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PREVIEW— Montana and Wyoming v. Washington: The Commerce Clause and the Clean Water Act Collide Over Coal Exports

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The Supreme Court of the United States has not scheduled oral arguments for this matter. In October 2020, the Court asked for the federal government's views on the case but has not yet decided whether it will exercise its jurisdiction over the challenge.

I. INTRODUCTION

Montana and Wyoming seek original jurisdiction in the Supreme Court of the United States because the State of Washington denied a Clean Water Act Section 401 permit for a private company's proposed coal export terminal in Washington. *Montana and Wyoming v. Washington* asks whether Washington's denial of port access to ship Montana and Wyoming coal to foreign markets violates the Commerce Clause. Montana and Wyoming assert that Washington's discriminatory denial of the Section 401 certification violates the Dormant Commerce and Foreign Commerce clauses of the United States Constitution. Washington, in response, argues that the permit denial was not discriminatory and was denied because the proposed coal terminal project did not comply with state law. This case is significant because litigation over a coal export terminal is unfolding against a backdrop of extensive changes to the Environmental Protection Agency's interpretation of Section 401 and could have broad impacts to Section 401 certification determinations under state law.

II. FACTUAL AND PROCEDURAL BACKGROUND

Congress established the Clean Water Act ("CWA") to "restore and maintain the chemical, physical, and biological integrity of the Nations waters."[1] Under Section 401 of the CWA, any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters must provide the federal licensing or permitting agency with a Section 401 certification.[2] A discharge is defined as "waters of the United States, including the territorial seas."[3] The certification, issued by the state where the discharge originates, attests that the discharge will comply with applicable provisions of certain enumerated sections of the CWA. Section 401 provides states, certain

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1. Clean Water Act § 101(a); 33 U.S.C. § 1251(a) (2019).

2. *Id.* § 1341. The statute defines "navigable waters" at CWA § 502(7); 33 U.S.C. § 1362(7).

3. 33 U.S.C. § 1362(7).

tribes, and in certain circumstances, the EPA, the authority to: (1) grant, (2) grant with conditions, (3) deny, or (4) waive certification of proposed federal licenses or permits that may result in a discharge into waters of the United States.[4]

This case arose after the State of Washington denied the necessary CWA permit ("Section 401 Certification") for a sublease of state-owned aquatic lands to Lighthouse Resources, Inc., Lighthouse Products, LLC, LHR Infrastructure, LLC, LHR Coal LLC, and Millennium Bulk Terminals-Longview, LLC (collectively, "Lighthouse") for a proposed coal export terminal along the Columbia River in Cowlitz County, Washington. Lighthouse proposed the so-called Millennium Bulk Terminal ("Terminal") to access foreign export markets for Wyoming and Montana coal.[5] The proposal would convert a former aluminum smelter site into a terminal with the capacity to export 44 million metric tons of coal per year.[6] The Terminal would receive coal from the Powder River Basin in Montana, Wyoming, and the Uinta Basin in Utah and Colorado via rail shipment.[7] The Terminal would receive, store, and load coal onto ships, and the coal would then travel via the Columbia River and Pacific Ocean to markets in Asia.[8] Given the size of the project, Lighthouse needed to obtain several federal, state, and local approvals.[9]

In 2012, Lighthouse applied for a Section 401 water quality certification because the project may result in discharge into waters of the United States, 33 U.S.C. § 1341. The CWA seeks to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution."[10] The permit application triggered an environmental review under the Washington State Environmental Policy Act ("SEPA").[11] Initially, the Washington Department of Ecology ("Ecology"), Cowlitz County, and the United States Army Corp of Engineers ("Corp") sought to undertake a joint Environmental Impact Statement ("EIS"). Under Washington law, agencies are required to assess the end use of products exported from Washington ports.[12] However, after Ecology demanded the EIS include an analysis of the impact of global greenhouse gas emissions from coal in foreign markets, the Corp decided not to participate in a joint EIS.

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4. Clean Water Act § 401(a)(1); 33 U.S.C. § 1341(a)(1).

5. Northwest Alloys, Inc. v. Department of Natural Resources, 447 P.3d 620, 624 (Wash. Ct. App. 2019).

6. *Id.*

7. Millennium Bulk Terminals–Longview, Final SEPA Environmental Impact Statement Summary, § S.1, p. S-1, https://perma.cc/27DR-67UX [hereinafter "EIS Summary"].

8. EIS Summary, § S.1, p. S-1, https://perma.cc/27DR-67UX.

9. Def. Br. In Opp. at 4, June 22, 2020, No. 220152.

10. 33 U.S.C. § 1251(b)(2020).

11. Pls' Br. In Supp. at 9, Jan. 21, 2020, No. 220152 (citing Rev. Code Wash. 43.21C *et seq*.).

12. Wash. Admin. Code 197–11–060(4)(b).

The EIS, jointly published by Ecology and Cowlitz County in 2017, identified nine potential environmental impacts that could result from construction and operation of the Terminal.[13] The EIS concluded "[t]here would be no unavoidable and significant adverse environmental impacts on water quality."[14] Except for the unmitigable potential impact on air quality, the EIS determined that mitigation efforts could resolve potential environmental impacts.[15] Cowlitz County issued a report recommending approval of Lighthouse's permit application, with several mitigation conditions.[16]

Following the EIS, Ecology continued with its review of Lighthouse's Section 401 Certification application to determine whether its proposal conformed with Washington's water quality requirements.[17] Generally, if water quality issues remain unresolved by the Section 401 certification deadline, Ecology's practice is to deny the certification "without prejudice."[18] A letter drafted but never sent by Ecology staff stated that denying the application "without prejudice would not in any way preclude [Lighthouse] from resubmitting a request for a [water quality certification] at a later date."[19] However, despite the drafted letter, Ecology subsequently denied Lighthouse's application "with prejudice."[20] The "with prejudice" denial precluded Lighthouse from resubmitting its application. Washington denied Lighthouse's application for a Section 401 permit on the following two grounds: (1) the Terminal's "significant unavoidable adverse impacts" identified in the EIS conflicted with SEPA policies; and (2) Washington did not have reasonable assurance that the Terminal would meet water quality standards.[21] The denial was based on Ecology's discretionary authority under SEPA.[22] Lighthouse appealed the Ecology's denial, but the Pollution Control Hearings Board affirmed the permit denial, and the Washington Court of Appeals affirmed.[23]

On January 21, 2020, Montana and Wyoming filed a motion requesting that the United States Supreme Court review Ecology's denial of the CWA certification. In July 2020, several months after the parties submitted briefs in this matter, the EPA issued a final water quality

13. Pls' Br. In Supp. at 9.

14. *Id.* at 11.

15. *Id.*

16. *Id.*

17. Pls' Br. In Supp. At 11; Order on Defendants' and Intervenor Motions for Partial Summary Judgment at *2, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018).

18. Pls' Br. In Supp. at 11.

19. *Id.*

20. *Id.* at 12; Def's Br. In Resp. at 8 (citing Lighthouse Res. Inc. v. Inslee, No. 3:18-c-05005-RJB, 2018 WL 6505372 (W.D. Wash. Dec. 11, 2018).

21. Pls' Br. in Supp. at 12.

22. *Id.*

23. Def's Br. In Resp. (citing Order on Defendants' and the Intervenor-Defendants' Motions for Partial Summary Judgment at *2, Lighthouse Res. Inc., 2018 WL 6505372).

certification rule ("2020 Final Rule") that went into effect on September 11, 2020, and replaced the prior implementing regulations from 1971.[24] The 2020 Final Rule includes numerous changes to existing regulation and practice that narrow the authority of states when acting on Section 401 certification requests. The 2020 Final Rule limits the application of Section 401 to point source discharges into waters of the United States.[25] The changes in the 2020 Final Rule also narrow the scope of review and conditions to focus on water quality requirements, specifically excluding consideration of other non-water-quality impacts.[26]

III. SUMMARY OF ARGUMENTS

The parties disagree on whether the Court has original jurisdiction to hear the controversy, and more importantly, whether Washington's denial of a Section 401 permit for the Terminal violates the Dormant Commerce Clause and the Foreign Commerce Clause of the United States Constitution. This case will likely turn on the Court's analysis of the parties' Dormant Commerce Clause arguments.

A. Plaintiffs' Arguments

Plaintiffs argue the Court should exercise its original jurisdiction because Washington's alleged discrimination against Montana and Wyoming coal is costing the states millions in taxes and revenue—a direct injury impacting Montana's and Wyoming's sovereign interests. Plaintiffs contend that Washington's denial of the Section 401 Certification resulted in a discriminatory closure of Washington's ports to coal from Montana and Wyoming, in violation of the Dormant Commerce Clause and the Foreign Commerce Clause.[27] Plaintiffs allege that by denying Section 401 certification, Washington blocked the construction of the port based on its desire to protect exports of Washington agricultural products over out-of-state coal and an unjustified concern about the extraterritorial effect on greenhouse gas emissions from shipping coal to overseas markets.[28] Plaintiffs argue that Washington's denial of the Section 401 Certification

24. Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210, July 13, 2020 [hereinafter "2020 Final Rule"].

25. *Id.* at 42234.

26. *Id.* at 42256. In the preamble to the 2020 Final Rule, EPA stated the agency is "aware of circumstances in which some States have denied certifications on grounds that are unrelated to water quality requirements and that are beyond the scope of CWA section 401." However, since the 2020 Final Rule, President Joe Biden issued an Executive Order titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which directed certain agency actions to be reviewed, including the July 13, 2020 CWA 401 Certification Rule. Even if the new rule remains in effect, litigation surrounding implementation of Section 401 will likely continue.

27. Bill of Complaint, Montana & Wyoming v. Washington, No. 220152, ¶ 1 (U.S. Jan. 21, 2020).

28. *Id.* ¶¶ 39, 44, 49.

for those reasons imposes a burden on interstate commerce and constitutes an impermissible attempt to regulate conduct outside its borders in violation of the Dormant Commerce Clause.[29] Plaintiffs also allege the Section 401 denial impedes their ability to engage in foreign commerce and infringes on the federal government's exclusive authority to regulate foreign commerce, in violation of the Foreign Commerce Clause.[30]

1. The Supreme Court's Original Jurisdiction

Plaintiffs argue that the "seriousness and dignity" of their claims, and the lack of an alternative forum to litigate the issues and provide appropriate relief, warrants the Court's original jurisdiction.[31] Plaintiffs assert Washington's complete bar on their access to an international shipping port and resulting loss of severance tax and coal production revenue implicate important sovereign interests.[32] Moreover, Plaintiffs' claim that Washington's discriminatory denial of the Section 401 Certification for the coal terminal violates the Dormant Commerce Clause and the Foreign Commerce Clause of the United States Constitution is sufficient to invoke the Court's original jurisdiction.[33]

2. Washington's Dormant Commerce Clause Violations

Plaintiffs argue Washington's treatment of the Section 401 Certification is unconstitutional because its effect favors Washington's economic interests over Montana's and Wyoming's.[34] Plaintiffs further contend Washington's Section 401 Certification denial was motivated by political reasons, and the Dormant Commerce Clause prevents a state from interfering with interstate commerce based on political and extra-territorial concerns.[35]

Plaintiffs assert that Washington denied the Section 401 Certification for pretextual reasons and that Washington's true motive was to benefit its own economic interests in violation of the Dormant Commerce Clause.[36] Plaintiffs rely on cases in which the Court emphasized the principle that states are not permitted to "promote [their] own economic advantages by curtailment or burdening of interstate commerce."[37] Plaintiffs present evidence that Washington "publicly stated" it denied the Section 401 Certification, in part, to protect its

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29. *Id.* ¶¶ 48–57.

30. Bill of Complaint, Montana & Wyoming v. Washington, No. 220152, ¶¶ 59–65 (U.S. Jan. 21, 2020).

31. Pls' Br. In Supp. at 18, Jan. 21, 2020, No. 220152.

32. *Id.* at 19.

33. *Id.* at 21.

34. *Id.* at 25.

35. *Id.* at 28.

36. *Id.* at 24.

37. *Id.* at 25 (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)).

economic interests.[38] Specifically, Plaintiffs explain, Washington explicitly denied the permit because "[i]ncreased coal trains from the [Terminal] proposal would compete with rail shipments of other goods, including Washington's important agricultural products."[39] Therefore, Plaintiffs argue, Washington's overt economic protectionism is *per se* invalid because it is in contrast to the Commerce Clause and the Court's precedent interpreting it.[40]

Plaintiffs further argue the Dormant Commerce Clause is as concerned with the "practical effects" of state action as it is with economic protectionism.[41] Plaintiffs assert local governments in California and Oregon have joined forces with Washington to block West Coast port access to export coal.[42] This politically motivated hostility, and "gate[keeping] of the national economy," Plaintiffs contend, is prohibited by the Dormant Commerce Clause because it constricts the flow of commerce.[43] Plaintiffs specifically claim that Washington Governor Jay Inslee and his political campaign to "control global greenhouse gas emissions" was the driving force to ensure his appointees denied the permit—with prejudice—for the coal export terminal.[44] Plaintiffs assert that Washington law—which explicitly requires that agencies consider a product's end use, and the impact that use has beyond the State's borders––is an unconstitutional extension of its police power beyond its jurisdictional bounds.[45] Consequently, according to Plaintiffs, Washington's politically motivated permit denial had the practical effect of restricting the free-flow of commerce, and therefore triggered a violation of the Dormant Commerce Clause.[46]

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38. *Id.*

39. *Id.* Plaintiffs also cite other statements by Washington, such as the "Millennium proposal would only ship coal, there would be no [Washington] apples," and "Aerospace brings thousands of jobs with those emissions; coal export doesn't."

40. *Id.* at 25–26 (see Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

41. *Id.* at 26 (citing Brown Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 583 (1986)).

42. *Id.* at 27 (citing Bill Lucia, *With West Coast States Blocking Coal Export Projects, Proponents Keep Pushing*, ROUTE FIFTY (Nov. 19, 2019), https://perma.cc/MJ66-5BEA).

43. *Id.*

44. *Id.* at 28 (citing E-mails RE: Gov's call with Boeing on July 25 and ghg emission triggers (Mar. 2, 2013–July 24, 2013)).

45. Pls' Br. in Resp., at 10, June 22, 2020, No. 220152; Pls' Br. in Supp. at 29.

46. Pls' Br. In Supp. at 31. To supports their claim, Plaintiffs cite to Governor Inslee's oral statement that Washington-based Boeing would not face similar scrutiny as the coal export terminal because it's a "very different commodity than coal" and that he would expect a "much different SEPA approach [to] apply to a proposed [Boeing] project."

3. Washington's Alleged Foreign Commerce Clause Violation

Finally, Plaintiffs argue Washington's denial of the Section 401 Certification to prevent the construction of a coal port violates the Foreign Commerce Clause because it "implicates foreign policy issues which must be left to the Federal government [and] violates a clear federal directive."[47] Plaintiffs rely on *Japan Line, Ltd. v. County of Los Angeles*,[48] to further its position that foreign commerce is "a matter of national concern" that "requires the Nation to speak with 'one voice.'"[49] This need for federal uniformity, Plaintiffs argue, makes state restrictions on foreign commerce subject to "rigorous and searching scrutiny."[50]

Plaintiffs contend the United States has an unambiguous foreign policy to support coal export.[51] Plaintiffs cite to remarks by former President Trump at the "Unleashing American Energy Event" and a 2017 Executive Order to support their claim that the United States has expressed a clear position on the benefits of exporting coal to foreign markets to the American economy and national security.[52] Moreover, Plaintiffs rely on a report issued by the U.S. Secretary of Energy that recommended developing West Coast terminal capacity.[53] The report noted the "limited capacity of export terminals has greatly limited the ability to export" coal.[54]

Plaintiffs also argue a strong export market for coal is not limited to the Trump Administration's foreign policy. Plaintiffs' assert that President Obama thought coal export was important—especially coal export to Asia.[55] Thus, Plaintiffs contend, the United States has a history of expressing an unambiguous foreign policy to support coal exports. Consequently, Washington's decision to block Plaintiffs from developing a coal export terminal prevents them from accessing foreign markets and prevents the "United States from speaking with 'one voice,' and contravenes clear federal directive."[56]

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47. *Id.* at 32 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)).

48. 441 U.S. 434 (1979).

49. *Id.* at 31 (internal citations omitted).

50. *Id.* at 32 (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 100 (1984)); *see also* Kraft Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71, 79 (1992).

51. *Id.*

52. *Id.* (citing Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), https://perma.cc/HS43-Z9PK; Executive Order 13783 (March 28, 2017)).

53. *Id.* at 33 (citing Letter from Rick Perry to Greg Workman, (January 7, 2018), https://perma.cc/P993-YA6U).

54. *Id.* at 33 (citing *Advancing U.S. Coal Exports*, National Coal Council, 2–10 (Oct. 22, 2018), https://perma.cc/MR7C-RJE7).

55. *Id.* at 34 (quoting David Frenthold and Michael Shear, *As Obama Visits Coal Country, Many Are Wary of His Environmental Policies*, WASHINGTON POST (Apr. 25, 2010)).

56. *Id.*

B. Defendant's Arguments

Washington argues that Congress expressly authorized states to deny certification under CWA Section 401, and so Plaintiffs may not challenge the denial under the Dormant Commerce Clause.[57] Washington further argues that the Section 401 denial does not amount to an embargo against coal from Plaintiffs because millions of tons of coal already move through Washington, including at the site of the proposed terminal.[58] Washington also disputes Plaintiffs' allegation that the Section 401 Certification denial was protectionist and discriminatory by stating the denial was neutral and not motivated economic protectionism.[59] Finally, Washington contends that the Section 401 Certification denial does not violate the Foreign Commerce Clause for the same reasons it does not violate the Dormant Commerce Clause, and also because it does not affect the federal government's ability to speak with one voice when regulating foreign commerce.[60]

1. The Court's Original Jurisdiction and Standing

First, Washington argues the Court should not exercise its original jurisdiction because the nature of Plaintiffs' interest, the "seriousness and dignity of the claim," and the availability of an alternative forum in which the issue can be resolved weigh against the Supreme Court exercising its original jurisdiction.[61]

Next, Washington asserts Plaintiffs do not have standing because the harm they allege is speculative.[62] Because Plaintiffs are not the "object of the government action or inaction" they challenge, Washington asserts standing is more difficult to establish.[63] Washington argues Plaintiffs will not lose tax revenue because coal mined in Montana and Wyoming will not be barred from reaching Asian markets.[64] Rather, Washington alleges Plaintiffs inappropriately rely on projected tax revenues from the export of coal to Asian markets[65] because a high volume of coal exports from the

57. Def's Br. in Opp'n for Mot. for Leave to File Compl., Montana & Wyoming v. Washington, No. 220152, at 20–21 (U.S. Jan. 21, 2020) (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986), and Ne. Bancorp, Inc. v. Bd. Of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985)).

58. Def's Br. In Opp'n at 23–27.

59. *Id.* at 27–33.

60. *Id.* at 34. Washington also argues that the case is not appropriate for Supreme Court review because the denial of a Section 401 certification "does not directly implicate any other States' sovereign or quasi-sovereign interests" but instead is "at its core . . . a challenge to the denial of a private company's permit application to build a privately owned project."

61. *Id.* at 16.

62. *Id.* at 17.

63. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)).

64. *Id.*

65. *Id.* at 18.

United States to Asia is not projected after 2017 as the global economy shifts to renewable energy.[66]

2. Dormant Commerce Clause Claim

Washington argues Plaintiffs' Commerce Clause claims suffer from three fatal flaws: (1) Congress expressly authorizes states to deny Clean Water Act permits that violate state law; (2) Plaintiffs improperly rely on the premise that Washington has "placed an embargo on coal" from Montana and Wyoming; and (3) Plaintiffs' argument that Washington's decision to deny a permit was motivated by economic protectionism "makes no sense" and does not align with the record.[67]

Washington claims Ecology denied the Section 401 Certification because Lighthouse did not comply with state water quality standards.[68] The agency's denial, Washington argues, is merely an exercise of Congress' delegated authority to the states—authority to deny certification under Section 401 where state water quality standards are not met.[69] To support its claim, Washington relies on the Order Denying Section 401 Water Certification to cite several water quality violations including: Lighthouse's failure to submit a wetlands mitigation plan; failure to submit adequate "wastewater characterization and treatment data;" failure to show it complied with the required methods of treating wastewater; failure to comply with Washington's antidegradation requirements; and failure to provide enough information about "potential toxic discharges to the Columbia River."[70] Because this denial implements the CWA, Washington asserts, this implementation of federal law does not violate the Dormant Commerce Clause.[71]

Washington relies on state law to argue that approving the Terminal conflicts with SEPA.[72] Citing CWA Section 401, Washington contends Ecology did not have reasonable assurance the project would meet "both applicable water quality standards and any other appropriate requirements of state law."[73] Citing the EIS, Washington articulated nine environmental resource areas that would suffer significant adverse environmental impacts if Lighthouse moved forward with the Terminal.[74] The EIS identified impacts on two resource areas that implicate water

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66. *Id.* (citing Ian Goodman, *Expert Report on Millennium Bulk Terminals-Longview/Lighthouse* (Goodman, *Expert Report*) at 37 (Table 5), 198 (Nov. 14, 2018).

67. *Id.* at 20.

68. *Id.*

69. *Id.*

70. *Id.* at 22.

71. *Id.*

72. *Id.* at 23.

73. *Id.* (citing 33 U.S.C. § 1341(d); PUD 1 of Jefferson County v. Washington State Dep't of Ecology, 511 U.S. 700, 711–13 (1994)).

74. Def. Br. In Opp. at 22, June 22, 2020, No. 220152 (citing Order Denying Section 401 Water Quality Certification at 10–11, 12–13).

quality, namely, increased traffic on the Columbia River, and impacts on "aquatic habitat, fish survival, and tribal fishing and treaty rights."[75] Consequently, Washington argues, it should not have to set aside water quality laws—that Congress explicitly authorized—just so Lighthouse can build a coal export terminal.[76]

Second, Washington argues its Section 401 Certification denial is not an embargo on Montana and Wyoming coal because, each year, coal from these states "pass[es] through Washington for export."[77] Washington notes that there is capacity for exporting coal at existing ports because "of the lack of demand for coal, not because of any imagined 'embargo.'"[78] Citing *Norfolk Southern Corp. v. Obersly*, which held that a Delaware law did not violate the Dormant Commerce Clause because it did not prohibit the export of coal and was not discriminatory, Washington argues that even if Plaintiffs are unable to export as much coal as they would like because of the permit denial, it does not violate the Commerce Clause because it does not prevent the movement of coal through the State or the export of coal to Asia.[79]

Washington argues that Plaintiffs have no evidence Washington discriminatorily denied the Section 401 permit to benefit in-state industries in the same market—here, Washington agricultural products.[80] Even if Plaintiffs had actual evidence of Washington's economic protectionism, Washington asserts they have not provided any case law or authority to support their claim.[81] Again relying on *Norfolk*, Washington wields the Court's reasoning to further its argument that differential treatment of industries does not violate the Dormant Commerce Clause.[82] Rather, as articulated in *Norfolk*, "[t]he Supreme Court has never adopted such a broad gauged view of a discriminatory effect; it has found . . . discriminatory effects only where the state law advantages in-state business in relation to out-of-state business *in the same market*."[83]

Moreover, Washington argues that the permit application was not denied—as clearly articulated in Ecology's Order—because it favored in-state industry or disfavored out-of-state industry.[84] Washington argues the decision to deny the permit was "on its face neutral," and cites *Minnesota v. Clover Leaf Creamery Co.*,[85] to assert the Court should defer to the stated reasons for the denial unless those reasons "could not have been a goal" of the finding.[86]

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75. *Id.*
76. *Id.* at 23.
77. *Id.* at 24.
78. *Id.*
79. *Id.* (citing 822 F.2d 388 (3d Cir. 1987)).
80. *Id.* at 27–28.
81. *Id.* at 28.
82. *Id.*
83. *Id.* (quoting *Norfolk*, 822 F.2d at 402) (emphasis added).
84. *Id.* at 29.
85. *Id.* (citing 449 U.S. 456, 463 n.7, 471 n.15 (1981)).
86. *Id.*

Finally, Washington argues Plaintiffs' assertion—that Governor Inslee "commandeered" the approval process—is baseless.[87] First, relying on testimony by the Director of Ecology, Washington points out the Director testified that "she did not rely on greenhouse gas emissions in making [her decision] nor did she harbor any 'anti-coal' bias."[88] Similarly, the EIS did not cite greenhouse gas emissions among the project's significant adverse impacts.[89] Thus, Washington argues, because each state has "substantial latitude to ensure the health, safety, and welfare of its residents, and to protect its environment and natural resources," Plaintiffs' characterization of a Section 401 denial as a "political and moral judgment" on other states is flawed. Moreover, Washington argues, the only type of discrimination that matters under the Commerce Clause is "differential treatment of in-state and out-of-state economic interests that benefits the former and burden[s] the latter."[90] Here, Washington concludes, there is no evidence of such differential treatment.[91]

3. Foreign Commerce Clause Claim

Washington argues its Section 401 permit denial does not violate the Foreign Commerce Clause for the same reasons it does not violate the Dormant Commerce Clause. However, Washington expands on its Dormant Commerce Clause argument, asserting its denial of the Section 401 Certification for the Terminal does not affect the federal government's ability to "speak with one voice" regarding foreign commerce.[92]

Washington argues it is not the "unambiguous foreign policy of the United States to support coal export."[93] Washington criticizes Plaintiffs' reliance on a "speech by the President, an Executive Order that never mentions exports, and an advisory committee report prepared by coal industry representatives," stating this is "hardly evidence" of an "unambiguous foreign policy" supporting coal exports.[94]

Even if there were a clear federal policy, Washington asserts, its denial would not contradict the policy because the State determined "this particular project at this particular location" cannot be approved under state and federal water quality laws.[95] The permit denial does not block the export of coal through other terminals, nor does it block Plaintiffs' access to foreign markets.[96]

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87. *Id.*

88. *Id.* at 30.

89. *Id.* (citing *Millennium*, 2020 WL 1651475, at *2).

90. *Id.* at 33 (citing Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)).

91. *Id.* at 30.

92. *Id.* at 34 (citing Japan Line Ltd. v. Los Angeles County, 441 U.S. 434, 449 (1979)).

93. *Id.* at 35.

94. *Id.*

95. *Id.* at 36.

96. *Id.*

IV. ANALYSIS

The fundamental issue in this case is whether Washington regulators violated the Dormant Commerce and Foreign Commerce clauses when it denied a Section 401 permit for the Terminal project in Longview, Washington. A ruling in favor of Montana and Wyoming could support EPA's contention that the scope of Section 401 certification is narrow, and thus would strengthen EPA's position in the cases challenging the 2020 Final Rule. Furthermore, while Washington denied Lighthouse's water quality certification application and Montana and Wyoming filed their complaint before EPA issued the 2020 Final Rule, EPA's recent criticism of broader-based certification denials may encourage the Court to scrutinize more closely the basis for Washington's denial of the Section 401 Certification. On the other hand, a ruling in favor of Washington may, if it addresses the appropriate scope of certification review, lead district courts to view the 2020 Final Rule with greater skepticism.

A. The Court's Original Jurisdiction and Standing

The Court will likely find that Plaintiffs have standing to sue because Washington's denial of the Section 401 Certification directly affects Plaintiffs' ability to collect severance tax revenues from its coal extraction and its injury is substantial enough to establish standing. Moreover, this case is appropriate for the Court's original jurisdiction because Plaintiffs' claims involve the transportation of natural resources and there is not an alternative forum to hear the dispute. In deciding whether to grant leave to file a complaint in a dispute arising under the Court's original jurisdiction, the Court examines two factors: (1) "the interest of the complaining State, focusing on the seriousness and dignity of the claim;" and (2) "the availability of an alternative forum in which the issue tendered may be resolved."[97] The Court has previously entertained several cases among states involving Commerce Clause claims, specifically in cases involving the transportation or taxation of natural resources.[98] Here, because the case involves Commerce Clause claims involving the transportation of natural resources, the first prong is easily met.

Additionally, there is no other forum in which Plaintiffs' interests will find an appropriate hearing and full relief. Under the second jurisdictional factor, the Court examines whether there is another forum where "there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had."[99] Congress vested the Court with "original and exclusive jurisdiction of all controversies between two or more States."[100] Here, although private

97. Mississippi v. Louisiana, 506 U.S. 73, 77 (1992).
98. Wyoming v. Oklahoma, 502 U.S. 437 (1992).
99. Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).
100. 28 U.S.C. § 1251(a).

parties in the litigation in the Western District of Washington raised a Commerce Clause challenge to Washington's denial of the Section 401 Certification, the litigation is not a "pending action" and Congress' description of the Court's jurisdiction as exclusive for cases between states denies jurisdiction of such cases to another federal court.[101] Moreover, even if the Court determines the litigation is a "pending action," it is likely the Court will hold that Plaintiffs' interests would not be directly represented in another forum.[102]

The Court will likely find Plaintiffs have standing. To constitute a proper controversy under the Court's original jurisdiction, "it must appear that the complaining [s]tate has suffered a wrong through the action of the other [s]tate, furnishing ground for judicial redress, or is asserting a right against the other [s]tate which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."[103] Moreover, when a plaintiff is not the object of the government action or inaction it challenges, standing is "substantially more difficult" to establish.[104] The Court finds a direct injury when one state merely reduces another state's ability to collect severance tax revenues.[105] In *Wyoming*, because Oklahoma's law directly affected Wyoming's ability to collect severance tax revenues, its claimed injury was substantial and the Court's original jurisdiction proper.[106] Like *Wyoming*, Washington's denial of the Section 401 Certification directly affects Plaintiffs' ability to collect severance tax revenues from its coal extraction and its injury is substantial enough to establish standing.

B. Dormant Commerce Clause

In its analysis of the Dormant Commerce Clause issue, the Court will likely consider two arguments. On one hand, as Plaintiffs contend, Washington's Section 401 Certification denial restricts the free-flow of goods across state lines and allows a single state to dictate the terms of interstate commerce based on its own political and economic interests—implicating the core reasons the Dormant Commerce Clause exists.[107] On the other hand, as Washington argues, Congress expressly and unambiguously authorized states to deny certification under Section 401 of the CWA where state water quality standards are not met.[108]

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101. *Mississippi*, 506 U.S. at 77–78.

102. *Wyoming*, 502 U.S. at 437.

103. Maryland v. Louisiana, 451 U.S. 725, 735–36 (quoting Massachusetts v. Missouri, 308 U.S. 1, 15 (1939)).

104. Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (quoting Allen v. Wright, 468 U.S. 737 (1984)).

105. *Wyoming*, 502 U.S. at 451.

106. *Id.* at 452.

107. Pls' Br. In Supp. at 22, Jan. 21, 2020, No. 220152.

108. Def. Br. In Opp'n at 21, June 22, 2020, No. 220152 (citing 33 U.S.C. § 1341(a); S.D. Warren Co. v. Maine Bd. Of Envtl. Prot., 547 U.S. 370, 380 (2006)).

Washington's strongest argument is that Ecology did what Congress authorized it to do by denying Section 401 certification because the Terminal proposal did not comply with state water quality standards.[109] If the Court accepts this argument, Ecology's implementation of federal law would not offend the Dormant Commerce Clause.[110] The Court will likely agree with Washington's assertion that Ecology's Section 401 denial was expressly authorized by Congress in the CWA, but will likely give substantial weight to Plaintiffs assertion that Washington's denial of the Section 401 Certification was discriminatory. The Court's evaluation of whether Washington's denial of the Section 401 Certification was to protect its economic and political interests will likely hinge on its interpretation of the evidence presented by the parties and the Court's willingness to expand the scope of its Dormant Commerce Clause jurisprudence.

The Court will likely find that Washington facially discriminated against Plaintiffs by denying the Section 401 Certification because it did not treat in-state and out-of-state business equally and discriminated against Montana and Wyoming coal. The Court will likely reject Washington's argument that none of the reasons set forth in Ecology's order denying the application has anything to do with favoring in-state industry or disfavoring out-of-state industry because its exclusive focus is protecting state water quality and the health, safety, and welfare of Washington citizens. Instead, the Court will likely scrutinize the extensive record presented by Plaintiffs in which Washington officials state a preference for its agricultural products, industry, and less scrutiny in its SEPA review for in-state projects. Like *Philadelphia v. New Jersey*, where the Court invalidated a New Jersey law prohibiting the importation of waste that originated outside the territorial limits of the State, the Court will likely find the record supports Washington's intention to slow or freeze the flow of coal importation for protectionist reasons.[111] The Court will likely agree with Plaintiffs and view the evidence in this case as a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods."[112] An examination of the circumstances here will weigh in favor of the Court finding the Section 401 Certification for water quality reasons "could not have been the goal" of the purported denial.[113]

However, even if the Court agrees with Washington and does not accept Plaintiffs' argument that the purpose of Washington's denial was motivated by economic reasons to protect its agricultural interests, the

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109. *Id.* at 21–22 (citing Order Denying Section 401 Water Quality Certification at 14–19).

110. *Id.* at 22.

111. 437 U.S. 617, 628 (1978).

112. Pls' Br. in Resp., at 25, June 22, 2020, No. 220152 (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951)).

113. Def. Br. In Opp'n at 29, June 22, 2020, No. 220152 (citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981)).

Court will still likely find the effect of Washington's decision to be discriminatory. Washington's strongest argument on this issue is that the Section 401 Certification denial does not prevent Montana and Wyoming coal exports through existing ports.[114] However, the Court will likely find Plaintiffs' assertion, that no state has the power to "burden or constrict" the flow of commerce, persuasive.[115]

The Court will likely reject Washington's reliance on *Norfolk Southern Corp.*[116] Instead, the Court will likely find two cases—*Hunt* and *C&A Carbone*—clearly establish that a facially neutral state action, such as the Section 401 Certification denial at issue here, is discriminatory if there is proof of a discriminatory impact.[117]

In *Hunt*, the Court found discrimination based on the disparate impact of a law against out of staters.[118] A North Carolina law required that all closed containers of apples sold or shipped into the state bare "no grade other than applicable U.S. grade or standard."[119] The Court found that the law was facially neutral in that all apples sold in the state—whether produced in state or out of state—had to comply with this rule. Nonetheless, the Court held that the law had the practical effect of burdening and discriminating against the sale of Washington apples.[120]

Here, like *Hunt*, the Court will likely weigh whether the effect of Washington's Section 401 Certification denial discriminates against Montana and Wyoming coal while protecting Washington agriculture and in-state industries. However, unlike *Hunt*, the Court will be required to determine whether a Dormant Commerce Clause violation can be based on favoring one industry over another—here, denying a Section 401 certification to build a terminal to preserve rail capacity for Washington agricultural products—as opposed to favoring in-state participants over out-of-state participants in the same industry. Despite this distinction, the Court will likely scrutinize the record to determine whether the discriminatory impact on Montana and Wyoming coal was not an unintended byproduct of a neutral Section 401 Certification denial.

The Court also found discrimination based on the disparate impact of a facially neutral law in *C&A Carbone, Inc. v. Town of Clarkstown*.[121] There, a city adopted an ordinance that required all nonhazardous solid waste in the town to be deposited at a transfer station. The law allowed recyclers to continue to receive solid waste, but they had to bring their

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114. *Id.* at 23.

115. Pls' Br. In Supp. at 27–28, Jan. 21, 2020, No. 220152 (citing H.P. Hood & Sons, 336 U.S. at 533).

116. Def's Br. In Opp'n at 26; Norfolk v. Oberly, 822 F.2d 388, 401 (3d Cir. 1987).

117. Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 351 (1977); C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994).

118. *Norfolk*, 822 F.2d at 351.

119. *Hunt*, 432 U.S. at 339.

120. *Id.* at 351.

121. 511 U.S. 383, 391 (1994).

nonrecyclables to the transfer station.[122] The Court deemed the law discriminatory because of its effect on out-of-staters. The Court will likely be persuaded by Plaintiffs' reliance on *C&A Carbone* to further its argument that "[f]or a State to deny a permit based on factors 'it might deem harmful to the environment' is illegitimate and 'would extend the [State's] police power beyond its jurisdictional bounds.'"[123]

Because the Court will likely find Washington's Section 401 Certification denial discriminatory, and there is a strong presumption against discriminatory state action, it is unlikely Washington will be successful in articulating an important purpose.

C. Foreign Commerce Clause Claims

The Supreme Court has only considered a few cases implicating the Foreign Commerce Clause.[124] As foreign commerce in the globalized economy reaches deeper inside state boundaries to touch local activity, and as the United States more aggressively projects a wide assortment of public and private laws to activity outside its borders, this is likely to change. However, it is unlikely the Supreme Court will hear this issue and will instead focus on the Dormant Commerce Clause claim. However, if it does, the Court will likely focus its analysis on whether the Section 401 Certification denial interferes with the federal government's ability to "speak with one voice with regard to commercial relations with foreign governments."[125]

Plaintiffs' strongest argument on this issue is that the federal government has made its position clear that exporting coal to Asia and other global markets is important to the American economy and protecting national security.[126] Like its Dormant Commerce Clause analysis, the Court will likely agree with Washington's assertion that the Department of Ecology's Section 401 denial was expressly authorized by Congress in the CWA, but the Court will likely give substantial weight to Plaintiffs' assertion that Washington's denial of the permit was discriminatory. Therefore, it is likely the Court will find the permit denial violates the Foreign Commerce Clause.

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122. *Id.*

123. Pls' Br. In Supp. at 20, Jan. 21, 2020, No. 220152; *C&A Carbone*, 511 U.S. at 393 (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)).

124. The most important of these cases is Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

125. *Japan Line Ltd.*, 441 U.S. at 449.

126. Pl's Br. In Supp. at 32 (citing Remarks by President Trump at the Unleashing American Energy Event (June 29, 2017), https://perma.cc/HS43-Z9PK); see also Executive order 13783 (Mar. 28, 2017); David Farenthold and Michael Shear, *As Obama Visits Coal Country, Many Are Wary of His Environmental Policies*, WASHINGTON POST (Apr. 25, 2010); *Advancing U.S. Coal Exports An Assessment of Opportunities to Enhance U.S. Coal*, NATIONAL COAL COUNCIL, https://perma.cc/L9CV-L5PA).

V. CONCLUSION

The Court will likely find Washington's denial of the Section 401 Certification to be discriminatory and in violation of the Dormant Commerce and Foreign Commerce clauses. Whether the Court determines the purpose of Washington's denial of the Section 401 Certification was to protect its economic and political interests will likely hinge on its interpretation of the evidence presented by the parties and the Court's willingness to expand the scope of its Dormant Commerce Clause jurisprudence. Nonetheless, the Court will likely find the effect of Washington's decision to be discriminatory. At a minimum, the Court's holding in this case will provide guidance to states on the scope of its permitting authority under Section 401 of the CWA.