Solutions, *Governor Jay Inslee on Washington’s Role in Climate Solutions*, YOUTUBE (May
20, 2014), <https://www.youtube.com/watch?v=5njtFvVjMn0&feature=youtu.be>.

23 ²⁷ *Governor Jay Inslee Press Conference*, TVW (Mar. 25, 2017), www.tvw.org/watch/?eventID=2017031315.

24 ²⁸ *Id.*

25 ²⁹ 350 Seattle, *Climate Townhall with Gov Inslee Q&A 10 19 2017*, YOUTUBE (Oct. 24, 2017),
https://www.youtube.com/watch?v=h_qohIqCYx8&feature=youtu.be.

26 ³⁰ *Governor Inslee Climate Change Town Hall*, TVW (Oct. 25, 2017, 2:45 PM),
www.tvw.org/watch/?eventID=2017101081.

1 90. Defendant Inslee’s policy goal of stopping coal exports is implemented in
2 large part through the Washington Department of Ecology.

3 91. Defendant Bellon was appointed by Defendant Inslee to the position of
4 Director of the Washington Department of Ecology in February 2013. In that position,
5 she has worked with Defendant Inslee to oppose coal exports.
6

7 92. In November 2013, Defendant Bellon explained during a panel discussion
8 that “This effort starts with Governor Inslee’s vision, his mission I’ve been asked to
9 lead the sustainable energy and clean environment goal area Governor Inslee is
10 pushing us hard on ‘You don’t do your work in a silo. You check in with [other
11 administration officials]’ . . . Something that I may push from the environmental or
12 water quality perspective may be problematic in a different area.”³¹

13 93. When the Washington Department of Ecology (Ecology) published its
14 Environmental Impact Statement (EIS) for the Millennium Bulk Terminal in April 2017,
15 its official Twitter account tweeted out four “key findings” from the EIS, while paying
16 little attention the EIS’s findings of no significant adverse impact.
17

18 94. When Ecology tweeted a “key finding” that “[t]he project would increase
19 carbon pollution globally by 2 million metric tons,” Defendant Bellon retweeted that
20 statement.

21 95. Despite Ecology having jurisdiction over several pending and future
22 permits for the Terminal project, Defendant Bellon also tweeted in April 2017 that
23

24
25 ³¹ Panel Discussion on “A New Direction in Washington” with Maia Bellon (Director, Dept. of Ecology),
26 Carol Nelson (Director, Dept. of Revenue), and Joel Sacks (Director, Dept. of Labor & Industries), TVW
(Nov. 14, 2013, 9:00 AM), <https://www.tvw.org/watch/?eventID=2013111061>.

1 “[t]he proposed coal terminal in Longview would significantly impact the environment
2”

3 96. Defendant Franz campaigned against coal exports when running for
4 Washington State Lands Commissioner, indicating in response to a questionnaire that
5 she “opposes coal and oil exports from Washington ports.”³²
6

7 97. Defendant Franz’s campaign website also argued that coal “is projected
8 to be an economically outdated energy source within 10 years,” and praised the U.S.
9 Army Corps of Engineers for “suspend[ing] the Cherry Point Coal Terminal project,”
10 another proposed coal export terminal in Washington State.³³

11 98. In sum, all the Defendants steadfastly oppose the use of coal as a source
12 of energy and, more specifically, the export of coal to Asian markets.

13 99. As public officials of the state of Washington, the Defendants have
14 translated their personal opposition to coal exports into official state policy by actively
15 thwarting Lighthouse’s plans to ship coal from Montana and Wyoming to the proposed
16 Millennium Bulk Terminal for export to Asia.
17

18 **G. Defendants’ coordination with other states to block coal exports**

19 100. On information and belief, the Defendants have also coordinated with
20 officials in Oregon and California in a “subnational” effort to prevent any new coal
21 exports from the United States Pacific Coast to Asian markets.
22

23
24 ³² TJ Martinelli, *Different Visions for Public Lands Chief*, THE LENS, (Sept. 7, 2016),
<http://thelens.news/2016/09/07/a-different-visions-for-public-lands-chief/>; see 46th District Democrats
Legislative & Statewide Questionnaire, THE LENS, [http://thelens.news/wp-](http://thelens.news/wp-content/uploads/2016/09/CommissionerofPublicLands_HilaryFranz.pdf)
25 content/uploads/2016/09/CommissionerofPublicLands_HilaryFranz.pdf 7 (last visited Dec. 19, 2017).

26 ³³ Hilary Franz, *Issue Priorities*, ELECT HILARY FRANZ, <http://www.hilaryfranz.com/issues/> (last visited
Dec. 19, 2017).

1 101. The Pacific Coast Collaborative (PCC), a partnership between
2 Washington, Oregon, California, Alaska, and British Columbia that was initially
3 formed in June 2008, has been used to coordinate policies and actions between the
4 states of Oregon, Washington, and California, as well as British Columbia.
5

6 102. Opposition to coal exports originated with one PCC member state at
7 least as early as February 2011, when then-Oregon First Lady Cylvia Hayes responded to
8 an email from the environmental group Climate Solutions about the proposed
9 Millennium Bulk Terminal coal export facility.³⁴

10 103. Hayes and her fiancée, then-Oregon Governor John Kitzhaber actively
11 worked to stop coal exports in Oregon and expanded collaboration with officials in
12 Washington, including one or more of the Defendants, in an attempt to block all coal
13 exports from the West Coast.

14 104. On information and belief, subnational efforts to prevent coal exports
15 from the West Coast by PCC member states were also intertwined with the efforts of
16 environmental groups seeking to block coal exports to Asia.
17

18 105. For instance, while acting as First Lady of Oregon, Hayes was being paid
19 by the Clean Economy Development Center to develop “a strategic approach to
20 preventing the development of coal export facilities on the west coast.”³⁵ A substantial
21 part of that compensation came from the Energy Foundation, a group that also worked
22

23 ³⁴ See E-mail from Cylvia Hayes, CEO, 3E Strategies, to KC Golden, Senior Policy Advisor, Climate
24 Solutions (Feb. 19, 2011), http://media.oregonlive.com/politics_impact/other/Nelson%20Hayes%20email.pdf; see also Anne
25 Mulkern, *West Coast Pact on Climate Action Pulled into Former Ore. Governor's Scandal*, E&ENEWS (Feb.
26 23, 2015), <https://www.eenews.net/stories/1060013822>.

³⁵ Nick Budnick, *Kitzhaber Told Staff State Policies Should Match Cylvia Hayes' Paid Agenda*, OREGON
LIVE (July 20, 2015, 1:47 PM), http://www.oregonlive.com/politics/index.ssf/2015/07/kitzhaber_told_staff_state_pol.html.

1 with Governor Kitzhaber to align anti-coal policies in Washington, Oregon, and
2 California.³⁶

3 106. Hayes worked with Governor Kitzhaber to ensure that Oregon's policies
4 and decisions opposing coal exports were consistent with the positions taken by the
5 environmental groups who paid her salary. They also worked with the Defendants to
6 help Washington adopt the same anti-coal export policies.
7

8 107. In December 2012, before Defendant Inslee was sworn into office,
9 Oregon Governor Kitzhaber left him a message to invite his participation in a project
10 that would create a systemic case against investment in west coast coal export
11 infrastructure.

12 108. In March 2013, Defendant Inslee and Governor Kitzhaber co-authored a
13 letter to the chair of the White House Council on Environmental Quality that decried
14 the "inevitable consequences of coal leasing and coal export . . . [which] are likely to
15 lead to long-term investments in coal generation in Asia" and urged the federal
16 government "in the strongest possible terms to undertake and complete a thorough
17 examination of the greenhouse gas and other air quality effects of continued coal
18 leasing and export" ³⁷

19 109. The Defendants also continued to coordinate with Oregon and California
20 officials through the PCC, using the PCC to "present united fronts opposing new coal
21

22
23
24 ³⁶ Nick Budnick, *Cylvia Hayes Scandal: Kitzhaber Associates Help Create Jobs for Her That Had Oregon
Influence in Mind*, OREGONLIVE (Feb. 9, 2015, 9:15 PM),
http://www.oregonlive.com/politics/index.ssf/2015/02/cylvia_hayes_kitzhaber_associa.html.

25 ³⁷ Letter from Jay Inslee, Governor of Wash., and John Kitzhaber, Governor of Or., to Nancy Sutley,
26 Chair, Council Env'tl. Quality (Mar. 25, 2013), <http://critfc.org/wp-content/uploads/2012/10/sutley-coal.pdf?x78172>.

1 export facilities on the West Coast,” and seeking grant funding for the PCC from
 2 environmental organizations opposed to coal exports.³⁸

3 110. On October 28, 2013, as part of their public efforts with the PCC,
 4 California, Oregon, Washington, and British Columbia signed an “Action Plan on
 5 Climate and Energy” that agreed to “meaningful coordination and linkage between
 6 states and provinces in North America . . . [to] improve the effectiveness of [their]
 7 actions, increase their overall positive impact and build momentum for broader
 8 international coordination to combat climate change.”

9 111. Officials in Oregon also sought funding for the PCC from groups
 10 opposed to coal exports with the idea that the states on the west coast, including
 11 Washington, could work with those anti-coal export groups as a unified “network.”

12 112. During an April 19, 2014 speech to the League of Conservation Voters,
 13 Governor Kitzhaber made it clear that he intended to stop all coal exports: “It is time
 14 once and for all to say no to coal exports from the Pacific Northwest The future of
 15 Oregon and the West Coast does not lie in nineteenth century energy sources.”³⁹

16 113. On October 8, 2014, *Willamette Week* published a story explaining how
 17 First Lady Hayes had misused her position in Governor Kitzhaber’s administration. In
 18 January 2015, it came to light that Hayes had not disclosed her contract with the Clean
 19 Economy Development Center in her ethics filings.
 20
 21

22
 23 ³⁸ 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/>.

24 ³⁹ Rob Davis, *Oregon Gov. John Kitzhaber Firmly Opposes Ambre Energy Coal Export Terminal, Sets May*
Deadline, OREGONLIVE (Apr. 25, 2015, 12:54 PM),
 25 http://www.oregonlive.com/environment/index.ssf/2014/04/oregon_gov_john_kitzhaber_firm.html;
 Ben Adler, *Kitzhaber is on His Way Out, But Expect Oregon to Keep Being a Green Leader*, GRIST (Feb. 14,
 26 2015), <http://grist.org/politics/kitzhaber-is-on-his-way-out-but-oregon-should-continue-being-a-green-leader/>.

1 114. On February 4, 2015, the Oregonian editorial board called for Kitzhaber
2 to resign. On February 9, 2015, Oregon Attorney General Ellen Rosenblum announced
3 a criminal investigation. On February 13, the U.S. Attorney’s Office issued a subpoena
4 for records.⁴⁰

5 115. Kitzhaber resigned as Governor of Oregon effective February 18, 2015, but
6 PCC member states continued to act in opposition to coal exports.

7 116. On June 1, 2016, members of the PCC—British Columbia, California,
8 Oregon, and Washington—together with the cities of Los Angeles, Oakland, Portland,
9 San Francisco, Seattle, and Vancouver, signed the “Pacific North America Climate
10 Leadership Agreement.” The Preamble to that agreement noted that the parties are
11 “embracing the Pacific Coast’s opportunity to demonstrate global leadership by
12 providing a model for decisive, coordinated subnational climate action”

13
14 **H. Washington’s environmental review of the proposed Terminal**

15 117. In November 2010, MBT Longview received a Shoreline Substantial
16 Development Permit from Cowlitz County for initial development of a coal export
17 facility at the Terminal. Several environmental groups appealed that decision.

18 118. The Washington Department of Ecology filed to intervene in the appeal.
19 Ecology’s Southwest Regional Office claimed in an email that Ecology was not
20 “suggesting that the SEPA analysis should include emissions that occur from the
21 burning of coal in China.” Instead, Ecology’s position was that the greenhouse gas
22

23
24
25 ⁴⁰ See Jonathan Cooper, *Feds Subpoena Records Pertaining to Departing Oregon Gov.*, AP NEWS (Feb. 14,
26 2014), <https://apnews.com/d2b8cb51c03947df859fe26b583bd0f3>.

1 emissions inventory should evaluate transportation impacts from the border of
2 Washington to the three mile territorial limit.

3 119. Rather than litigate the appeal of its original Shoreline Development
4 Permit, MBT Longview withdrew its permit application and began a new process that
5 would evaluate the environmental effects of the possible expansion of coal exports at
6 the Terminal—including preparation of an EIS.

7
8 120. In October 2012, the U.S. Army Corps of Engineers, Washington
9 Department of Ecology, and Cowlitz County agreed to collaborate on a joint National
10 Environmental Policy Act (NEPA)/State Environmental Policy Act (SEPA) document.
11 Approximately three years later, after Defendants Inslee and Bellon were in office, the
12 parties amended their Memorandum of Understanding to allow separate state and
13 federal environmental reviews.

14 121. The separation of the federal and state environmental review process
15 stemmed from a disagreement over the scope of the document. Defendant Bellon
16 explained on August 22, 2013 that the State’s broader scope of environmental review
17 was based on “the end use of a product” and that “there is no speculation as to the end
18 use of the exported coal; it will be combusted for thermal power.”⁴¹

19
20 122. In other words, Defendant Bellon explicitly proposed to expand the
21 environmental review of proposed Terminal project beyond the scope originally
22
23
24

25 ⁴¹ Letter from Maia Bellon, Dir. of Wash. Dept. of Ecology, to Doug Erickson, Wash. State Senator 4, 7
26 (Aug. 22, 2013), <http://washingtonports.org/wp-content/uploads/2013/11/Annual13-CLE-EcologyLetterGatewayReview.pdf>.

1 envisioned with the federal government solely because of the commodity being
2 exported: coal.⁴²

3
4 123. In November 2013, just 2 days after the public scoping comment period
5 to define the scope of the Millennium Bulk Terminal EIS ended, Governor Kitzhaber
6 praised Defendant Inslee for assuring that Washington's review of coal export facilities
7 would include a full examination of upstream and downstream impacts, including rail
8 effects and the effects of coal's use as a fuel in Asia.

9
10 124. In February 2014, Ecology formally decided that the Draft EIS for the
11 Terminal project would evaluate impacts beyond the State's borders, including impacts
12 from lifecycle greenhouse gas emissions and transportation that occurs outside of the
13 project area and the State of Washington. This change in scope was inconsistent with
14 both Ecology's stated position in 2011 and its original scoping agreement with the
15 federal government.

16
17 125. The U.S. Army Corps of Engineers declined to follow Ecology's decision
18 to conduct an expansive environmental review.

19
20 126. The Corps explained its scoping decision in a February 2014
21 Memorandum of Record. In sum, the Corps concluded that Ecology's broader analysis

22
23 ⁴² The proposed MBT Longview coal export terminal is almost six years into the permitting process and
24 it has undergone repetitive, burdensome, and unnecessarily complex government processes. As of
25 October 2017, MBT Longview has invested about \$15 million in permitting. A report by James Bacchus
26 and Rosa Jeong of the law firm Greenberg Traurig LLP prepared for the National Association of
Manufacturers noted that expanded SEPA review could constitute export restrictions under World
Trade Organization rules. See JAMES BACCHUS & ROSA JEONG, GREENBERG TRAUIG LLP, LNG AND COAL:
UNREASONABLE DELAYS IN APPROVING EXPORTS LIKELY VIOLATE INTERNATIONAL TREATY OBLIGATIONS 3-5
(Nov. 2013), [http://www.nam.org/Issues/Energy/LNG-and-Coal-Report-NOV-2013/LNG-COAL-
Report.pdf](http://www.nam.org/Issues/Energy/LNG-and-Coal-Report-NOV-2013/LNG-COAL-Report.pdf).

1 infringed on numerous areas over which “other Federal agencies may have regulatory
2 control.”

3 127. On information and belief, Defendant Inslee and Defendant Bellon
4 influenced the scope and preparation of the EIS in a manner to include factors over
5 which Washington State has no jurisdiction, some of which are exclusively under
6 federal jurisdiction.
7

8 128. In June 2016, following publication of the state’s Draft EIS, Defendant
9 Bellon reiterated the State of Washington’s goal of being a national and global leader
10 in opposing the use of carbon-based fuels, and argued that if Washington, Oregon, and
11 California show leadership, then “others will fall in line.”⁴³

12 129. During the same June 2016 interview, Defendant Bellon acknowledged
13 that the state has little authority to regulate rail transportation, and that if a recently
14 passed law went further, it would be “beyond our authority again and . . . interfering
15 with commerce clause concepts.”⁴⁴
16

17 130. The unusually broad, global scope of analysis for the Final EIS is just one
18 of the ways that the Defendants undermined the Terminal expansion project’s goal of
19 exporting U.S. coal to Asian markets.

20 131. On information and belief, Defendant Inslee and Defendant Bellon also
21 influenced the preparation of the EIS to exclude analysis that did not support their
22 opposition to coal exports.
23

24
25 ⁴³ Inside Olympia, Interview with WA Dept. of Ecology Director Maia Bellon, TVW (June 2, 2016, 7:00
PM), www.tvw.org/watch/?eventID=2016061084.

26 ⁴⁴ *Id.*

1 132. For example, the draft EIS excluded the analysis of greenhouse gas
2 emissions during coal extraction. After several comment letters noted the omission,
3 the final EIS added two paragraphs referencing “uncertainty associated with estimated
4 coal extraction emissions”—but entirely excluded the results of that analysis from its
5 conclusion that the project would increase greenhouse gas emissions.
6

7 133. This omission is particularly glaring in light of the 122-page SEPA
8 Greenhouse Gas Emissions Technical Report—prepared by Ecology’s own third-party
9 consultant—which found that U.S. coal mining actually reduces total greenhouse gas
10 emissions by displacing mining with higher emissions elsewhere in the world, even
11 when accounting for uncertainty.⁴⁵

12 134. Ultimately, the Defendants used their substantive authority under SEPA
13 to reject MBT Longview’s proposal by finding that it would cause significant adverse
14 environmental effects not reasonably capable of mitigation.

15 135. In particular, the Defendants concluded that the environmental effects of
16 a coal export facility at the Terminal could not be mitigated because those effects were
17 subject to federal jurisdiction, and not within the state’s authority to mitigate.
18

19 136. On May 25, 2017, following publication of the Final EIS, Defendant Bellon
20 admitted that the state subjected the Terminal project to a greater level of scrutiny
21 because the coal it would export is “meant to be used as an end product for
22

23
24 ⁴⁵ The final EIS reported that the project increased total net annual emissions in 2028 by 1.19 million
25 metric tons of CO₂ equivalent. MBT Longview SEPA Final Environmental Impact Statement, *supra* note
26 4, at 5.8-19. However, if coal extraction analysis is included as reported in the Technical Report, total
net indirect annual emissions in 2028 decreases by 3.77 million metric tons of CO₂ equivalent. *See* ICF,
SEPA GREENHOUSE GAS EMISSIONS TECHNICAL REP., 3-23 tbl. 67 (Apr. 2017),
<http://www.millenniumbulkeiswa.gov/assets/greenhouse-gas-emissions2.pdf>.

1 combustion.”⁴⁶ These comments again confirmed Defendant Bellon’s opposition to
 2 coal export to Asian markets.

3 137. Washington State’s expanded review of the Terminal stands in sharp
 4 contrast to its treatment of the Barlow Point terminal, which is adjacent to the MBT
 5 Longview site and is served by the same rail line that serves the Terminal.
 6

7 138. At Barlow Point, the Port of Longview aims to export dry or liquid bulk
 8 commodities including bio-diesel, crude oil, methanol, potash, urea/ammonia, and
 9 wood chips.⁴⁷ State officials and agencies are actively pushing for expedited
 10 development of Barlow Point.⁴⁸ It was estimated that its environmental review process
 11 will take between 18 and 24 months.⁴⁹

12 139. The primary material difference between the Barlow Point project and
 13 the Terminal is the commodity being shipped from the Terminal: coal.

14 140. Washington State’s expanded review of the Terminal also stands in sharp
 15 contrast to its review of a grain export terminal that was originally proposed at the Port
 16 of Longview in or about June 2009.⁵⁰
 17

18 ⁴⁶ Inside Olympia, Interview with Wash. Dept. of Ecology Maia Bellon, TVW (May 25, 2017, 7:00 PM),
 19 www.tvw.org/watch/?eventID=2017051094.

20 ⁴⁷ See KPFF & PORT OF LONGVIEW, PORT OF LONGVIEW: MASTER PLAN PHASE I FEASIBILITY STUDY, EXECUTIVE
 21 SUMMARY REPORT 3 (Mar. 9, 2016), [http://wa-
 portoflongview.civicplus.com/DocumentCenter/Home/View/49](http://wa-portoflongview.civicplus.com/DocumentCenter/Home/View/49).

22 ⁴⁸ See Letter from Roger Millar, Sec’y of Transp., and Dan Gatchet, Chair, Wash. State Freight Advisory
 23 Comm., to David Schumacher, Dir., Office of Fin. Mgmt., Curtis King, Chair, Senate Transp. Comm., and
 24 Judy Clibborn, Chair, House Transp. Comm. (Oct. 31, 2016), [http://wa-
 portoflongview.civicplus.com/DocumentCenter/Home/View/70](http://wa-portoflongview.civicplus.com/DocumentCenter/Home/View/70); see also DRAFT 2017 WASHINGTON
 25 STATE FREIGHT SYSTEM PLAN, WASH. STATE DEP’T OF TRANSP. (2017),
 26 [https://www.wsdot.wa.gov/NR/rdonlyres/AC37124C-A761-485F-8ADI-
 5D673191A9B8/0/DraftFreightSystemPlanAppendices20170815.pdf](https://www.wsdot.wa.gov/NR/rdonlyres/AC37124C-A761-485F-8ADI-5D673191A9B8/0/DraftFreightSystemPlanAppendices20170815.pdf); KPFF & PORT OF LONGVIEW, *supra*
 note 47 at 14.

⁴⁹ KPFF & PORT OF LONGVIEW, *supra* note 47 at 14.

⁵⁰ *Bunge Partners with Two Leading Agribusiness Firms to Build Export Grain Terminal in the Pacific Northwest*, EGT (June 1, 2009), [http://www.egtgrain.com/news/release/bunge-partners-with-two-
 leading-agribusiness-firms-to-build-export-grain-terminal-in-the-pacific-northwest/](http://www.egtgrain.com/news/release/bunge-partners-with-two-leading-agribusiness-firms-to-build-export-grain-terminal-in-the-pacific-northwest/).

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 29 OF

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1 141. Despite the fact that this grain export terminal also receives 110-car trains
2 from Montana and other states, and transloads grain onto oceangoing vessels bound
3 for Asian markets,⁵¹ it proceeded quickly through the environmental review and
4 permitting process. It began receiving trains in September 2011.⁵²
5

6 142. The primary material difference between the grain export terminal at the
7 Port of Longview and the Millennium Bulk Terminal is the commodity being shipped
8 from the Terminal: coal.

9 143. The State of Washington's treatment of the Terminal further stands in
10 contrast to its review of a 2015 Port of Seattle proposal to modernize its currently-
11 vacant Terminal 5, including associated dredging, to allow much bigger container ships
12 to call at that terminal.

13 144. The Port of Seattle's proposed container terminal modernization project
14 is targeted at attracting new shipping to the Northwest through upgrades that would
15 allow Terminal 5 to handle at least 1 million more twenty foot shipping containers per
16 year than the facility's current permits allow.
17

18 145. SEPA review for the Port of Seattle's Terminal 5 modernization project,
19 which was initiated in 2015, limited its analysis of GHG emissions to emissions related
20 to the operation of the project itself. This limitation was in spite of the revitalized
21 terminal's potential effects on the dynamics international trade in any number of
22 products.
23

24
25 ⁵¹ Longview Export Grain Terminal, <http://www.egtgrain.com/facility/>.

26 ⁵² *EGT Receives First Wheat Shipment in Washington State*, EGT (Sept. 21, 2011),
<http://www.egtgrain.com/news/release/egt-receives-first-wheat-shipment-from-washington-state/>.

1 146. Ecology also did not request an analysis of GHG emissions from the
2 trans-Pacific shipping of goods to or from the terminal, or any analysis of the market
3 effects of a modernized terminal designed to accommodate much bigger vessels than
4 any port in the Northwest can currently handle.

5
6 147. The final EIS was issued in October 2016, just one year after the Port of
7 Seattle determined that an EIS would be prepared.

8 148. Again, the primary material difference between the Port of Seattle
9 terminal expansion and the Millennium Bulk Terminal is the commodity being
10 shipped from the Terminal: coal.

11 **I. Washington State’s denial of a sublease to MBT Longview**

12 149. LHR Infrastructure initially approached the Washington Department of
13 Nature Resources (DNR) in August 2010 to discuss LHR Infrastructure becoming the
14 sublessee under the Aquatic Lands Sublease at the Terminal.

15 150. After LHR Infrastructure transmitted the lessee’s consent to DNR, the
16 Department’s representative indicated in an October 18 email that he had “no
17 objections” to the sublease. He then explained that “[t]he only thing [DNR] require[s]
18 will be the security and insurance be in place at the time or before the sublease is in
19 place.”

20
21 151. On October 19, 2010, in a follow-up telephone conversation, the same
22 DNR representative confirmed that his October 18 email was DNR’s consent to the
23 sublease, and that DNR would not sign a written consent because there was no one
24 within the agency to sign such a document.

1 152. Later in October 2010, as part of the transaction for MBT Longview to
2 acquire the Terminal assets, Northwest Alloys submitted a written request for approval
3 of an aquatic lands sublease to MBT Longview.
4

5 153. On November 12, 2010, four environmental groups (Sierra Club,
6 Columbia Riverkeeper, Washington Environmental Council, and Climate Solutions)
7 sent then-Washington DNR Commissioner, Peter Goldmark, a letter urging him to
8 deny consent to a “sublease transfer” to LHR Infrastructure and requesting a meeting
9 to discuss DNR’s decision.

10 154. Six days later, on November 18, 2010, DNR left a voice message for LHR
11 Infrastructure’s attorney to inform him that an attorney would be taking over the
12 sublease issue.

13 155. More than six years later, in January 2017, DNR announced that it would
14 not approve the proposed sublease between Northwest Alloys and MBT Longview.

15 156. Although the ostensible reason for this sublease denial was a lack of
16 information about MBT Longview’s finances and the structure of the sublease, MBT
17 Longview had in fact provided all of the information normally required.

18 157. Opponents of the Terminal project hailed DNR’s decision as “a firm no to
19 the largest coal terminal in the country.”⁵³
20

21 158. Defendant Franz, who assumed leadership of the DNR just weeks after
22 her predecessor’s decision, subsequently explained that the denial of the sublease was
23 “right” because “the answer to sustainable, long-term revitalization of our economies is
24

25 ⁵³ Hal Bernton, *Departing DNR Boss Jolts Longview Coal-Terminal Plan*, THE SEATTLE TIMES (Jan. 4, 2017,
26 10:21 AM), <https://www.seattletimes.com/seattle-news/environment/dnr-boss-rejects-longview-coal-export-loading-dock-sublease/>.

1 best served by looking forward to the development of new technologies that protect
2 the environment, not backward to technologies that exploit it.”⁵⁴

3 159. Defendant Franz’s statement is consistent with the platform she
4 espoused when running for her current office, when she indicated that she “opposes
5 coal and oil exports from Washington ports,”⁵⁵ but inconsistent with DNR’s stated
6 reasons for denying the sublease.
7

8 160. When MBT Longview challenged DNR’s sublease denial in Cowlitz
9 County Superior Court, the judge ruled that DNR’s decision was “arbitrary and
10 capricious.”

11 **J. Washington State’s denial of a Clean Water Act § 401 certification**

12 161. In July 2016, MBT Longview requested a water quality certification under
13 section 401 of the Clean Water Act (CWA) from the Washington Department of
14 Ecology (Ecology). Obtaining that certification is a key step in securing a CWA section
15 404 dredge and fill permit for the Terminal project from the U.S. Army Corps of
16 Engineers.
17

18 162. On September 26, 2017—just 3 business days after receiving 240 pages of
19 additional information in response to Ecology’s requests and questions—Ecology
20 denied the request for a CWA section 401 certification “with prejudice.” A copy of that
21 decision is filed with this Complaint as **Exhibit A**.

22
23
24 ⁵⁴ Marissa Luck, *Millennium Appeals State’s Denial of Coal Dock Sublease*, TDN (Feb. 11, 2017),
http://tdn.com/news/local/millennium-appeals-state-s-denial-of-coal-dock-sublease/article_1a70be78-0191-5eb1-bc50-4a9b4f4e78c6.html.

25 ⁵⁵ Martinelli, *supra* note 32; *see* 46th District Democrats Legislative & Statewide Questionnaire, *supra* note
26 32.

1 163. Lighthouse and MBT Longview are not aware of any other instances in
2 which Ecology denied a request for CWA section 401 certification “with prejudice.”
3 Ecology has also admitted that it does not know of other “with prejudice” 401
4 certification denials.

5 164. Ecology’s denial was not based on the water quality effects of the
6 Terminal, as required by CWA section 401. Indeed, the SEPA EIS for the Terminal
7 project concluded that it would not have any significant adverse effects on water
8 quality.

9 165. Unable to rely on water quality issues, Ecology denied the certification
10 based almost entirely on effects that would be caused by rail carriers transporting coal
11 into Washington from Montana and Wyoming, where it is being mined by LHR Coal’s
12 subsidiaries.

13 166. Ecology’s denial was also founded in part on the potential effects of the
14 oceangoing vessels that would transport coal from the Terminal to LHP’s customers in
15 Asia.

16 167. Defendant Bellon announced Ecology’s denial of MBT Longview’s
17 request for CWA section 401 certification on her Twitter account. She has not
18 mentioned other CWA section 401 certification decisions on Twitter.

19 168. Defendant Bellon also “liked” several responses to her tweet announcing
20 Ecology’s denial, including a tweet that said “Let’s keep Powering Past Coal!”
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1 169. In October 2017, on the heels of Ecology’s section 401 denial, Defendant
2 Inslee publicly argued that “[c]limate change policy is under attack at the federal level,
3 making state and local action more urgent and important than ever.”⁵⁶

4 170. Defendant Inslee further stated that because Washington State has
5 “control of [its] own destiny,” it has “done some very progressive things leading the
6 country and the world to reduce carbon pollution that is damaging our future here in
7 the state.”⁵⁷ This appears to be a direct reference to Ecology’s denial of MBT Longview’s
8 requested CWA section 401 certification.

9 171. During the same October 2017 discussion, Defendant Inslee specifically
10 referenced the proposed Terminal as a project that could not meet Washington’s
11 rigorous environmental standards in order to receive permits.⁵⁸ In another apparent
12 reference to the Terminal, he warned against building “an infrastructure that locks us
13 into a fossil fuel.”⁵⁹

14 172. MBT Longview’s CWA section 401 certification request was not treated
15 like other requests of its kind. It was denied because the Defendants oppose coal
16 exports and construction of a coal export facility at the Terminal.

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19 **K. Washington State’s refusal to permit improvements to the Terminal**

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21 ⁵⁶ WA Governor’s Office, *Inslee Visits Colleges to Urge Climate Action*, MEDIUM (Oct. 25, 2017),
22 <https://medium.com/wagovernor/inslee-visits-colleges-to-urge-climate-action-5a5b385fd290>.

23 ⁵⁷ See *Governor Inslee Climate Change Town Hall*, *supra* note 30.

24 ⁵⁸ *Id.*; see also Emily Boerger, *Gov. Inslee Encourages Action and Innovation at Climate Town Hall*, WASH.
25 STATE WIRE (Oct. 26, 2017), <https://washingtonstatewire.com/gov-inslee-encourages-action-innovation-climate-town-hall/>.

26 ⁵⁹ *Governor Inslee Climate Change Town Hall*, *supra* note 30. Similarly, at a Climate Change Town Hall at Bellevue College, Defendant Inslee noted that he doesn’t want Washington to “lock [it]self into infrastructure that is going to be there 50 years that will essentially expand fossil fuel and lock you into that. We do not want to get into that mindset or make those kinds of decisions.” 350 Seattle, *supra* note 29.

1 173. In August 2017, the current lessee of the Millennium Bulk Terminal,
2 Northwest Alloys, sought DNR's consent under the lease to make certain
3 improvements to the existing terminal.
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5 174. The proposed improvements to the terminal were part of MBT
6 Longview's plan to construct a coal export facility, but they did not exempt MBT
7 Longview from any permitting or approval requirements.

8 175. Because the lease already allows transloading of coal and the coal export
9 facility would still be subject to numerous federal and state environmental review and
10 permitting requirements, DNR approval should have been straightforward and
11 consistent with the 60 days allowed for such review under the lease.

12 176. Nonetheless, on October 24, 2017, Defendant Franz sent a lengthy legal
13 memorandum to the lessee explaining that DNR had determined the proposed
14 improvements were not "in the best interests of the State." A copy of that
15 memorandum is filed with this Complaint as **Exhibit B**.

16 177. Defendant Franz's memorandum rejecting the proposed lease
17 improvements adopts Ecology's rationale for denying MBT Longview's request for
18 CWA section 401 certification, including Ecology's reliance on the environmental
19 effects of rail transportation.
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21 178. Despite having executed a lease that expressly allows a coal export
22 facility at the site, DNR did not treat the request to make improvements to the
23 Terminal like other similar requests. It refused to consent to the proposed
24 improvements because Defendant Franz and the other Defendants do not support
25 construction of a coal export facility at the Terminal.
26

1 **L. Defendants' actions lead to the denial of the shoreline permit**

2 179. As part of its proposal to construct a coal export facility at the Terminal,
3 MBT Longview applied for a Shoreline Substantial Development Permit and a
4 Shoreline Conditional Use Permit from Cowlitz County. In November 2017, the permits
5 came before a Cowlitz County Hearing Examiner for review.
6

7 180. The Cowlitz County staff who reviewed MBT Longview's proposal found
8 that it was consistent with all requirements of the county's Shoreline Master Plan and
9 with the Shoreline Management Act and recommended that the permits be approved.

10 181. Despite Cowlitz County's recommendation, the Hearing Examiner
11 explicitly relied on Ecology's EIS, as well as the findings that Ecology made in
12 connection with its CWA section 401 decision, to deny the permits. A copy of that
13 decision is filed with this Complaint as **Exhibit C**.

14 182. The Hearing Examiner further observed that DNR's refusal to authorize
15 improvements related to MBT Longview's proposal made it "likely" that DNR would
16 also deny future permits.
17

18 183. Despite the fact that the Cowlitz County staff recommended granting the
19 permits requested by MBT Longview, the Hearing Examiner relied on the prior
20 decisions of the Defendants to block MBT Longview's proposed coal export terminal.
21 Those prior decisions were motivated by the Defendants' opposition to coal exports,
22 and were not based in law or consistent with the facts of the case.

23 **M. Defendants have no intention of ever approving the Terminal**

24 184. It is well established that the Defendants oppose coal and coal exports on
25 policy grounds. Their actions in denying the proposed sublease, the CWA section 401
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1 certification, and the proposed lease improvements demonstrate that they have no
2 intention of allowing the Terminal to be constructed.

3 185. On October 23, 2017, Ecology sent a letter to MBT Longview that makes
4 the state's position on the proposed Terminal crystal clear. A copy of that letter is filed
5 with this Complaint as **Exhibit D**.

6 186. In that letter, Ecology stated that the same potential environmental
7 effects on which it relied to deny MBT Longview's request for CWA section 401 water
8 quality certification "likely preclude Ecology from approving" any of MBT Longview's
9 other permit applications.

10 187. Ecology's letter also bluntly stated that its "staff will not be spending
11 time on permit preparation" related to those applications.

12 188. The letter, which was signed by Defendant Bellon, referred any questions
13 MBT Longview might have to the Washington Attorney General's Office.

14 189. Defendants, in their capacity as Washington public officials, are using
15 the state's regulatory approval authority to set economic and foreign policy for the
16 United States as a whole.

17 190. Any bulk commodity shipped by train would have many of the same in-
18 state environmental effects as coal. If the environmental review processes and
19 regulatory standards that Defendants have applied to the proposed coal export facility
20 at the Terminal were applied more broadly, it would have a chilling effect on virtually
21 all interstate and foreign commerce.

22 191. The SEPA EIS concludes that the project can meet all state and federal
23 environmental standards. But because they believe that coal exports should not be
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1 permitted, the Defendants are blocking both foreign and interstate commerce by not
2 approving—or even processing—the permits for the Millennium Bulk Terminal.

3 V. LEGAL AND REGULATORY BACKGROUND

4 A. Federal support for coal and coal exports

5 192. The United States government has long supported coal mining and coal
6 export to other countries.

7 193. Twenty-five years ago, Congress directed the Secretary of Commerce to
8 prepare “a plan for expanding exports of coal mined in the United States.”⁶⁰

9 194. Between 2002 and 2012, total U.S. coal exports grew from 39.6 million
10 short tons to 125.7 million short tons.⁶¹

11 195. The current administration continues to pursue a policy of “export[ing]
12 American energy all over the world,” including into Asian markets.⁶²

13 196. On March 29, 2017, Secretary of Interior Ryan Zinke published
14 Secretary’s Order 3348, which lifted a moratorium on the federal coal leasing program
15 that had been put in place by the prior administration.

16 197. Secretary’s Order 3348 directed the Bureau of Land Management to
17 process coal lease applications and modifications expeditiously. Much of the coal that
18 will be mined under these leases and modifications is intended for export to Asia.

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22 ⁶⁰ 42 U.S.C. § 13367(a).

23 ⁶¹ *Coal Data Browser*, U.S. ENERGY INFO. ADMIN.,
24 https://www.eia.gov/beta/coal/data/browser/#/topic/41?agg=2,1,0&rank=ok&linechart=COAL.EXPORT_QTY.TOT-TOT-TOT.A&columnchart=COAL.EXPORT_QTY.TOT-TOT-TOT.A&map=COAL.EXPORT_QTY.TOT-TOT-TOT.A&freq=A&ctype=map<ype=pin&rtype=s&pin=&rse=0&mapttype=0 (last visited Dec. 20, 2017).

25 ⁶² Office of the Press Secretary, *Remarks by President Trump at the Unleashing America Energy Event*,
26 THE WHITE HOUSE (June 29, 2017, 3:31 PM), <https://www.whitehouse.gov/the-press-office/2017/06/29/remarks-president-trump-unleashing-american-energy-event>.

1 198. Secretary Zinke issued a statement accompanying Order 3348 in which
2 he explained that “it is better to develop our energy here under reasonable regulations
3 and export it to our allies [A]chieving American energy independence will
4 strengthen our national security by reducing our reliance on foreign oil and allowing
5 us to assist our allies with their energy needs.”
6

7 199. Approximately one quarter of all existing United States coal exports are
8 shipped to South Korea, Japan, China, and India.⁶³ And demand for coal in Asian
9 markets is continuing to increase.⁶⁴

10 200. Japan, for example, is “highly interested in importing coal from the
11 United States” to stabilize and secure its energy supplies.⁶⁵

12 201. The United States recently launched a “U.S.-Japan Economic Dialogue,”
13 aimed at, among other things, “deepen[ing] energy ties.”⁶⁶

14 202. The United States also recently forged an agreement with the
15 Government of Ukraine that facilitates purchase of American coal. In connection with
16 that agreement, Secretary of Energy Rick Perry issued a statement indicating that the
17 U.S. “looks forward to making available even more of our abundant natural resources
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20 ⁶³25% of U.S. Coal Exports go to Asia, but Remain a Small Share of Asia’s Total Coal Imports, U.S. ENERGY
INFO. ADMIN. (June 21, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11791>.

21 ⁶⁴*Southeast Asia’s Coal Demand Boom*, INST. FOR ENERGY RESEARCH (Nov. 6, 2017),
<https://instituteeforenergyresearch.org/analysis/southeast-asias-coal-demand-boom/>.

22 ⁶⁵Shozo Kaneko, *The Coal-Terminal Debate: A View from Japan*, THE SEATTLE TIMES (Sept. 19, 2017, 1:43
23 PM), <https://www.seattletimes.com/opinion/the-coal-terminal-debate-a-view-from-japan/>.

24 ⁶⁶ Press Release, Office of the Vice President, Joint Press Release from Vice President Mike Pence and
25 Deputy Prime Minister Taro Aso on the Second Round of U.S.-Japan Economic Dialogue (Oct. 16, 2017),
[https://www.whitehouse.gov/the-press-office/2017/10/16/joint-press-release-vice-president-mike-
26 pence-and-deputy-prime-minister](https://www.whitehouse.gov/the-press-office/2017/10/16/joint-press-release-vice-president-mike-pence-and-deputy-prime-minister); see also Roberta Rampton & Minami Funakoshi, *Pence Kicks Off
Japan Talks, Both Sides Seek ‘Near Term’ Results*, REUTERS (April 17, 2017, 2:05 PM),
[https://www.reuters.com/article/us-pence-asia-japan/pence-kicks-off-japan-talks-both-sides-seek-near-
term-results-idUSKBNI7JIGI](https://www.reuters.com/article/us-pence-asia-japan/pence-kicks-off-japan-talks-both-sides-seek-near-term-results-idUSKBNI7JIGI).

1 to allies and partners like Ukraine in the future to promote their own energy security
2 through diversity of supply and source.”⁶⁷

3 203. Secretary of Commerce Wilbur Ross also issued a statement in
4 connection with the agreement to supply coal to the Ukraine. There, he emphasized
5 that he “look[s] forward to working with Secretary Perry and others in industry and
6 government to further expand American exports in support of our goals of keeping this
7 country safe and promoting robust economic growth.”

8 204. In December 2017, the White House released its updated National
9 Security Strategy. Its discussion of energy issues includes “Promote Exports” in a list of
10 “Priority Actions.”⁶⁸

11 205. The National Security Strategy further explains that “[t]he United States
12 will promote exports of our energy resources,” including by “expand[ing] our export
13 capacity through the continued support of private sector development of coastal
14 terminals”⁶⁹

15
16 **B. The dormant commerce clause**

17 206. The U.S. Constitution’s commerce clause provides that “Congress shall
18 have Power . . . [t]o regulate Commerce with foreign Nations, and among the several
19 States, and with the Indian Tribes.”

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23 ⁶⁷ Dept. of Energy, *Secretary Perry and Secretary Ross Hail New Coal Deal with Ukraine*, ENERGY.GOV
24 (JULY 31, 2017), <https://energy.gov/articles/secretary-perry-and-secretary-ross-hail-new-coal-deal-ukraine>.

25 ⁶⁸ 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>.

26 ⁶⁹ *Id.*

1 207. Though the commerce clause only explicitly mentions Congress’
2 affirmative power to regulate commerce, federal courts have long read into it a
3 “dormant” or negative limitation that also constrains the states’ power to regulate
4 foreign and interstate commerce.

5 208. States violate the dormant commerce clause if their actions discriminate
6 against or unduly burden foreign or interstate commerce.

7 209. More specifically, state regulation runs afoul of the foreign commerce
8 clause if it (1) creates a substantial risk of conflicts with foreign governments; or, (2)
9 undermines the ability of the federal government to speak with “one voice” concerning
10 foreign commercial affairs.

11 210. Dormant interstate commerce clause claims are analyzed using a two-
12 tier framework: If an action is facially discriminatory, either in purpose or “practical
13 effect,” it is unconstitutional unless it serves a legitimate local purpose that could not
14 be served by available nondiscriminatory means. Nondiscriminatory actions, on the
15 other hand, are unconstitutional when the burden imposed on interstate commerce is
16 clearly excessive in relation to the putative local benefits.

17
18
19 **C. General Agreement on Tariffs and Trade**

20 211. The United States has been a party to the General Agreement on Tariffs
21 and Trade (GATT) since January 1, 1948, and a member of the World Trade
22 Organization (WTO) since January 1, 1995.

23 212. Article XI:1 of the GATT provides “[n]o prohibition or restrictions other
24 than duties, taxes or other charges, whether made effective through quotas, import or
25 export licenses or other measures, shall be instituted or maintained by any contracting
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1 party . . . on the exportation or sale for export of any product destined for the territory
2 of any other contracting party.”

3 213. Article XI:2 provides a number of exceptions to this general rule,
4 including “[e]xport prohibitions or restrictions temporarily applied to prevent or
5 relieve critical shortages of foodstuffs or other products essential to the exporting
6 contracting party” and “export prohibition or restrictions necessary to the application
7 of standards or regulations for the classification, grading or marketing of commodities
8 in international trade.”

9 214. Article XX of the GATT provides certain additional exceptions to the
10 requirements of Article XI, provided that the measure in question is not “a disguised
11 restriction on international trade.”

12 215. In the past, the United States has relied on GATT Article XI:1 to protect
13 its commercial interests. For instance, in a recent case, the United States successfully
14 challenged Chinese export restrictions on rare earths, tungsten, and molybdenum.

15
16 **D. ICC Termination Act**

17 216. Congress and the courts long have recognized a need to regulate railroad
18 operations at the federal level. Today that regulation is performed pursuant to the ICC
19 Termination Act (ICCTA),⁷⁰ which created the Surface Transportation Board and gave
20 it complete jurisdiction, to the exclusion of the states, over the regulation of railroad
21 operations.
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⁷⁰ 49 U.S.C. §§ 10101, *et seq.*

1 217. ICCTA further provides that “remedies . . . with respect to regulation of
2 rail transportation are exclusive and preempt the remedies provided under Federal or
3 State law.”⁷¹

4 218. Any form of state or local permitting or preclearance that, by its nature,
5 could be used to deny, or place conditions on, a railroad’s ability to conduct some part
6 of its operations is “categorically” preempted by ICCTA.

7 219. Even when state actions are not categorically preempted, they are still
8 preempted if they may reasonably be said to have the effect of managing or governing
9 rail transportation.
10

11 **E. Ports and Waterways Safety Act**

12 220. The Ports and Waterways Safety Act (PWSA)⁷² regulates the operation of
13 marine tanker vessels in U.S. harbors.

14 221. In enacting the PWSA, Congress intended to provide for sole federal
15 regulation of national and international maritime commerce.

16 222. The PWSA accordingly preempts state and local laws that are
17 inconsistent with the federal statutory structure.

18 223. Where state actions bear on national and international commerce, there
19 is no threshold assumption that concurrent regulation by the State is a valid exercise of
20 its police power.
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25 ⁷¹ 49 U.S.C. § 10501(b).

26 ⁷² 33 U.S.C. §§ 1221, *et seq.*

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VI. CLAIMS FOR RELIEF

Count I – Dormant Foreign Commerce Clause

224. Plaintiffs incorporate and re-allege the foregoing paragraphs.

225. By unreasonably denying and refusing to process permits for the Millennium Bulk Terminal, the Defendants have discriminated against Lighthouse’s and its subsidiaries’ efforts to export coal to their Asian customers, in violation of the dormant foreign commerce clause.

226. By expanding the scope of their SEPA review beyond the boundaries of Washington State, and especially by including the environmental effects of coal exports to foreign nations, the Defendants have further discriminated against Lighthouse’s and its subsidiaries’ efforts to export coal to their Asian customers, in violation of the dormant foreign commerce clause.

227. The Defendants’ actions have created a substantial risk of conflict with foreign governments, which rely on American coal exports for power production.

228. In addition, the federal government has made it clear that the policy of the United States is to favor the expansion of coal exports to foreign countries, including countries in Asia.

229. By taking actions and refusing to act in ways consistent with the federal government’s coal export policies, the Defendants have severely undermined the ability of the United States to speak with one voice in foreign commercial affairs and to implement its National Security Strategy.

1 230. By unilaterally imposing an embargo on new coal exports, the
2 Defendants are interfering with Washington’s sister states’—including Wyoming and
3 Montana—ability to engage in foreign commerce.
4

5 231. By expanding the scope of their SEPA review beyond the boundaries of
6 Washington State, and especially by including the environmental effects of coal
7 shipments destined for foreign nations, the Defendants have further discriminated
8 against Lighthouse’s and its subsidiaries’ efforts to engage in foreign commerce.

9 232. By concluding that potential environmental effects cannot be mitigated
10 under SEPA if those effects are within the jurisdiction of the federal government, the
11 Defendants are unduly burdening, and in effect regulating, foreign commerce.

12 233. Defendants’ refusal to license a coal export facility is prohibited under
13 the United States’ obligations as a member of the WTO, as it constitutes a prohibition
14 or restriction on exportation under GATT Article XI:1; is not covered by any of the
15 exceptions set out in GATT Articles XI:2 or XX; and, in any case, is a “disguised
16 restriction on international trade.”
17

18 234. In addition, Defendants’ actions could be cited and leveraged by
19 respondents in WTO disputes involving export restrictions brought by the United
20 States, and may interfere with the ability of the United States to compel other nations
21 through the WTO dispute settlement process and other available bilateral, regional,
22 and multilateral mechanisms to reduce or remove export restrictions that impair the
23 foreign commerce of the United States.
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1 235. The Defendants' actions also injure Lighthouse and its subsidiaries by
2 impacting the willingness of the private sector to invest in the development of coal
3 export facilities in the state of Washington, and along the entire Pacific Coast.

4 236. Defendants' actions have injured Lighthouse and its subsidiaries directly
5 and have created a disincentive to build or expand other coal export facilities, which
6 will negatively impact U.S. economic growth, job creation, and exports.

7 237. Defendants' actions amount to an embargo or quota on American coal
8 exports to Asia, in violation of the dormant foreign commerce clause.

9 238. On information and belief, the Defendants' true reason for denying the
10 Plaintiffs' permit applications is the desire to prevent American coal export to Asia.

11 239. In all of these ways, the Defendants in their capacity as public officials of
12 the state of Washington have violated the dormant foreign commerce clause and 42
13 U.S.C. § 1983.

14
15 **Count II – Dormant Interstate Commerce Clause**

16 240. Plaintiffs incorporate and re-allege the foregoing paragraphs.

17 241. By unreasonably denying and refusing to process permits for the
18 Millennium Bulk Terminal, the Defendants have discriminated against Lighthouse's
19 and its subsidiaries' efforts to transport into Washington coal that is being mined in
20 Montana, Wyoming, and other states in violation of the dormant interstate commerce
21 clause.

22 242. By expanding the scope of their SEPA review beyond the boundaries of
23 Washington State, and especially by including the environmental effects of coal
24 shipments being transported from other states, the Defendants have further
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1 discriminated against Lighthouse's and its subsidiaries' efforts to transport into
2 Washington coal that is being mined in Montana and Wyoming.

3 243. By concluding that potential environmental effects cannot be mitigated
4 under SEPA if those effects are within the jurisdiction of the federal government, the
5 Defendants are unduly burdening, and in effect regulating, interstate commerce.
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7 244. Defendants' actions and inactions with respect to the Millennium Bulk
8 Terminal discriminate against interstate commerce in both purpose and practical
9 effect, and they serve no legitimate local purpose that could not be served by
10 nondiscriminatory means.

11 245. Defendants' actions and inactions with respect to the Millennium Bulk
12 Terminal have also imposed a burden on interstate commerce that is clearly excessive
13 in relation to its putative local benefits.

14 246. Defendants' actions also injure Lighthouse and its subsidiaries by
15 impacting the willingness of the private sector to invest in the development of coal
16 export facilities in the state of Washington, and along the entire Pacific Coast.
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18 247. Defendants' actions have injured Lighthouse and its subsidiaries directly
19 and have created a disincentive to build or expand other coal export facilities, which
20 will negatively impact U.S. economic growth, job creation, and exports.

21 248. In all of these ways, the Defendants in their capacity as public officials of
22 the state of Washington have violated the dormant interstate commerce clause and 42
23 U.S.C. § 1983.

24 **Count III – ICCTA Preemption**

25 249. Plaintiffs incorporate and re-allege the foregoing paragraphs.
26

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF – 48 OF

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[4822-5378-3084]

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1 250. Lighthouse, LHR Coal and its subsidiaries, and LHP are all rail customers
2 who have a right to common carrier rail service under ICCTA.

3 251. Defendants' actions and inactions with respect to the Millennium Bulk
4 Terminal are forms of permitting or preclearance that are being used to deny or
5 condition rail carriers' ability to provide common carrier service to Lighthouse and its
6 subsidiaries.

7 252. Defendants' actions and inactions with respect to the Millennium Bulk
8 Terminal have the effect of managing or governing rail transportation, including the
9 common carrier service requested by Lighthouse's subsidiaries.

10 253. Defendants' conclusion that potential environmental effects cannot be
11 mitigated under SEPA if those effects are within the jurisdiction of the federal
12 government, and their actions in denying permits and approvals on that basis, have the
13 effect of managing or governing rail transportation, including the common carrier
14 service requested by Lighthouse's subsidiaries.

15 254. Defendants' actions also injure Lighthouse and its subsidiaries by
16 impacting the willingness of the private sector to invest in the development of coal
17 export facilities in the state of Washington, and along the entire Pacific Coast.

18 255. Defendants' actions have injured Lighthouse and its subsidiaries directly
19 and have created a disincentive to build or expand other coal export facilities, which
20 will negatively impact the investment-backed expectations of Lighthouse investors
21 specifically, as well as U.S. economic growth, job creation, and exports generally.
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1 256. For all these reasons, Defendants' actions in their capacity as public
2 officials of the state of Washington are preempted by ICCTA and violate Lighthouse's
3 and its subsidiaries' rights to receive common carrier service under 42 U.S.C. § 1983.
4

5 **Count IV – PWSA Preemption**

6 257. Plaintiffs incorporate and re-allege the foregoing paragraphs.

7 258. Lighthouse, LHR Coal and its subsidiaries, and LHP all have a right to
8 receive vessel service as a means of exporting coal to their Asian customers.

9 259. The PWSA preempts state laws that attempt to regulate the operation of
10 vessels in U.S. harbors, including the vessels that would provide service to Lighthouse
11 and its subsidiaries at the proposed Millennium Bulk Terminal coal export facility.

12 260. By concluding that potential environmental effects cannot be mitigated
13 under SEPA if those effects are within the jurisdiction of the federal government, the
14 Defendants are in effect regulating the operation of vessels in U.S. harbors, including
15 the vessels that would provide service to Lighthouse and its subsidiaries at the
16 proposed Millennium Bulk Terminal coal export facility.

17 261. Defendants in their capacity as public officials of the state of Washington
18 have acted to prevent vessels from serving the Terminal, including by relying on the
19 effects of vessel traffic as one reason for the denial of MBT Longview's request for CWA
20 section 401 certification.
21

22 262. Defendants' actions also injure Lighthouse and its subsidiaries by
23 impacting the willingness of the private sector to invest in the development of coal
24 export facilities in the state of Washington, and along the entire Pacific Coast.
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1 263. Defendants' actions have injured Lighthouse and its subsidiaries directly
2 and have created a disincentive to build or expand other coal export facilities, which
3 will negatively impact U.S. economic growth, job creation, and exports.
4

5 264. For all these reasons, Defendants' actions in their capacity as public
6 officials of the state of Washington are preempted by the PWSA and violate
7 Lighthouse's and its subsidiaries' rights to receive vessel service under 42 U.S.C. § 1983.
8

VII. PRAYER FOR RELIEF

9 Wherefore, the Plaintiffs respectfully request the following relief:

10 A. A declaration that Defendants' denial of MBT Longview's requested
11 sublease for the Millennium Bulk Terminal was an unconstitutional violation of the
12 dormant commerce clause.

13 B. A declaration that Defendants' denial of MBT Longview's requested
14 CWA section 401 certification was an unconstitutional violation of the dormant
15 commerce clause.

16 C. A declaration that Defendants' denial of MBT Longview's requested
17 CWA section 401 certification was preempted by ICCTA and the PWSA.

18 D. A declaration that any environmental reviews of the proposed coal
19 export facility at the Millennium Bulk Terminal—or any future coal export terminal
20 that Lighthouse or its subsidiaries propose—may not be used to deny or unreasonably
21 condition a permit beyond the standards applied to other non-coal terminal projects,
22 including denying or unreasonably conditioning a permit based on the effects of
23 transporting coal to and from the Terminal by rail and vessel traffic in interstate or
24 foreign commerce.
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1 E. A declaration that potential environmental effects within the jurisdiction
2 of the federal government cannot be the basis of a conclusion that the environmental
3 effects of the Millennium Bulk Terminal—or any future coal export terminal that
4 Lighthouse or its subsidiaries propose—project are unmitigable.

5
6 F. A declaration that any decision by any state or local entity relying on the
7 Defendants' denial of the sublease or the Defendants' denial of the CWA section 401
8 certification, including the denial of MBT Longview's requested shoreline permit, is an
9 unconstitutional violation of the dormant commerce clause and/or is preempted by
10 ICCTA and the PWSA.

11 G. An order vacating any and all of the Defendants' unconstitutional and
12 illegal decisions regarding the Millennium Bulk Terminal, as well as any federal, state,
13 or local decisions relying on Defendants' unconstitutional or illegal actions.

14 H. An injunction ordering the Defendants to apply the same review
15 standards to the Millennium Bulk Terminal—or any future coal export terminal that
16 Lighthouse or its subsidiaries propose—that are applied to other non-coal terminal
17 proposals.

18 I. An injunction ordering the Defendants not to deny MBT Longview's
19 requested CWA section 401 certification or any other permit or approval for the
20 Millennium Bulk Terminal on the basis of rail or vessel traffic, or any other potential
21 environmental effects within the jurisdiction of the United States.

22
23 J. An injunction ordering the Defendants to continue processing any and
24 all current and future MBT Longview permit applications.

1 K. An order awarding plaintiffs their costs of litigation, including attorneys'
2 fees and expert witness fees, including those awardable under 42 U.S.C. § 1988.

3 L. Such other relief as the court deems just and proper.

4 Dated this 3rd day of January, 2018 at Tacoma, Pierce County, Washington.

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