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## Coal and Commerce: Local Review of the Gateway Pacific Coal Terminal

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# Coal and Commerce: Local Review of the Gateway Pacific Coal Terminal

*David A. Bricklin,<sup>†</sup> Bryan Telegin<sup>‡</sup> & Henry W. McGee Jr.<sup>\*</sup>*

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## I. INTRODUCTION

Coal has been described as “the dirtiest fossil fuel on the planet.”<sup>1</sup> And the Pacific Northwest is facing a glut of it. For the first time in over twenty years, coal companies are pushing to expand their west-coast exports with new marine export terminals. Two of the proposed terminals — the 12,000-acre Gateway Pacific Terminal in Whatcom County and the 416-acre Millennium Bulk Terminal in Cowlitz County — are slotted for Washington. Combined, these two coal terminals would cost more than a billion dollars to construct;<sup>2</sup> they would export nearly 100 million metric tons of coal per year, destined for Asian power plants;<sup>3</sup> and they would result in substantially increased vessel and rail traffic.<sup>4</sup> Not surprisingly, the two proposals have drawn the ire of many

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1. Aaron Corvin, *Port Dodges Coal, Embraces Potash*, COLUMBIAN (Apr. 3, 2011), available at <http://www.columbian.com/news/2011/apr/03/dodging-coal-embracing-potash-the-port-of-vancouver/>.

2. See *Project Information Document: Gateway Pacific Terminal*, PACIFIC INT’L TERMINALS, INC. 1-6 (February 28, 2011), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/2011-02-28-project-info-doc.pdf>; see also *Economic & Fiscal Impact Assessment of Millennium Bulk Terminals* (Apr. 12, 2012), available at [http://millenniumbulk.com/wp-content/uploads/2012/04/Economic\\_Study-Executive\\_Summary.pdf](http://millenniumbulk.com/wp-content/uploads/2012/04/Economic_Study-Executive_Summary.pdf).

3. See *Gateway Pacific Terminal at Cherry Point Proposal*, WASH. DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/geographic/gatewaypacific> (last visited June 9, 2014) (reporting that the Gateway Pacific Terminal is projected to export up to 54 million metric tons of coal per year); *Millennium Bulk Terminals Longview (MBTL) Proposal*, WASH. DEP’T OF ECOLOGY, <http://www.ecy.wa.gov/geographic/millennium/> (last visited June 9, 2014).

4. The Gateway Pacific Terminal alone is expected to increase local vessel traffic by 487 round-trips per year between Whatcom County and Asian coastal energy markets. See PACIFIC INT’L TERMINALS, *supra* note 2, at 4-54. The Gateway Pacific Terminal is also expected to receive approximately nine train-loads of coal per day (or approximately 3,285 trainloads per year). *Id.* at 4-51. According to the BNSF Railway Company, these coal trains lose between 250 and 700 pounds of coal dust per trip, which can foul local waters and potentially lead to health problems for communities along the rail line. See *In re. Ark. Elec. Coop. Corp.- Petition for Declaratory Order: Public Hearing Before the U.S. Surface Transp. Bd.* 39-49 (July 29, 2011) (Testimony of Gregory Fox, BNSF Vice President of Transportation) available at [http://www.stb.dot.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/9e49ebf2fea431f1852578460066c5cb/\\$FILE/0729stb-exh.pdf](http://www.stb.dot.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/9e49ebf2fea431f1852578460066c5cb/$FILE/0729stb-exh.pdf). The impacts of “coal dust” spilling off these trains, and into waterways throughout the state of Washington, are currently the subject of two citizen suits under the federal Clean Water Act. See *Sierra Club, et al. v. BNSF Railway Company*, No. 2:13-cv-00967-JCC (W.D. Wash. filed

Washington citizens and environmental groups. Environmental review of the two projects under Washington's State Environmental Policy Act ("SEPA")<sup>5</sup> has generated more than 300,000 public comments.<sup>6</sup> It is safe to say that the proposed coal terminals, if constructed, would be the largest coal export facilities ever seen on the west coast (and likely the most controversial, too). Indeed, the Gateway Pacific Terminal would be the largest coal export facility ever built in North America,<sup>7</sup> and it alone would boost "America's total export of coal by some 40 percent."<sup>8</sup> In light of the dramatic impacts on climate change that might result from burning that much more coal, Washington Governor Jay Inslee has described approval of these coal terminals as "the largest decision we will be making as a state from a carbon pollution standpoint."<sup>9</sup>

To date, large west coast coal terminals have been a bust, with other facilities in Portland, Oregon, and Los Angeles failing in the 1980s and 1990s.<sup>10</sup> Several Washington ports (including the Port of Vancouver, the Port of Tacoma, and the Port of Kalama) have rejected similar proposals

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June 4, 2013); *Sierra Club et al. v. BNSF Railway Company*, No. 2:13-cv-00272-LRS (E.D. Wash. filed July 24, 2013).

5. WASH. REV. CODE § 43.21C.

6. *Scoping Report, GATEWAY PACIFIC TERMINAL EIS* (2012) <http://www.eisgatewaypacificwa.gov/resources/scoping-report> (reporting that the public scoping period for the Gateway Pacific Terminal generated approximately 125,000 public comments at in-person scoping meetings, online, and in writing); see also WASH. DEP'T OF ECOLOGY, *supra* note 3 (reporting that the public scoping period for the Millennium Bulk Terminal generated more than 215,000 comments from the public). While these numbers are already impressive, the outpouring of public comments on the two proposals is likely to grow significantly in the future. As discussed below, the projects have yet to receive their most intensive environmental review by federal, state, and local agencies.

7. See, e.g., *Key Facts, COAL TRAIN FACTS*, [www.coaltrainfacts.org/key-facts](http://www.coaltrainfacts.org/key-facts) (last visited June 9, 2014); see also Eric de Place & Pam Mac Rae, *Coal Exports from Canada: Why Coal Planned for Ports in Oregon and Washington Cannot Divert to British Columbia* (July 2012), [http://www.sightline.org/wp-content/uploads/downloads/2012/07/canada-coal\\_2012.pdf](http://www.sightline.org/wp-content/uploads/downloads/2012/07/canada-coal_2012.pdf).

8. Letter from Maia Bellon, Dir. of the Wash. Dep't. of Ecology, to Hon. Doug Ericksen, State Senate, 42nd Legislative Dist. (Aug. 22, 2013), available at <http://washingtonports.org/wp-content/uploads/2013/11/Annual13-CLE-EcologyLetterGatewayReview.pdf>.

9. Jessica Goad, *Governor Inslee Calls Coal Exports 'The Largest Decision We Will Be Making As A State From A Carbon Pollution Standpoint'*, *Climate Progress*, THINKPROGRESS (Jan. 22, 2013, 2:56 PM), <http://thinkprogress.org/climate/2013/01/22/1480481/governor-inslee-on-coal-exports-this-is-the-largest-decision-we-will-be-making-as-a-state-from-a-carbon-pollution-standpoint/>.

10. See Brett VandenHeuvel & Eric de Place, *Coal Export: A history of Failure for Western Ports* (Aug. 2011), <http://columbiariverkeeper.org/our-work/coal-export/coal-export-a-history-of-failure/> (detailing the 1980's failure of the Pacific Coal Terminal in Portland, Oregon, and the 1990's failure of the LAXT terminal in Los Angeles). See also Eric de Place, *Northwest Coal Exports: Some Common Questions about Economics, Health, and Pollution* 7-8 (April 2012), <http://treatyprotection.org/documentation/coal-FAQ-April12.pdf>.

due to coal's risky market status.<sup>11</sup> Market analysts have warned that Asian coal markets may not be the boon that many in the coal industry believe them to be.<sup>12</sup> Indeed, one big-money backer (Goldman Sachs) recently backed out of the Gateway Pacific Terminal project altogether, leaving many to wonder if Wall Street still considers the project viable.<sup>13</sup>

Nevertheless, proponents of the new coal terminals are pushing on. In 2012, controversy over the Gateway Pacific Terminal turned a small Whatcom County election into national news.<sup>14</sup> With four seats up for grabs on the seven-member Whatcom County Council (a body with significant review authority over the Gateway Pacific Terminal, including the authority to disapprove it) pro-coal interests flooded the election with campaign donations.<sup>15</sup> Groups opposed to the project pushed back<sup>16</sup> and, "Big Coal" money notwithstanding, candidates perceived to be opposed to the terminal swept the local election. Further, while the new Council members refused to talk about the terminal during the campaign, and for good reason,<sup>17</sup> it is widely believed that a majority of the Council are willing to consider with an open mind criticisms that the proposal does not meet legal requirements. The public perception is

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11. See VandenHeuvel & de Place, *supra* note 10; see also de Place, *supra* note 10.

12. See Coal Age News, *Building a Coal Terminal on the West Coast*, COAL AGE (December 18, 2010), <http://www.coalage.com/index.php/features/763>; Clark Williams-Derry, *The Coal Export Bubble*, SIGHTLINE DAILY (Aug. 6, 2013, 9:30 AM), <http://daily.sightline.org/2013/08/06/the-coal-export-bubble/> (detailing recent declines in Pacific Rim coal prices; but see Steven Globerman, *Coal Exports from the Pacific Northwest and the Economic Growth of the Northwest Economy* (June 2013), available at <http://www.wsfb.com/system/files/Globerman,+WAFB+Export+Paper.pdf>).

13. See, e.g., Eric de Place, *Is the Smart Money Bailing on Northwest Coal Exports?*, SIGHTLINE DAILY (Jan. 8, 2014, 7:00 AM), available at <http://daily.sightline.org/2014/01/08/is-the-smart-money-bailing-on-northwest-coal-exports/>.

14. See, e.g., Carol Davenport, *The Obscure County Election that Could Change the Planet*, NAT'L J. (May 23, 2013), <http://www.nationaljournal.com/magazine/the-obscure-county-election-that-could-change-the-planet-20130523>.

15. See Eric de Place, *Coal Money in Politics: Whatcom County*, SIGHTLINE DAILY (Oct. 21, 2013, 12:41 PM), <http://daily.sightline.org/2013/10/21/coal-money-in-politics-whatcom-county/>; see also Ralph Schwartz, *Coal Terminal, Outside Money at Issue in Whatcom County Council Races*, BELLINGHAM HERALD (Oct. 24, 2013), <http://www.bellinghamherald.com/2013/10/24/3274914/coal-terminal-outside-money-at.html>.

16. See de Place, *supra* note 15; Schwartz, *supra* note 15.

17. See WASH. REV. CODE § 42.36.040. See also Timothy Lange, *Winners of Whatcom County, Washington, Council Races Could Nix Proposed Coal-Exporting Terminal*, DAILY KOS (November 6, 2013, 9:05 AM) <http://www.dailykos.com/story/2013/11/06/1253557/-Winners-of-WhatcomCounty-Washington-council-races-could-nix-proposed-coal-exporting-terminal> (reporting that "neither the pro-conservation no pro-development candidates in the race mentioned the coal terminal in their campaigns because of their quasi-judicial decision in the matter requires . . . the 'appearance of impartiality'").

that when the Council reviews the project under its local zoning and development codes, it will have wide leeway to reject it.<sup>18</sup>

Proponents of Pacific Northwest coal terminals are now raising the specter of turning the local review process into a federal case. In 2013, proponents of the Gateway Pacific Terminal were dismayed to learn that the Washington Department of Ecology would be reviewing the project not only for its direct impacts on local resources, but also for its contribution to climate change (caused by the burning of coal in Asian power plants) and other region-wide impacts.<sup>19</sup> Determined to ensure that the Millennium Bulk Terminal would not face the same fate (and providing a preview of things to come in Whatcom County), the Attorneys General for Montana and North Dakota warned Cowlitz County that reviewing the project on such grounds is unconstitutional.<sup>20</sup> They also argued that “any” decision to deny the project would violate the Federal Constitution’s Commerce Clause because impacts of the decision would fall predominately (or even entirely) on private businesses and states outside Washington’s borders,<sup>21</sup> and because (in all likelihood) a decision to deny the project would focus on impacts specific to coal, which would also allegedly violate the Commerce Clause.<sup>22</sup>

Similar arguments based on the dormant Commerce Clause have been cited elsewhere (with varying degrees of success) in challenges

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18. See Joel Connelly, *Bad News for Big Coal in Whatcom County*, SEATTLE P.I. (November 5, 2013), available at <http://blog.seattlepi.com/seattlepolitics/2013/11/05/bad-news-for-big-coal-in-whatcom-county/>.

19. See Press Release, Joint Release: Whatcom County, Washington State Department of Ecology, U.S. Army Corps of Engineers, Agencies Set Scope of Environmental Impact Statement for Proposed Cherry Point Export Project (July 31, 2013), available at <http://www.ecy.wa.gov/news/2013/197.html>. See also *FAQ on Scope of EIS Studies for Gateway Pacific Terminal (GPT)*, EISGATEWAYPACIFICWA.GOV (July 31, 2013), available at [http://www.eisgatewaypacificwa.gov/sites/default/files/content/files/GPT-%20FAQ%20-7-30-13%20Final\\_0\\_1.pdf#overlay-context=resources/project-library](http://www.eisgatewaypacificwa.gov/sites/default/files/content/files/GPT-%20FAQ%20-7-30-13%20Final_0_1.pdf#overlay-context=resources/project-library).

20. See Letter from Rob McKenna, Partner, Orrick, Herrinton & Sutcliffe LLP, to Millennium Bulk Terminals-Longview EIS, Dep’t of Ecology-Southwest Regional Office, U.S. Army Corps of Engineers, Cowlitz Cnty., & George Raiter, Special Projects Manager (Nov. 18, 2013), available at <http://www.millenniumbulkeis.wa.gov/comments/MBTL-EIS-0002299-58927.pdf>. Montana and North Dakota are two of the states hoping to capitalize on the Gateway Pacific Terminal (along with Wyoming, which hopes to export substantial amounts of coal from the Powder River Basin, the most productive coal land in the country).

21. See *id.* at 5. Washington has few coal reserves, and denial of the project will largely impact other states (like Montana, North Dakota, and Wyoming) that produce the coal to be exported at the Gateway Pacific Terminal.

22. *Id.*

involving natural gas drilling bans,<sup>23</sup> railroads,<sup>24</sup> liquefied natural gas (“LNG”) export facilities,<sup>25</sup> and, not surprisingly, coal export terminals on the East Coast of the United States.<sup>26</sup> The new Whatcom County Council might view these arguments as a shot across the bow — a threat that any serious scrutiny of the terminal will provoke a challenge of constitutional proportions. As a result, it is possible that the Council might take a light hand to its environmental review for fear of embroiling itself in a bigger fight.

Accordingly, this article examines the potential constitutional law issues involved in local review of the proposed coal terminals. It explores these issues in the specific context of Whatcom County’s review of the Gateway Pacific Terminal. Part II provides a brief overview of the history of the Gateway Pacific terminal. Part III explores issues associated with the facility under the dormant Commerce Clause. Finally, this article concludes that there are few serious issues associated with Whatcom County’s review of the proposal that would violate the dormant Commerce Clause. Moreover, Whatcom County will have a great deal of authority to approve or deny the Gateway Pacific Terminal, and it faces few threats of violating the dormant Commerce Clause. While proponents of the new coal terminal appear to be gearing up for a fight of constitutional proportions, their bark is likely worse than their bite.

## II. HISTORY OF THE GATEWAY PACIFIC TERMINAL

### *A. The Original Proposal*

On December 24, 1991, a joint venture known as Pacific International Terminals (also known as “PIT”) applied to the United States Army Corps of Engineers to construct a bulk materials export

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23. See Kenneth S. Kamlet, *Shale Gas Perspectives — When do Gas Drilling Bans Violate the Constitution of the United States*, HINMAN, HOWARD & KATTELL LLP (Oct. 9, 2013), <http://blog.hhk.com/?p=370>.

24. See *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 236 F. Supp. 2d 989 (S.D.S.D. 2002) (striking down state law requiring railroad to file separate proceeding to condemn each parcel along a trans-state rail corridor), *affirmed in part, rev’d in part, and modified on other grounds* at 362 F.3d 512 (8th Cir. 2004).

25. See *AES Sparrows Point LNG, LLC v. Smith*, 539 F. Supp. 2d 788 (D. Md. 2007) (upholding state law prohibiting LNG export facility), *rev’d on other grounds* at 527 F.2d 120 (4th Cir. 2008), *cert denied* at 129 S. Ct. 310 (2008).

26. See *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388 (3rd Cir. 1987) (upholding Delaware law prohibiting marine coal “transfer” facilities in Delaware Bay).

facility in Whatcom County, Washington.<sup>27</sup> The joint venture, formed in 1990, was a partnership between a subsidiary of the Stevedoring Services of America (now called “SSA Marine”) and Westshore Terminals, Ltd.<sup>28</sup> SSA Marine is the West Coast’s largest stevedoring company and Westshore Terminals currently operates the largest coal export facility in North America, which is located in Vancouver, British Columbia.<sup>29</sup> The Army Corps permit application (needed to construct the multi-berth pier and approach trestle serving the terminal) was soon followed by applications to obtain authorization for the facility under Washington’s Shoreline Management Act<sup>30</sup> and to obtain a Major Development permit from Whatcom County.<sup>31</sup>

The original terminal proposal, described generically by PIT as a “multi-user import and export marine terminal for bulk, break-bulk, and other marine cargoes,” was to be built in Whatcom County’s Cherry Point Industrial Area, south of an existing ARCO oil refinery.<sup>32</sup> Cherry Point has been described as “one of the richest, most productive and sensitive marine resource sites in Washington state.”<sup>33</sup> Among other things, Cherry Point is home to one of the most productive herring populations in the State of Washington.<sup>34</sup> In 2000, the Washington

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27. See Letter from Stanley R. Cowdell, Agent for Pacific International Terminals, Westmar Consultants, Inc., to US Army Corps of Engineers, Seattle District Regulatory Branch (Dec. 26, 1991), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1991-92-documents.pdf>.

28. See *History*, SSA MARINE, <http://www.ssamarine.com/company/history.html> (last visited June 9, 2014).

29. See *US-Canadian Venture to Develop Bulk Terminals on West Coast*, J. COM. (May 9, 1991).

30. WASH. REV. CODE § 90.58.

31. See Letter from Robert M. Tull to John Tyler, Whatcom County Department of Buildings & Code (June 18, 1992), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1991-92-documents.pdf>.

32. See Public Notice, Whatcom County, Determination of Significance and Request for Comments on Scope of EIS 1 (Dec. 4, 1995), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1995-eis-scoping.pdf>.

33. See David M. Schmaltz, *Deliberations Continue on Proposed Fifth Deep Water Pier at Cherry Point*, 7(12) WHATCOM WATCH (Dec. 1998), available at [http://www.whatcomwatch.org/old\\_issues/v7i12.html#story1](http://www.whatcomwatch.org/old_issues/v7i12.html#story1). Similarly, the area has been described as a “living jewel” for Washington and its citizens. See also *Our Living Jewel – Cherry Point Aquatic Reserve*, WHATCOM WATCH (October/November 2012), available at [http://www.whatcomwatch.org/pdf\\_content/OurLivingJewelOct2012.pdf](http://www.whatcomwatch.org/pdf_content/OurLivingJewelOct2012.pdf).

34. As one critic of the Gateway Pacific Terminal has observed, “Herring are the cornerstone of the marine food chain and are extremely important to the lives of salmon, seabirds, waterfowl, marine fish and marine mammals during their entire life history.” See Schmaltz, *supra* note 33. Yet, despite the historical abundance of herring at Cherry Point, in 2000 the Washington Department of Fish and Wildlife listed the Cherry Point herring stock as “critical,” a category reserved for wildlife populations are depressed enough that “permanent damage to [the] population is likely or has

Department of Natural Resources set the area aside as a State Environmental Aquatic Reserve — a decision that signifies its importance not only to Pacific herring, but also to the endangered Chinook Salmon, waterfowl, and other wildlife such as bald eagles and marine mammals.<sup>35</sup> The area has been designated as a “shoreline of statewide significance.”<sup>36</sup> Finally, Cherry Point provides significant Dungeness crab habitat and it is of high importance to the commercial crabbing industry.<sup>37</sup>

As originally proposed, the terminal would have consisted of a 100-foot wide, 2,100-foot long wharf with a 30-foot wide, 1,200-foot long approach trestle; a 70- to 80-acre upland storage area located immediately adjacent to the shoreline (with both covered and uncovered storage areas, depending on the export product); and an extended, 100-acre rail loop for transporting cargo to the facility from the adjacent BNSF Railway track.<sup>38</sup> Under that configuration (and then-existing market conditions) the facility was anticipated to result in approximately 140 vessel calls per year.<sup>39</sup> Train traffic to and from the facility was never studied, but the facility was expected to receive (and export) up to 8.2 million tons of cargo annually.<sup>40</sup>

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already occurred.” See *Petition to List the Cherry Point Population of Pacific Herring, Clupea Pallasii*, as “threatened” or “endangered” under the endangered Species Act, 16 U.S.C. § 1531 *et seq.* at 8 (Jan. 21, 2004) available at [http://www.biologicaldiversity.org/species/fish/Cherry\\_Point\\_Pacific\\_herring/pdfs/71069\\_6360.pdf](http://www.biologicaldiversity.org/species/fish/Cherry_Point_Pacific_herring/pdfs/71069_6360.pdf). More recently, the Department of Fish and Wildlife has reported that “The Cherry Point population has dramatically declined from 15,000 tons in the 1970s to less than 1,000 tons in 2010.” See *Pacific Herring Information Summary*, WASH. DEP’T OF FISH AND WILDLIFE, available at [http://wdfw.wa.gov/conservation/fisheries/PacificHerringInformation\\_121911.pdf](http://wdfw.wa.gov/conservation/fisheries/PacificHerringInformation_121911.pdf).

35. See *Withdrawal Order for Cherry Point State Aquatic Reserve*, WASH. DEP’T OF NAT. RES. (Aug. 1, 2000), available at [http://www.dnr.wa.gov/Publications/aqr\\_rsve\\_chpt\\_comm\\_order.pdf](http://www.dnr.wa.gov/Publications/aqr_rsve_chpt_comm_order.pdf); see also *Represented Ecological Resources Identified for the Cherry Point Planning Area*, WASH. DEP’T OF NAT. RES. (Nov. 20, 2007), available at [http://www.dnr.wa.gov/Publications/aqr\\_rsve\\_chpt\\_ecologic\\_resource.pdf](http://www.dnr.wa.gov/Publications/aqr_rsve_chpt_ecologic_resource.pdf); *Critical Habitat Designation for 19 Evolutionary Significant Units of Salmon and Steelhead in Washington, Oregon, Idaho, and California*, 65 Fed. Reg. 7777 (Feb. 16, 2000) (designating the area as critical habitat for Chinook Salmon).

36. *Title 23: Shoreline Management Program*, WHATCOM CNTY. PLANNING & DEV. NAT. RES. MGMT. 32 (August 8, 2008) [http://www.co.whatcom.wa.us/pds/naturalresources/shorelines/pdf/SMP\\_CountyApproved\\_EcologyApproved\\_090323\\_clean\\_000.pdf](http://www.co.whatcom.wa.us/pds/naturalresources/shorelines/pdf/SMP_CountyApproved_EcologyApproved_090323_clean_000.pdf).

37. See *Our Living Jewel — Cherry Point Aquatic Reserve*, WHATCOM WATCH 14 (October/Nov. 2012), available at [http://www.whatcomwatch.org/pdf\\_content/OurLivingJewelOct2012.pdf](http://www.whatcomwatch.org/pdf_content/OurLivingJewelOct2012.pdf).

38. Letter from Robert M. Tull to John Tyler, *supra* note 31.

39. See *Gateway Pacific Terminal: Draft Environmental Impact Statement*, WHATCOM CNTY. PLANNING AND DEV. SERVS. II-2 (Dec. 1996), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1996-draft-eis.pdf>.

40. See *Gateway Pacific Terminal: Final Environmental Impact Statement*, WHATCOM CNTY. PLANNING AND DEV. SERVS. II-8 (Feb. 1997), available at <http://www.co.whatcom.wa.us/pds/plan/>

In December of 1996, Whatcom County issued a Draft Environmental Impact Statement (“DEIS”) for the original Gateway Pacific Terminal,<sup>41</sup> followed by a Final Environmental Impact Statement (“FEIS”) in February of 1997.<sup>42</sup> The EISs found few unavoidable significant adverse impacts to the environment (a decision that would later be challenged).<sup>43</sup> On May 14, 1997, the Whatcom County Council approved PIT’s application for a substantial shoreline permit and a major development permit after review by the County’s hearing examiner.<sup>44</sup>

Notably, however, the proponent of the original Gateway Pacific Terminal never identified it as a potential export point for coal, an omission that likely caused the EISs to underestimate its impact on the environment.<sup>45</sup> Instead, it was proposed to handle and export a number of other dry bulk commodities including alumina, automobiles, salt, scrap metal, grain, ores, green petroleum coke, rock, feed pellets, potash, and wood chips.<sup>46</sup> Accordingly, the Council’s decision authorized the terminal to be used for exporting the commodities identified above.<sup>47</sup> It did not authorize the facility to be used for coal, and nor did it consider the potential climate change impacts associated that new use.

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current/gpt-ssa/pdf/1997-final-eis.pdf.

41. See WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 39. The DEIS was published five years after PIT submitted its application for approval of the terminal facility. While a seemingly long period of time, during that five years PIT spent substantial time wrangling with various state and federal agencies over the size of the facility’s materials handling wharf. See generally *Gateway Pacific Terminal Project – Documents from 2011 and back*, *Planning and Development Services*, WHATCOM COUNTY (1993), <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/documents-2011.jsp>. During this time, PIT was also required to study the facility’s expected impacts on wetlands and other marine resources. See *id.* (1994 Natural Resources Report and 1995 Wetland Report).

42. See WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 40.

43. See WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 39, at I-7 - I-24; WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 40, at I-7 - I-24.

44. See Findings of Fact, Conclusions of Law, and Major Development Permit and Substantial Development Decision, *In re: Application for Major Dev. Permit and Shoreline Substantial Dev. Permit by Gateway Pacific Terminal*, Nos. MDP92-0003 and SHS9200020 (May 13, 1997), available at [https://www.ezview.wa.gov/Portals/\\_1357/images/default/MDP%20SHS%20Permits.pdf](https://www.ezview.wa.gov/Portals/_1357/images/default/MDP%20SHS%20Permits.pdf).

45. For example, neither the DEIS nor the FEIS assessed the potential climate change impacts of the original terminal proposal, which is now one of the most controversial effects associated with the facility’s new anticipated use as a coal export facility. See WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 39, at I-7 - I-24 (listing impacts assessed under SEPA); WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 40, at I-7 - I-24.

46. See WHATCOM CNTY. PLANNING AND DEV. SERVS., *supra* note 39, at I-2.

47. Findings of Fact, Conclusions of Law, and Major Development Permit and Substantial Development Decision, *supra* note 44, at 10.

### B. The 1997 Lawsuit

In 1997, the Washington Department of Ecology and Department of Fish and Wildlife (together with a coalition of environmental groups including, the Washington Environmental Council, the North Cascade Audubon Society, People for Puget Sound, League of Women Voters of Bellingham, and Ocean Advocates) appealed Whatcom County's FEIS to Washington's Shoreline Hearings Board. The lawsuit resulted in a comprehensive settlement requiring PIT to re-evaluate the Gateway Pacific Terminal's impact on the environment. Among other things, the settlement required PIT to undertake a comprehensive vessel traffic study, including: (1) an analysis of the risk of vessel collisions under the congested traffic conditions that would be caused by the terminal; (2) to undertake a herring monitoring study and to assess vessel impacts on the population; and (3) to mitigate impacts to the 5.85 acres of wetlands that the project would fill.<sup>48</sup>

These provisions were incorporated into PIT's permits as a condition of construction. And they reflect the community's concern that the project, even as originally proposed in 1992, *sans-coal*, would have had much greater impacts on the environment than Whatcom County originally predicted.

### C. The Current Proposal

The project languished for several years after the 1997 lawsuit was settled, but in 2011 PIT renewed its interest in the project and applied for permits to build a greatly-expanded and reconfigured export facility. For the first time, PIT also announced in 2011 that it intended to use the facility to export coal.<sup>49</sup>

Under the revised terminal concept, the Gateway Pacific Terminal would consist of two storage areas which had been moved from an area immediately adjacent to the shoreline to an area further to the north. The two storage areas would now consist of an 80-acre, uncovered storage area to be used primarily to store 2.75 million metric tons of coal at any

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48. See *Settlement Agreement: Pacific International Terminals Shoreline Substantial Permits SHS 92-0020 and SHB Appeals Numbers 97-22 and 97-23*, WHATCOM CNTY. (March 1996), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1999-settlementagreement.pdf>; see also *Stipulation & Order of Dismissal*, Washington Environmental Council, et al. v. Whatcom County et al., No. 97-22 & 97-23 (Aug. 20, 1999), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/1999-stipulation-order-of-dismissal.pdf>.

49. See *Project Information Document, Gateway Pacific Terminal*, WHATCOM CNTY. 1-9 (Feb. 28, 2011) available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/2011-02-28-project-info-doc.pdf>.

given time (the “East Loop”),<sup>50</sup> and a smaller, two-acre covered storage area for potash and petroleum coke (the “West Loop”).<sup>51</sup> The revised project would impact 140 acres of wetlands (as opposed to the 5.85 acres anticipated under the original terminal concept).<sup>52</sup> It would result in approximately 487 ship calls per year (as opposed to the 140 annual ship calls anticipated under the original concept).<sup>53</sup> The rail loop associated with the project grew from 100 acres to 300 acres.<sup>54</sup> The revised facility would use the same wharf and trestle configuration as the County permitted in 1997, but at much higher capacity. Finally, both the East Loop and the West Loop would straddle a small county road called Lonseth Road. Lonseth Road cuts across the entirety of the two storage areas and the associated rail loop, and the County would need to vacate the road (i.e., sell it to PIT) for PIT to build the re-designed facility.<sup>55</sup> PIT plans to ask the county to vacate the road after the project is approved.<sup>56</sup>

Through a confusing series of decisions and communications with PIT, Whatcom County determined that the original permits from 1997 — which were conditioned on the performance of the settlement agreement — were still in effect. This raised the initial possibility that PIT would not be required to undergo a second-round environmental review prior to constructing its revised terminal project.<sup>57</sup> But several environmental groups pushed back, including Climate Solutions, the Sierra Club, and

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50. See *id.* at 4-7. As one observer has noted, this 80-acre uncovered coal storage area (and the attendant “fugitive dust” that may escape the area and pollute nearby lands and waters) is what “particularly distinguishes” the revised, 2011 terminal concept from the earlier, 1992 design. See Terry Wechsler, *Gateway Pacific Terminal: History, Scoping and a Discussion of Implications*, WHATCOM WATCH (October-November, 2012), available at [http://www.whatcomwatch.org/php/WW\\_open.php?id=1489](http://www.whatcomwatch.org/php/WW_open.php?id=1489).

51. See PACIFIC INT’L TERMINALS, INC., *supra* note 2, at 1-9.

52. *Id.* at 5-70. The project would also result in direct impacts to more than 12,814 linear feet of streams and ditches tributary to the waters off Cherry Point.

53. *Id.* at 4-54. The increased vessel traffic is especially troubling in light of a recent report that, even under PIT’s prior estimate of 140 vessel calls per year, the Gateway Pacific Terminal could result in a 62 percent increase in the risk of a major fuel spill. See Van Dorp et al., *Assessment of Oil Spill Risk due to Potential Increased Vessel Traffic at Cherry Point*, Washington, GEORGE WASH. UNIV. 67 (Aug. 31, 2008) available at <http://www.seas.gwu.edu/~dorpjr/VTRA/FINAL%20REPORT/083108/VTRA%20REPORT%20-%20Main%20Report%20083108.pdf>. See also Wechsler, *supra* note 49.

54. PACIFIC INT’L TERMINALS, INC., *supra* note 2, at 1-5, 1-7 (Fig. 1-2).

55. *Id.* at 4-1, 4-5 (Figure 4-1), 4-13 (Figure 4-4).

56. *Id.* at 1-10.

57. See CHAD YUNGE & DAVID STALHEIM, WHATCOM COUNTY PLANNING & DEVELOPMENT SERVICES, ADMINISTRATIVE DETERMINATION (October 22, 2008), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/2008-SHR2008-00019.pdf> (concerning MDP92-0003 and SHS92-0020).

RE Sources for Sustainable Communities. In response, the County amended its position and held, instead, that new permits will be required for the revised portions of the project. In particular, the environmental groups noted that the increased capacity of the facility — together with the addition of coal to the terminals export roster — raised serious questions about whether a new shoreline permit would be needed as well.<sup>58</sup> Reflecting these concerns about increased vessel traffic and the addition of coal, the County determined on June 23, 2011, that a new shoreline permit would be required for the upland portions of the revised project.<sup>59</sup> PIT disagreed with that decision, but it missed its appeal deadline to challenge it.<sup>60</sup>

The County did, however, explain that the issues and determinations made in the prior permit decision (the 1992 project) would give “flavor and substance”<sup>61</sup> to the new permit process. Of course, “flavor and substance” is an amorphous standard that the County will need to flesh out as the new proposal makes its way through the County’s local review process. For now, the public can only assume that all of the regulatory considerations that relate to the granting or denial of a shorelines permit — discussed below — are open to debate and may be applied to the revised Gateway Pacific Terminal application. In all, whatever “flavor and substance” might turn out to mean, PIT’s obligation to obtain new permits (rather than rely on the original 1997 permits) means that the County will have wide leeway to re-evaluate the project, in its entirety, under the County’s local environmental codes.

#### *D. Federal, State, and Local Review Framework*

Review of the revised Gateway Pacific Terminal will require analysis under a slew of federal, state, and local environmental laws.

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58. See Letter from Jan Hasselman and Kristen Boyles, Earthjustice, to Tyler Schroeder, Whatcom County Planning & Development, Gateway Pacific Terminal Major Project Permit Application (June 17, 2011), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/2011-june11-17-gpt-emails.pdf>.

59. See Letter from Tyler Schroeder, Whatcom County Planning Supervisor, to Pacific International Terminals, Inc. (June 23, 2011), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/20110623-gptdetermination.pdf>.

60. See Letter from Tyler Schroeder, Whatcom Planning Supervisor, to William T. Lynn (July 11, 2011), available at <http://www.co.whatcom.wa.us/pds/plan/current/gpt-ssa/pdf/20110711-wc-response-to-request-for-reconsideration.pdf>.

61. See *id.*

At the federal level, the wharf and trestle will require permits under Section 404 of the federal Clean Water Act<sup>62</sup> and the Rivers and Harbors Act.<sup>63</sup> It must also undergo a comprehensive environmental review under the National Environmental Policy Act (“NEPA”),<sup>64</sup> which has been described as “our basic national charter for protection of the environment.”<sup>65</sup> In essence, compliance with these laws is required before the Corps authorizes PIT to place any “fill” or “structures” into the waters off Cherry Point. For example, NEPA requires a comprehensive environmental review of “major federal actions” that significantly affect the quality of the human environment, including any project requiring a federal permit.<sup>66</sup> Further, NEPA requires an assessment of direct, indirect, and cumulative impacts, which could require the Corps to evaluate wide-ranging impacts from the project (including its contribution to global warming by feeding Asian power markets hungry for more coal).<sup>67</sup>

But for better or for worse, and despite the apparent irony, NEPA will *not* be the vehicle through which a truly comprehensive environmental review will be undertaken. The Army Corps has determined that, in its opinion, many of the most controversial impacts associated with the facility (including climate change impacts associated with exporting more coal to Asian power markets) are not subject to NEPA.<sup>68</sup>

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62. 33 U.S.C. § 1344 (2006). In combination, Sections 301 and 404 of the Clean Water forbid the placement of any “fill material” into the waters of the United States without a permit first being issued by the United States Army Corps of Engineers. *See* 33 U.S.C. § 1311(a)(1).

63. 33 U.S.C. § 403 *et seq.* Similar to the Section 404 of the Clean Water Act, the Rivers and Harbors Act requires an Army Corps permit for the placement of any “structure” in the navigable waters of the United States. *Id.*

64. 42 U.S.C. §§ 4321–4370h (2006). The project will also require review and consultation under the federal Endangered Species Act, 16 U.S.C. § 1531–1544, because it requires the issuance of a federal permit and “may affect” several threatened and endangered species, including Chinook salmon and the Marbled Murrelet.

65. *See* 40 C.F.R. § 1500.1(a); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998).

66. 42 U.S.C. § 4332 (2006).

67. *See* 40 C.F.R. § 1508.8. *See also id.* at § 1508.7 (Defining “cumulative impact” to mean “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.”).

68. *See* Memorandum for Record from Bruce A. Estok, Colonel, Corps of Engineers (July 3, 2013), available at <http://www.nws.usace.army.mil/Portals/27/docs/regulatory/News/SCOPEMFRGATEWAYBNSF.pdf> (regarding the U.S. Army Corps of Engineers scope of analysis and extent of impact evaluation for National Environmental Policy Act Environmental Impact Statement). The Corps based its decision to not study these impacts on its lack of direct regulatory control over the burning of coal in Asian power plants. *See id.* at 6. But as noted elsewhere, the

Instead, a truly comprehensive environmental review will only be undertaken at the state and local level, under Washington's State Environmental Policy Act ("SEPA"). Like NEPA, SEPA requires an exhaustive review of the project's impacts.<sup>69</sup> But unlike the Army Corps' decision to limit its review under NEPA to direct, local impacts, on July 31, 2013, the Department of Ecology announced that the entire project will be submitted to what has been called a "life cycle" analysis.<sup>70</sup> In addition to direct impacts, this life cycle analysis will consider greenhouse gas ("GHG") impacts of coal combusted in Asian power plants, impacts along the entire rail line leading to the Gateway Pacific Terminal, and impacts in states such as Montana and Wyoming where the coal is expected to be mined.<sup>71</sup> In other words, the Gateway Pacific Terminal will face two levels of environmental review — a comprehensive state-level review under SEPA and a more narrow federal review under NEPA.

Ecology's decision to take a life-cycle approach under SEPA has been heralded as a victory for opponents to the Gateway Pacific Terminal.<sup>72</sup> But it has also been criticized as overbroad and "unprecedented," and pro-coal interests have demonized the decision as an attack on industry in general.<sup>73</sup> These criticisms have been fueled, in large part, by the Corps' decision to take a much narrower approach to its review of the project under NEPA.<sup>74</sup> But the Corps' decision notwithstanding, several federal agencies are already beginning to

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Corps' position betrays a misunderstanding between federal control over actions (which triggers the duty to review impacts under NEPA) and direct regulatory control over the impacts themselves (which much be studied under NEPA so long as they are reasonably foreseeable). See ELIZABETH SHEARGOLD & SMITA WALAVALKAR, COLUMBIA CENTER FOR CLIMATE CHANGE LAW, COLUMBIA LAW SCHOOL, *NEPA and Downstream Greenhouse Gas Emissions of U.S. Coal Exports* (August 2013), available at <http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/NEPA%20and%20Review%20of%20Coal%20Exports.pdf>.

69. See WASH. REV. CODE § 43.21C.030.

70. See Letter from Rob McKenna, *supra* note 20, at 2.

71. See EISGATEWAYPACIFICWA.GOV, *supra* note 19.

72. See Lefty Coaster, *In Big Victory for NW Coal Export Terminal Opponents Climate Impacts Will Be Considered by the State*, DAILY KOS (July 31, 2013, 6:03 PM), <http://www.dailykos.com/story/2013/07/31/1228063/-In-Big-Victory-for-NW-coal-export-terminal-opponents-Army-Corps-will-consider-Climate-Impacts>.

73. See, e.g., Dick Settle, Pat Schneider & Beth Clark, *Ecology Requires Unprecedented Global SEPA Analysis*, FOSTER PEPPER PLLC (August 2, 2013), <http://www.foster.com/newsroom.aspx?nid=684>.

74. See, e.g., Erik Smith, *Army Corps, Ecology Announce Divorce – Will Write Separate Environmental Impact Statements on Coal Ports*, WASH. STATE WIRE (Sept. 7, 2013) <http://washingtonstatewire.com/blog/army-corps-ecology-announce-divorce-will-write-separate-environmental-impact-statements-on-coal-ports/>; see also Letter from Rob McKenna, *supra* note 20, at 3.

include life-cycle evaluations of GHG emissions in their NEPA analyses.<sup>75</sup> The United States Environmental Protection agency itself urged the Corps to take a more comprehensive approach under NEPA<sup>76</sup> (a request that the Corps ignored). And as Maia Bellon (Director of Washington's Department of Ecology) recently noted,<sup>77</sup> the regulations implementing SEPA specifically require each state agency, in conducting its environmental assessment, to look at impacts beyond Washington's borders. *See* WAC 197-11-060(4)(b) ("In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries . . ."). Thus, as far as SEPA is concerned, there should be little dispute about Ecology's authority to require disclosure of GHG emissions in Asia, or impacts in other states, as part of its review of the Gateway Pacific Terminal. Indeed, such review is required under SEPA.<sup>78</sup>

At the local level, Whatcom County will also be required to study the environmental impacts of the project under SEPA,<sup>79</sup> and it will be doing so as a "co-lead agency" alongside the Department of Ecology.<sup>80</sup>

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75. *See* SHEARGOLD & WALAVALKAR, *supra* note 68.

76. *See* Letter from Dennis J. McLerran, Regional Administrator for U.S. Environmental Protection Agency Region 10, to Randel Perry, U.S. Army Corps of Engineers (January 22, 2013) available at [http://www.eisgatewaypacificwa.gov/sites/default/files/content/files/EPA\\_Reg10\\_McLerran.pdf](http://www.eisgatewaypacificwa.gov/sites/default/files/content/files/EPA_Reg10_McLerran.pdf) (noting that review of the Gateway Pacific Terminal under NEPA should include an evaluation of "impacts along the full route associated with transportation of dry bulk goods, including coal, to the new terminal," as well as "effects in the United States from combustion of the exported coal.").

77. *See* Letter from Maia Bellon, *supra* note 8.

78. In addition to SEPA, NEPA may also require an assessment of down-stream GHG emissions notwithstanding the Corps' decision to exclude such impacts from its review. *See* *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (holding that the federal Surface Transportation Board violated NEPA by failing to consider impacts relating to the downstream burning of coal before approving a new rail line in Wyoming coal country, and explaining that "it is reasonably foreseeable — indeed it is almost certainly true — that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal."); *Border Power Plan Working Group v. U.S. Dept. of Energy*, 260 F. Supp. 2d 997, 1033 (S.D. Cal. May 2, 2003) (holding that NEPA analysis of electricity transmission corridor must consider downstream impact of power plants across U.S. border). *See also* SHEARGOLD & WALAVALKAR, *supra* note 68.

79. WASH. REV. CODE § 43.21C.030 (requiring "all branches of government . . . including state agencies, municipal and public corporations, and counties" to comply with SEPA).

80. *See* Memorandum of Understanding ("MOU") between the U.S. Army Corps of Engineers, Whatcom County, and Washington State Department of Ecology (Oct. 12, 2011), available at [http://www.ecy.wa.gov/geographic/gatewaypacific/20111024\\_mou\\_jointreview.pdf](http://www.ecy.wa.gov/geographic/gatewaypacific/20111024_mou_jointreview.pdf); *see also* Amendment to the Memorandum of Understanding between the U.S. Army Corps of Engineers, Whatcom County and Washington State Department of Ecology (Sept. 18, 2013), available at [http://www.ecy.wa.gov/geographic/gatewaypacific/20130918\\_mou\\_amendment\\_signed.pdf](http://www.ecy.wa.gov/geographic/gatewaypacific/20130918_mou_amendment_signed.pdf).

The County will also be required to review the project under Washington's Shoreline Management Act<sup>81</sup> and under the local zoning and development codes which impose unique environmental requirements on the project.

Local review of the project will involve an analysis of impacts on the natural environment. For example, the County's shoreline regulations authorize it to take action broadly to protect commercial shellfish beds<sup>82</sup> and other fish and wildlife populations (including the Pacific herring),<sup>83</sup> as well as to balance "[p]otential short-term economic gains or convenience . . . against potential long-term and/or costly impairment of natural features."<sup>84</sup> The local zoning code contains requirements relating to dust suppression, a big issue in light of the massive uncovered coal storage piles planned for the facility.<sup>85</sup> And, as a prerequisite to obtaining a Major Development Permit for the upland portion of the facility, the Whatcom County Code may even require PIT to mitigate any impacts imposed on Whatcom County that result from climate change.<sup>86</sup> Finally,

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81. WASH. REV. CODE § 90.58.

82. *See* Whatcom County Code § 23.40.030(H) (2014) ("Resources and ecological systems of shorelines of statewide significance should be protected. Shorelands and submerged lands should be protected to accommodate current and projected demand for economic resources of statewide importance such a commercial shellfish beds.").

83. *See* Whatcom County Code § 23.40.030(I) (2014) ("Those limited shorelines containing unique, scarce and/or sensitive resources should be protected to the maximum extent feasible."). *See also* Whatcom County Code § 23.20.060.B.4 (requiring the County to "[b]alance the location, design, and management of shoreline uses throughout the county to prevent a net loss of shoreline ecological functions and processes over time.").

84. Whatcom County Code § 23.40.030(F) (2014).

85. *See* Whatcom County Code § 20.68.704 ("No odors, dust, dirt, or smoke shall be emitted that are detectable, at or beyond the property line for the use concerned, in such a concentration or of such duration as to cause a public nuisance, or threaten health or safety, or to unreasonably infringe upon the use and enjoyment of property beyond the boundaries of the district."). *See also* Wechsler, *supra* note 50.

86. *See* Whatcom County Code 20.88.130(6) (requiring permit applicant to demonstrate that the project "[w]ill not impose uncompensated requirements for public expenditures for additional utilities, facilities, and services, and will not impose *any uncompensated costs* on other property owned.") (emphasis added). By prohibiting the imposition of "any uncompensated costs," this requirement may be interpreted to require PIT to compensate the County for any anticipated costs associated with County responses to climate change impacts. Similarly, Whatcom County Code 20.88.150 may be interpreted to authorize the County to take action to mitigate impacts of global warming. That provision provides that the County may impose any reasonable conditions precedent to the establishment of the major development as may be required to mitigate impacts of the proposal on the natural environment of the county, and to protect the health, safety and general welfare of the people of the county consistent with the policies for environmental protection set forth in the comprehensive plan. Whatcom County Code 20.88.150. Especially relevant to Cherry Point, the Whatcom County Comprehensive Plan contains many goals and policies for the protection of the natural environment, including the strong discouragement of "any activity which might cause significant degradation of the fishery resource or habitat," and the "protection and enhancement of

the County's "substantive authority" under SEPA gives the County wide leeway to disapprove the project based on virtually any "significant" adverse impacts whatsoever. In particular, SEPA not only requires full disclosure of a project's significant environmental impacts, but also supplements the existing authority of every city, county, and state agency to deny projects based on their environmental impacts — provided, however, that the city, county, or agency has adopted policies to implement this authority.<sup>87</sup> In turn, the County's implementing SEPA policies give it an exceedingly broad range of authority to prevent adverse environmental impacts.<sup>88</sup> Together, these policies allow the County to take action broadly to deny a permit application whenever the County's SEPA review identifies a significant adverse environmental impact, provided that the impact is not mitigated.<sup>89</sup>

In all, state and local review of the project will involve a wide variety of environmental impacts. These range from impacts on local natural resources like wetlands and fish and wildlife habitat, to impacts on the area resulting from the burning of coal in Asian power plants, to impact wholly outside the State of Washington (including impacts along the entire rail line stretching from coal mines in Wyoming, Montana, and North Dakota, to the Gateway Pacific Terminal itself).

### *E. Threats of Litigation*

It is unclear how the Gateway Pacific Terminal will fair under the state and federal environmental laws discussed above, and it will be years before federal, state, and local review of the project is complete.<sup>90</sup>

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fish and wildlife habitat through site design and new development." See Whatcom County Comprehensive Plan at 11-23 (Policies 11-J1 and 11J-4).

87. See WASH. REV. CODE § 42.21C.060.

88. See generally Whatcom County Code § 16.08.160(D) (2014). (authorizing the County to take action necessary to act "as trustee of the environment for succeeding generations"; to "[a]ssure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings"; to "[p]reserve important historic, cultural, and natural aspects of our natural heritage"; and to "[a]chieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities[.]").

89. See Whatcom County Code § 16.08.160(C) (2014); see also Whatcom County Code 20.188.130(7) (requiring every project to "be appropriately responsive to any EIS prepared for the project" under SEPA).

90. According to the Washington Department of Ecology, the draft EIS for the Gateway Pacific Terminal is scheduled to be released sometime in 2015; and the final EIS is not scheduled to be completed until 2016 or later. See WASH. DEP'T OF ECOLOGY, *supra* note 3. And it is not until those reviews are completed that Whatcom County may even begin to review the project under its local zoning and development codes. As one commentator has noted, "It has taken 20 months for the agencies to issue their scoping notices, the draft EIS is predicted to take approximately two years, and preparation of the final EIS will take an unknown additional time. Only then will a multi-year

What is clear, however, is that proponents of the project are already brainstorming ways to undercut those laws and the potentially negative treatment that the terminal might receive under them. One potential avenue for undercutting these laws has to do with commerce — or more specifically, interference with commerce.

Shortly after learning of Ecology's decision to subject the Gateway Pacific Terminal to a "life-cycle" review under SEPA, Montana and North Dakota expressed their opinion that such review is unconstitutional. In particular, they objected that any consideration of climate change impacts resulting from the burning of coal exported from the Gateway Pacific Terminal would exceed the State's regulatory jurisdiction, as well as offend the Commerce Clause of the United States Constitution.<sup>91</sup> They stated that any consideration of impacts along the railway line outside Washington's borders would be objectionable for the same reasons.<sup>92</sup>

But they did not stop there. Instead, Montana and North Dakota intimated that *any* denial of the project would violate the constitution because impacts of the decision would fall squarely on companies engaged in interstate and international commerce. In their own words, "[t]he effect of *any* decision [by Washington] to limit or prohibit coal exports would fall entirely upon other states, including Montana and neighboring states."<sup>93</sup> As a result, they argue that any denial of the facility would be "objectionable under the commerce clause of the U.S. Constitution" because it would "impose upon other states the costs of a policy decision in the State of Washington, by discriminating against products produced in other states in applying [Washington's] regulatory jurisdiction."<sup>94</sup>

In essence, Montana and North Dakota are on record as stating that any decision to deny the project, to the extent that it relates to the movement of coal in interstate and international commerce, would be unconstitutional. And it can be expected that other proponents of the project will raise similar challenges should the Whatcom County Council (or the State) disapprove the project.

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permitting process for the terminal be able to commence, with appeals surely to follow." See SHEARGOLD & WALAVALKAR, *supra* note 68.

91. See Letter from Rob McKenna, *supra* note 20, at 4.

92. *Id.*

93. *Id.* at 5 (emphasis added).

94. *Id.*

### III. OVERVIEW OF THE DORMANT COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides that “Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>95</sup> By its express terms, the Commerce Clause vests jurisdiction in the federal government in the regulation of interstate and international trade. But it also has an implied aspect known commonly as the dormant or Negative Commerce Clause. The dormant Commerce Clause is a judge-made doctrine that generally forbids the states from interfering with interstate or international commerce.<sup>96</sup> It does so in two separate circumstances: the first deals with obstacles that target interstate trade, and the second deals with obstacles that do not specifically target interstate trade but that are nevertheless highly burdensome.

First, the dormant Commerce Clause forbids the states from passing laws that “discriminate” against interstate commerce either on the face of the statute, in its purpose, or in its effect. A statute and regulation that discriminates against interstate commerce in these ways is “virtually *per se* invalid” . . . and will survive only if it ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’<sup>97</sup> That is so even when the state is acting to protect the local environment or natural resources, or pursuing some other essentially local end.<sup>98</sup> In other words, virtually no end will justify a state or local law that discriminates against interstate commerce.

Second, even where a statute does not discriminate against interstate commerce, but rather has only an “incidental effect” on interstate commerce, it may still be struck down if it has an “undue burden” on

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95. United States Const., Art. I, § 8.

96. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (explaining that “[t]he constitutional provision of power ‘[t]o regulate Commerce . . . among the several States,’ . . . has long been seen as a limitation on state regulatory powers, as well as an affirmative grant of congressional authority.”).

97. *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008), quoting *Or. Waste Systems, Inc. v. Dept. of Env’tl Quality of the State of Or.*, 511 U.S. 93, 99(1994).

98. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (striking down New Jersey law prohibiting the importation of solid waste originating outside the state, and explaining that “it does not matter whether the ultimate aim of [the law] is to reduce waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume that new Jersey has every right to protect its residents’ pocketbooks as well as their environment. . . . But whatever New Jersey’s ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.”).

interstate commerce.<sup>99</sup> The undue burden prong of the dormant Commerce Clause is determined through a flexible balancing test known commonly as “*Pike* balancing,” after the United States Supreme Court’s decision in *Pike v. Bruce Church*.<sup>100</sup> Under the *Pike* balancing test, a nondiscriminatory state or local law will be upheld unless its impacts on interstate commerce are “clearly excessive in relation to the putative local benefits.”<sup>101</sup> In other words, a non-discriminatory local law will be upheld unless it is “unreasonable or irrational,”<sup>102</sup> and courts “should not second-guess the empirical judgments of lawmakers concerning the utility of legislation.”<sup>103</sup> In the Ninth Circuit, *Pike* balancing has also been referred to as the “minimal scrutiny test.”<sup>104</sup>

Both of these prongs<sup>105</sup> of the dormant Commerce Clause serve the same basic purpose — the elimination of “economic protectionism,” i.e., “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” But as discussed above, while economic protectionism may be the basis for dormant Commerce Clause jurisprudence, it is not the defining characteristic from a practical standpoint. No local interest will protect a law or state or local action that discriminates against interstate commerce. Instead, what decides the fate of a law or other state action is whether it discriminates against interstate commerce (in which case it will almost always be held invalid<sup>106</sup>) or has

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99. Under this prong of the analysis, the word “incidental” is typically not understood to mean “slight” or “small,” but rather that the impacts on interstate commerce are “indirect” results of local action. See *Huron Portland Cement Co. v. City of Detroit*, Mich., 362 U.S. 440 (1960).

100. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

101. *Id.*

102. S.D. Myers, Inc. v. City and Cnty. of S.F., 253 F.3d 461, 471 (9th Cir. 2001), quoting *Pac. Nw. Venison Producers v. Smith*, 20 F.3d 1008, 1017 (9th Cir. 1994).

103. *Id.*, quoting *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991).

104. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231 (9th Cir. 2010). While the burden of justifying state interests under *Pike* is “minimal,” one scholar has noted that, the Ninth Circuit, the state does bear some burden in justifying its policy choices under *Pike*. In particular, the state bears the burden of demonstrating that the putative local benefits of state action are “not illusory,” which has been described as rational basis review “with bite.” See James D. Fox, *State Benefits under the Pike Balancing Test of the Dormant Commerce Clause: Putative or Actual?*, 1 Ave Maria L. Rev. 175, 203 (Spring 2003) (discussing *Alaska Airlines v. City of Long Beach*, 951 F.2d 977 (9th Cir. 1991)).

105. At least one circuit uses a three-part Dormant Commerce Clause Analysis, which contains a test even more lenient than the *Pike* balancing test to the least problematic state laws. See *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995). However, the Ninth Circuit does not follow suit, and applies the two-part test described above. See, e.g., *Black Star Farms LLC*, 600 F.3d at 1231.

106. In its history, the United States Supreme Court has upheld only one state or local law that overtly discriminated against interstate commerce. See *Maine v. Taylor*, 477 U.S. 131 (1986) (upholding Maine law prohibiting the importation of non-native bait fish).

only “incidental effects” on interstate commerce, in which case the law is more likely to be upheld.<sup>107</sup>

#### IV. APPLICATION OF DORMANT COMMERCE CLAUSE JURISPRUDENCE

As discussed below, we believe that Whatcom County and the Washington Department of Ecology have authority to disapprove the Gateway Pacific Terminal which would not violate the dormant commerce clause.

##### *A. Whatcom County Has Significant Authority to Deny the Project in Its “Proprietary” Capacity.*

Perhaps the simplest way for Whatcom County to block the Gateway Pacific Terminal, without risking potential dormant Commerce Clause implications, would be to simply refuse PIT’s request to vacate Lonseth road. As noted above, the proponent is well aware that its project requires the street to be vacated (i.e., for the County to essentially convey title to PIT), and it is unclear that the Gateway Pacific Terminal could be re-configured and built without Whatcom County giving up ownership of the road.<sup>108</sup>

It has long been held that state and local “proprietary” actions are immune from challenge under the dormant Commerce Clause. Most often, this principle is articulated in the context of the “market participant” exception to the dormant Commerce Clause doctrine, under which states and local governments are free to discriminate against interstate commerce so long as they do so as participants in the free market, not as regulators of it.<sup>109</sup> But the principle is equally applicable to

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107. See *Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011) (explaining that local regulations that discriminate against interstate commerce “are generally struck down,” while local regulations having only an incidental effect on interstate commerce may be struck down “if the burdens they impose so outweigh the putative benefits so as to render the regulations unreasonable or irrational.”).

108. See *supra* Part II.C.

109. See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (explaining that “Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others.”) (footnotes omitted); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (“[S]tate proprietary activities may be, and often are burdened with the same restrictions imposed on private market participants. Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause.”) (footnotes omitted). See also *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (explaining that “The ‘market participant’ exception to judicially created dormant Commerce Clause restrictions makes sense because the evil addressed by those restrictions — the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the

other proprietary actions, such as a state choosing how and where it will spend its own money.<sup>110</sup> Applied here, it is hard to imagine a clearer example of a city or county acting in a “proprietary” capacity than when it decides whether to sell its own real property to a private company. Thus, such a decision would likely be held immune to the restrictions of the dormant Commerce Clause.

Here, should the Whatcom County Council decide not to vacate Lonseth road for the construction of the Gateway Pacific Terminal, there would be little that PIT could do about it. That is so even if the County Council makes its decision based on an overtly discriminatory motive of hindering coal exports or any other aspect of interstate or international commerce. The very purpose of the proprietary action exception to the dormant Commerce Clause is to allow state and local governments to avoid the prohibition against interstate discrimination.

Moreover, the Council may consider restricting the use of Lonseth Road *beyond* a mere refusal to vacate the property if and when PIT asks it to. And one way of doing so might be to dedicate the road to a conservation trust, the terms of which might be drafted to preclude future development. Council seats may well turn over again before the County finishes its review of the terminal. And the current Council (with its perceived political will) might naturally consider tying the property up in this way to bind future members who could be more sympathetic to the project (and therefore more prone to transferring title to PIT). We are not aware of any cases that discuss dormant Commerce Clause problems with this sort of transaction. Dedication of the road to a trust could be a feasible and easily doable mechanism for blocking the terminal indefinitely.<sup>111</sup>

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expenditure of state resources) to favor their own citizens — is entirely absent where the States are buying and selling in the market.”) (internal citation omitted).

110. See *White v. Mass. Council of Const. Employees*, 460 U.S. 204 (1983) (upholding city ordinance requiring all construction projects financed with public funds to use a workforce comprised of at least 50 percent city residents).

111. Perhaps most problematic for this maneuver, the United States Supreme Court has held that while a state or local government may discriminate against interstate commerce when it *initially* disposes of public property, it may not use that authority to effectively regulate *subsequent* transactions in a manner that would interfere with interstate commerce. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984). However, in *Wunnicke*, the court confronted a situation in which Alaska was attempting to invoke the “market participant” exception to the dormant Commerce Clause (premised on its selling of state-owned timber), but also exceeding that exception by attaching sale restrictions intended to limit the actions of subsequent private purchasers. The Court held that such attempts to regulate down-stream economic activity violated the dormant Commerce Clause. But in doing so, the court emphasized that the “wrong” committed by Alaska that it was attempting to regulate commercial transactions involving property in which it no longer “retained a continuing proprietary interest.” *Id.* at 99. Here, were Whatcom County to

*B. Whatcom County has Significant Authority to Protect Local Natural Resources from the Direct Impacts of the Gateway Pacific Terminal.*

In addition to denying PIT's request to vacate Lonseth Road, it is also likely that Whatcom County will avoid dormant Commerce Clause problems so long as it acts to protect local resources such as shellfish beds, herring and salmon populations, and other elements of the local natural environment from the direct effects of the project (i.e., the immediate effects of actions taking place within the County). As discussed below, mitigating the direct impacts of the project implicate purely local concerns unrelated to interstate commerce.

First, it is noteworthy that many of the local code provisions that might limit PIT's ability to construct the Gateway Pacific Terminal (including those that would allow the County to consider climate change impacts) flow from the County's zoning ordinance.<sup>112</sup> Traditionally, zoning is a core area of state sovereignty.<sup>113</sup> As one scholar has observed, virtually every zoning ordinance restricts interstate commerce (indeed, that is more often than not the very point of a zoning ordinance).<sup>114</sup> But rather than invalidate such laws, courts have largely ignored issues arising in the Commerce Clause context even when the zoning ordinance likely discriminates against interstate commerce, such as local prohibitions on "big box" retail outlets.<sup>115</sup> Exceptions exist when it is

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dedicate Lonseth Road to a trust, it would also be attempting to restrict future transactions. But unlike the situation in *Wumnicke*, the County would retain equitable title to the road and so would still have a continuing proprietary interest in it, thus avoiding the problem identified by the Supreme Court.

112. See *supra* text accompanying note 85; see also *supra* text accompanying note 86 (discussing applicable provisions contained in Chapter 20 of the Whatcom County Code, titled "Zoning.").

113. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926) (upholding state zoning ordinance that created residential districts from which "business and trade of every sort" would be excluded). See also *Schad v. Burou of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.").

114. See John M. Baker & Mehmet K. Konar-Steenberg, "*Drawn from Local Knowledge . . . and Conformed to Local Wants*": *Zoning and Incremental Reform of dormant Commerce Clause Doctrine*, 38 Loy. U. Chi. L.J. 1, 17 (Fall 2006) (explaining that "[m]any ordinary zoning regulations are supposed to have a negative effect on commerce that is interstate in nature, particularly when those regulations are viewed in isolation").

115. See, e.g. *Loesel v. City of Frankenmuth*, 743 F.Supp.2d 619 (E.D. Mich. 2010) (upholding local overlay zone restricting the size of retail stores); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006) (upholding city's ordinance prohibiting large discount superstores). See also *Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1066 (5th Cir. 1988) (upholding local zoning ordinance freezing commercial development of alluvial land along the Mississippi River); *Randy's Sanitation, Inc. v. Wright Cnty.*, 65 F. Supp. 2d 1017, 1029 (D. Minn.

abundantly clear that state and local action is premised on overt hostility to interstate commerce.<sup>116</sup> But the County's review of the Gateway Pacific Terminal under the local zoning ordinance should already be weighted in favor of its constitutionality. This result has been questioned by some,<sup>117</sup> but it nevertheless appears to be the practical reality of judicial reluctance to interfere with local zoning decisions on Commerce Clause grounds.

Second, it is likely that any action by the County to protect local resources would be reviewed under the state-friendly *Pike* balancing analysis (not the *per se* invalidation rule reserved for state laws that "discriminate" against out of state commerce). As discussed above, the first question that a court would ask when reviewing the County's disapproval of the Gateway Pacific Terminal would be whether the action (or the code provision or statute under which the County acted) is discriminatory. In this case, the laws under which the County might act to disapprove the Gateway Pacific Terminal do not fall into any of the three categories of discrimination, and so would be scrutinized only under the state-friendly *Pike* balancing test.

There should be little argument that the laws under which the County could disapprove the Gateway Pacific Terminal are not discriminatory on their face. The County's local zoning ordinance, shoreline ordinances, and SEPA are facially neutral with respect to intrastate and interstate projects and activities. It is far too early to know if any denial of the Gateway Pacific Terminal will be based on a "discriminatory motive" (though the Council's mindfulness to avoid discriminatory statements to date is certainly a step in the right direction to avoiding that challenge).<sup>118</sup> Further, while Montana and North Dakota have argued that any disapproval of the project would be

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1999) (denying summary judgment in claim alleging that county's denial of re-zone application and conditional use permit was animated by animus toward interstate commerce, and explaining that "federal courts have traditionally been somewhat hesitant to interfere in the zoning process."); *Flava Works, Inc. v. City of Miami*, 800 F. Supp. 2d 1182, 1193 (S.D. Fla. 2011) (upholding local zoning ordinance prohibiting adult entertainment in residential area).

116. See *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281, 1287 (S.D. Fla. 2007) (striking down local ordinance prohibiting big box retail, in part, because the city's vice-mayor admitted that the ordinance was intended to keep "them darn chain stores" from being built), *aff'd* at 542 F.3d 844 (11th Cir. 2008).

117. See Brannon P. Denning, *Dormant Commerce Clause Limits on the Regulation of Big Boxes and Chain Stores: An Update*, 58 Case W. Res. L. Rev. 1233 (2008) (arguing that the current reluctance of the judiciary to scrutinize local zoning ordinances under the dormant Commerce Clause is the result, in part, of judicial confusion about the doctrine).

118. See *E. Ky. Res. v. Fiscal Court of Magoffin Cnty.*, 127 F.3d 532 (6th Cir. 1997) (explaining that it is the burden of the challenger to prove that discriminatory motive infected the basis of government action).

“discriminatory” to the extent that it relates to the type of product being exported (coal),<sup>119</sup> or imposes disparate impacts on interstate business or other states, neither consideration alone suffices to prove discriminatory effect.<sup>120</sup>

For example, the mere fact that denial of the Gateway Pacific Project would impact interstate businesses and other states does not demonstrate discriminatory effect. The United States Supreme Court has long held that the mere happenstance that a local law impacts interstate commerce more than intrastate commerce is not the relevant inquiry. In *Exxon Corporation v. Governor of Maryland*,<sup>121</sup> the Court considered a law prohibiting oil producers and refiners from operating in-state retail operations, and it so happened that the only businesses burdened by the rule were out-of-state firms.<sup>122</sup> But the Court nevertheless held that the law was neutral with respect to interstate commerce because it did not benefit any intrastate competitors (none existed) to the disadvantage of the out-of-state companies.<sup>123</sup> In other words, it was merely a quirk of fact that the primary firms affected by the law were located out-of-state; the result was not the effect of the law.<sup>124</sup>

A similar result was reached in *Norfolk Southern Corporation v. Oberly*.<sup>125</sup> There, the Third Circuit reviewed a Delaware statute banning bulk transfer facilities (including coal export facilities not unlike the proposed Gateway Pacific Terminal) from a portion of Delaware Bay.<sup>126</sup> Like proponents of the Gateway Pacific Terminal, the plaintiffs in *Oberly* complained that the law discriminated against interstate commerce because it precluded operation of interstate and international

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119. See Letter from Rob McKenna, *supra* note 20, at 5 (arguing that Ecology’s life-cycle analysis violated the dormant Commerce Clause because “[t]he fact that the proposed exports include coal appears to be the determining factor in Ecology’s position on the Cherry Point Project.”).

120. See *id.* (“The effect of any decision to limit or prohibit coal exports would fall entirely upon other states, including Montana and neighboring states. A regulatory decision that is discriminatory in this fashion is doubly objectionable under the commerce clause of the U.S. Constitution.”).

121. *Exxon Corp. et al. v. Governor of Md. et al.*, 437 U.S. 117 (1978).

122. See *id.* at 125.

123. *Id.* (acknowledging that impacts of law would “fall solely on interstate companies” but holding that “this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce . . .”).

124. See also *AES Sparrows Point LNG, LLC v. Smith*, 539 F. Supp. 2d 788, 799-800 (D. Md. 2007) (holding that local prohibition on LNG export facility did not discriminate against interstate commerce because there was no in-state LNG facility that would reap the benefits of the prohibition), *rev’d on other grounds* at 527 F.3d 120 (4th Cir. 2008).

125. *Norfolk S. Corp. v. Oberly*, 822 F.2d 388 (3rd Cir. 1987).

126. *Id.* at 391.

export facilities.<sup>127</sup> But consistent with *Exxon Corporation*, the Third Circuit held that the law was not discriminatory because it did not treat intrastate and interstate commerce differently. In the Third Circuit's words, "It is the discrimination against interstate versus intrastate movements of goods, rather than the 'blockage' of the interstate flow *per se*, that triggers heightened scrutiny review in such cases."<sup>128</sup> Indeed, as the court noted in *Oberly*, the Supreme Court has itself opined that a state may block an area of commerce completely so long as it does so evenhandedly.<sup>129</sup>

The holdings of *Exxon Corporation* and *Oberly* are not unique; for a law to be discriminatory in effect, it must result in a *differential* treatment of similarly-situated in-state and out-of-state actors.<sup>130</sup> If there is no differential treatment — whether by accident or design — there is no discrimination. Applying this principle here, while the brunt of any decision denying the Gateway Pacific Terminal would fall largely or exclusively on PIT and other states that want to export their coal through Washington, any such decision would equally preclude an in-state business from building a substantially similar facility and shipping its coal to Washington power plants. Thus, it is highly unlikely that such impacts would result in a finding of discriminatory effect.

Similarly, the fact that denying the Gateway Pacific Terminal might relate to, or even focus on, impacts unique to coal (such as coal dust being blown from the terminal's massive coal piles, the spilling of coal dust from trains entering the facility, or even climate change impacts

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127. *Id.* at 401 (describing the plaintiff's argument as being premised on the law's effectively blocking the trade in coal at the state's borders).

128. *Id.* at 401.

129. *Id.* See also *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (holding that New Jersey could not prohibit the import of hazardous waste originating outside the state's borders, but explaining that "it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected").

130. *Id.* See also *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) ("[A]ny notion of discrimination assumes a comparison of substantially similar entities."); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961) (no discrimination where state law did not favor interstate commercial fishing operation differently than its intrastate competitor); *Rocky Mountain Farmers Union v. Cory*, 730 F.3d 1070, 1087 (9th Cir. 2013) ("For dormant Commerce Clause purposes, economic protectionism, or discrimination, 'simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"), quoting *Oregon Waste Systems, Inc. v. Dept. of Env'tl. Quality of the State of Oregon*, 511 U.S. 93, 99 (1994); *Nat'l Ass'n of Optometrists & Opticians LensCrafters v. Brown*, 567 F.3d 521 (9th Cir. 2009) ("To determine whether the laws have a discriminatory effect it is necessary to compare [plaintiff] with a similarly situated in-state entity."). *International Dairy Foods Association v. Boggs*, 622 F.3d 628 (6th Cir. 2010) (discriminatory effect requires a showing of both (1) legislation favors local economic actors, and (2) burdens out-of-state economic actors).

resulting from the operation of coal export machinery) would not violate the dormant Commerce Clause. It is true that the Supreme Court has said that state and local governments may not discriminate against “articles” of interstate commerce,<sup>131</sup> and coal is certainly an article of interstate commerce. But regulation of an article of commerce does not amount to discrimination under the dormant Commerce Clause unless it reflects “hostility to trade.”<sup>132</sup> In other words, treating one article of commerce differently than another article is not prohibited if the disparate treatment “results from natural conditions.”<sup>133</sup> Applied here, treating coal differently because of its unique impacts on the environment would not offend the dormant Commerce Clause. It is unlikely that any assessment of coal’s direct impacts on Washington or Whatcom County would amount to prohibited discrimination against the interstate movement of coal.

*C. Washington and Whatcom County May Consider Downstream Greenhouse Gas Emissions as Part of their Local Review.*

In addition to the direct impacts of the project, the Department of Ecology will also be reviewing the terminal’s climate change impacts,

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131. *City of Philadelphia*, 437 U.S. at 626.

132. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1095 (9th Cir. 2013) (“[A] regulation setting its boundaries along state lines would not be considered a forbidden protectionist measure when its boundaries and the process setting them reflected genuine attention to the legitimate goals of regulation and not a mere hostility to trade.”). Indeed, state laws targeting specific “articles” of commerce are routinely upheld. *See, e.g.*, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978) (upholding state law targeting retail of “gas”); *Ass’n de Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 953 (9th Cir. 2013) (upholding California law banning the sale of foie gras); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007) (upholding ban on horsemeat); *National Paint & Coatings Ass’n v. City of Chicago*, 45 F.3d at 1131 (upholding city ban on the sale of spray paint and “jumbo indelible markers”); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (upholding state law banning the sale of “petroleum-based sweeping compounds”).

133. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007). *See also City of Philadelphia*, 437 U.S. at 626 (holding that discrimination against interstate commerce “may not be accomplished by discriminating against articles of commerce coming from outside the State *unless there is some reason, apart from their origin, to treat them differently.*”) (emphasis added); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 347 n. 11 (2009) (explaining that “hostility to the thing itself, not merely to interstate shipments of the thing,” while “an undiscriminating hostility is at least nondiscriminatory” under the dormant Commerce Clause); *C & A Carbone Inc. v. Town of Klarkstown*, 511 U.S. 383, 390 (1994) (explaining that the dormant Commerce Clause forbids measures that “impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State.”) (emphasis added); *Oregon Waste Systems, Inc. v. Dep’t of Env’tl Quality of the State of Oregon*, 511 U.S. 93, 101 n. 5 (2000) (striking down Oregon law prohibiting the importation of out-of-state waste, but explaining that “if out-of-state waste did impose higher costs on Oregon than instate waste, Oregon could recover the increased cost through a differential charge on out-of-state waste”).

including impacts that flow from the ultimate combustion of coal in Asian power plants. As we noted above, the County may also consider reviewing climate change impacts in association with its local review. The County's zoning code authorizes the County to impose necessary mitigation measures or deny the project to avoid "any uncompensated costs" incurred by the County in responding to those impacts.<sup>134</sup> As above, Montana and North Dakota have alleged that review or denial of the terminal on these grounds would violate the dormant Commerce Clause.<sup>135</sup>

As an initial matter, consideration of climate change impacts arising from coal combustion in Asian power plants would likely not render a decision "discriminatory" under the dormant Commerce Clause. The Ninth Circuit's recent opinion in *Rocky Mountain Farmers v. Corey*<sup>136</sup> is instructional.

*Rocky Mountain Farmers* concerned California's Global Warming Solutions Act, a fuel standard regulation that established a "declining annual cap on the average carbon intensity of California's transportation-fuel market."<sup>137</sup> That regulation required all fuel sold in California to be categorized based on its carbon footprint, and the carbon footprint dictated how much could be sold in the state fuel market.<sup>138</sup> At issue, however, was that the regulation distinguished some fuels based on their point of origin, assigning a higher carbon footprint to fuels produced in regions of the world that used "dirtier electricity or less efficient plants" than were used elsewhere.<sup>139</sup> In other words, fuels otherwise indistinguishable from each other would be treated differently based on where they were produced. And that, in turn, correlated with each fuel's carbon footprint under what California described as a "life-cycle analysis."<sup>140</sup>

In upholding the regulation, the Ninth Circuit explained that the law was not discriminatory within the meaning of the dormant Commerce

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134. See Whatcom County Code § 20.88.130(6); see also *supra* text accompanying note 86.

135. See Letter from Rob McKenna, *supra* note 20, at 8 (arguing that "[a] decision to investigate environmental impacts in China or other importing countries, as well as in the States [e.g., Montana and North Dakota], is a decision that those extraterritorial impacts should play a role in determining whether these other States' citizens may engage in commerce nationally and internationally. . . . The States believe that such actions are far outside of Washington's borders and infringe on the rights of the citizens of other States and nations.").

136. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *rehearing en banc denied* at 740 F.3d 507 (9th Cir. 2014), petition for cert. filed March 20, 2014.

137. *Id.* at 1080.

138. *Id.* at 1080–86.

139. *Id.* at 1089–90.

140. *Id.* at 1089.

Clause. In particular, while the law treated fuels differently based on their point of origin, the distinction reflected an actual difference between the products. Moreover, the court held that in treating the fuels differently, California need not be confined to differences originating purely within the state but could, instead, consider differences stemming from production methods used elsewhere in the world provided that they had in-state ramifications.<sup>141</sup> In the court's words,

Unless and until either the United States Supreme Court or Congress forbids it, California is entitled to proceed on the understanding that global warming is being induced by rising carbon emissions and attempt to change that trend. California, if it is to have any chance to curtail GHG emissions, must be able to consider *all* factors that cause those emissions when it assesses alternative fuels.<sup>142</sup>

In other words, considering the real factors that contribute to global warming (even if they relate to actions taken beyond a state's boundaries) is not discriminatory within the meaning of the dormant Commerce Clause. In many respects, this result is merely a logical extension of the established and longstanding rule that treating products differently by reason of their point of origin or destination is not prohibited so long as the distinction also "results from natural conditions."<sup>143</sup>

Applying this logic to local review of the Gateway Pacific Terminal, the same result should obtain. In *Rocky Mountain Farmers*, the facts making the fuel detrimental to California arose largely out-of-state. But that did not diminish the impact on California or prohibit it from differentiating between fuels on that basis.<sup>144</sup> In the case of the Gateway

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141. *See id.* at 1089 (explaining that "[i]f we ignore these real differences between ethanol pathways, we cannot understand whether the challenged regulation responds to genuine threats of harm or to the mere out-of-state status of an ethanol pathway.").

142. *Id.* at 1090 (emphasis added).

143. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007). *See also* cases cited *supra* note 133. Moreover, a consideration of real impacts, and natural conditions relating to climate change, is exactly what animated the Washington Department of Ecology's decision to subject the Gateway Pacific Terminal to a searching review under SEPA. *See, e.g.*, Letter from Maia Bellon, *supra* note 8, *supra*, at 5 (explaining that under SEPA "the scope of environmental analysis . . . is determined by the specific impacts potentially associated with the specific project undergoing review. As a result, there is no 'rule' or 'standard' that leads to an identical scope of review for different projects. . . . In every case, the scope of review is determined by the extent of the proposal's probable, significant, adverse environmental impacts.").

144. *See Rocky Mountain Farmers*, 730 F.3d at 1081 (explaining that "One ton of carbon dioxide is emitted when fuel is produced in Iowa or Brazil harms Californians as much as one emitted when fuel is consumed in Sacramento."); *id.* at 1090 n. 8 ("[E]missions of well-mixed greenhouse gases . . . contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare.") (ellipsis)

Pacific Terminal, part of what would make the terminal harmful to Washington is its transport of coal to power plants that produce harmful greenhouse gas emissions. In this way, the two cases concern opposite ends in the chain of production and consumption. But just as California did in *Rocky Mountain Farmers*, Washington may “consider all factors” (including the real impacts — in Washington — of burning coal in Asia) without thereby discriminating against interstate or international trade within the meaning of the dormant Commerce Clause.

*D. Consideration of Downstream GHG Emissions Likely Would Not Violate the Dormant Commerce Clause Prohibition on “Extraterritorial” State Laws.*

However, even if state or local action does not *discriminate* against interstate commerce, it might still run afoul of another aspect of the dormant Commerce Clause doctrine — the prohibition on “extraterritorial” state regulation. Under the extraterritoriality doctrine, the Supreme Court has explained that a state law which “directly controls commerce occurring *wholly* outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority,” and thereby violates the dormant Commerce Clause.<sup>145</sup> In this case, proponents of the Gateway Pacific Terminal will undoubtedly allege that any decision reflecting greenhouse gas emissions in Asia will run afoul of this prohibition.

There are two reasons why such criticisms are likely ill-founded. First, the extraterritoriality doctrine has rarely been used to strike down state and local laws, most famously in the price-setting context when the law would have the practical effect of regulating commercial transactions that would otherwise have nothing to do with the enacting state.<sup>146</sup> The doctrine has been used to strike down state environmental laws when they were found, in essence, to reflect a paternalistic environmental policy not benefiting any in-state interests. But in each case it was also clear that the commercial activity affected by the local law occurred

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in original), quoting EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66499 (December 15, 2009).

145. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (emphasis added).

146. See *Healy*, 491 U.S. at 145, 338–340 (striking down Connecticut law prohibiting in-state beer sales at prices exceeding the price in neighboring states — Court found that such a law attempted to “control[] the prices set for sales occurring wholly outside Connecticut’s borders, including prohibition on promotional and volume discounts offered in neighboring states); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) (striking down New York price affirmation law concerning the sale of liquor that had the practical effect of precluding liquor distributors from offering promotional sales in neighboring states); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 528 (1935) (striking down New York law concerning the local sale of milk that had the effect of imposing wage and sale restrictions in Vermont).

wholly outside the state's boundaries, and that the negative impacts targeted by the law would fall outside the state's boundaries, too.

For example, in the 7th Circuit case of *National Solid Wastes Management Association v. Meyer*<sup>147</sup> the court struck down a Wisconsin law restricting access to in-state landfills by waste generators in neighboring states except on condition that the neighboring states adopt Wisconsin's recycling standards.<sup>148</sup> In effect, the Wisconsin law meant that if a neighboring state wanted to use Wisconsin's landfills for *any* of its waste, it had to comply with Wisconsin law for *all* of its waste even if a substantial portion would never end up in Wisconsin. This violated the ban on extraterritorial state laws because it required out-of-staters to "adhere to the Wisconsin standards whether or not they dump their waste in Wisconsin."<sup>149</sup> Similar concerns have animated other extraterritoriality cases in which the state was found, in essence, to be imposing its law in a manner that would regulate conduct outside its borders regardless of the ultimate impact on in-state interests.<sup>150</sup>

There is a marked difference in the case of the Gateway Pacific Terminal and the paternalistic laws struck down in *National Solid Wastes Management* and other cases. It should be obvious that Washington citizens are not concerned about burning coal in Asia because it will cause global warming *in Asia* — they are concerned about global warming *in Washington* because climate change impacts originating in Asia are of a global nature. In this way, denying the Gateway Pacific Terminal would not merely be an instance of imposing local environmental policy on outsiders — it is a way of protecting Washington citizens from the real and harmful effects of burning coal and, in turn, of the Gateway Pacific Terminal's role in the problem.<sup>151</sup>

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147. *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 658 (7th Cir. 1995).

148. *See id.* at 657–58.

149. *Id.* at 658.

150. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (explaining, in dicta, that a town may not pass an ordinance intended "to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment."); *Hardage v. Atkins*, 619 F.2d 871, 873, (10th Cir. 1980) (striking down Oklahoma law similar to the one in *National Solid Wastes management Association* because it would "forc[e] Oklahoma's] judgment with respect to hazardous wastes on its sister states"). *Cf. Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (striking down Illinois "Business Take-Over Act" which attempted to regulate commercial transactions that "would not affect a single Illinois shareholder").

151. Moreover, it is notable that a significant amount of the commercial activity at issue in local review of the Gateway Pacific Terminal will be located in Washington (namely, export of the coal itself). Thus, denial of the facility would not be an illegal attempt to regulate commercial activity occurring "wholly" outside Washington's borders. *See Healy*, 491 U.S. at 340. As the Ninth Circuit observed in *Rocky Mountain Farmers Union*, the ban on extraterritorial state laws generally does not extend to local laws targeting commercial transactions "in which at least one party is

In contrast, it is likely that neither Washington nor Whatcom County could legally deny the Gateway Pacific Terminal based on mining-related impacts occurring exclusively within other states. As noted above, the Washington Department of Ecology has stated that it will review those impacts under SEPA.<sup>152</sup> Because direct mining impacts likely would not affect Washington itself, denial of the project on those grounds would violate the dormant Commerce Clause ban on extraterritorial state laws.

Second, even if the ban on extraterritorial state laws did preclude the State or Whatcom County from using greenhouse gas emissions in Asia to outright deny the Gateway Pacific Terminal, the State and County could still impose mitigation measures on the terminal to offset those impacts. Again, *Rocky Mountain Farmers Union* provides an apt example. In that case, the Court ruled that California's fuel standard regulation did not, in fact, attempt to control out of state conduct, but was rather a simple mechanism designed to ensure that the price of products sold in California would reflect the actual damage done to California by their carbon footprint. In essence, the regulation did not *regulate* out-of-state fuel producers, but rather attempted to *influence* out-of-state fuel producers to internalize the true costs of their product.<sup>153</sup> In the court's words "States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."<sup>154</sup>

In the case of the Gateway Pacific Terminal, mitigation measures intended to offset the local costs of supplying Asian power markets may be viewed, like the fuel standards at issue in *Rocky Mountain Farmers Union*, as a simple way of internalizing the costs of PIT's conduct and, thus, as a way of influencing its out-of-state commercial decisions. At this point, it is unclear what such mitigation measures would look like.

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located in [the regulating state].” *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070,1103 (9th Cir. 2013), *rehearing en banc denied at* 740 F.3d 507 (9th Cir. 2014), petition for cert. filed March 20, 2014., quoting *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003) (brackets in original). Here, in the sale of coal to Asian power plants, one of the major parties will obviously be located in Washington (i.e., the Gateway Pacific Terminal and its owner/operators).

152. *See supra* Part II.D.

153. *See Rocky Mountain Farmers Union*, 730 F.3d at 1104.

154. *Id.* at 1103, *citing* *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644, 679 (2003).

But Whatcom County has the authority under its local code to impose such mitigation measures<sup>155</sup> and they would likely be constitutional.

Further, should PIT view the costs as being too high to operate, that is a result of its own business decisions, not the dormant Commerce Clause. As the Supreme Court has explained, the dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”<sup>156</sup> The Clause does not protect “the particular structure or methods of operation in a retail market.”<sup>157</sup> And, as a corollary, it does not guarantee that market participants “may compete on the terms they find most convenient.”<sup>158</sup>

## V. CONCLUSION

In the words of Governor Jay Inslee, whether to approve massive new coal export facilities is “the largest decision we will be making as a state from a carbon pollution standpoint.”<sup>159</sup> In the case of the Gateway Pacific Terminal, that decision would result in increasing national coal exports by up to 40 percent;<sup>160</sup> it could have significant environmental impacts on some of the State’s most significant natural resources;<sup>161</sup> it will undoubtedly affect the lives of tens of thousands of Washington citizens; and it will do so in a market that has proven unreliable in the past.<sup>162</sup> Finally, if proponents of the facility make good on their threats to date, any opposition to the project will likely face a substantial legal fight.

But for the reasons discussed above, and despite the recent comments of Montana and North Dakota, we do not believe that local review of the project will seriously implicate the dormant Commerce Clause. Indeed, Whatcom County may be in the unique and significant position to deny the property in its own proprietary capacity (i.e., by refusing to vacate Lonseth Road). The County will have wide leeway to review the direct impacts of the project on the local environment, and has the regulatory tools to do so. And both the County and the Washington Department of Ecology likely may respond to global climate change impacts as part of their review and decision-making processes (including impacts stemming from the burning of coal in Asian power plants). They

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155. See *supra* notes 82–89.

156. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-128 (1978).

157. *Id.* at 128.

158. *Rocky Mountain Farmers Union*, 730 F.3d at 1092.

159. Goad, *supra* note 9.

160. See Letter from Maia Bellon, *supra* note 8.

161. See Part II.A.

162. See *supra* notes 10-13.

are entitled to proceed based on the understanding that global climate change is being caused by rising carbon emissions, whether those emissions originate within or outside the State's border. If they are to take seriously their obligations to protect Washington's coastlines and other natural resources, they must be free to consider all factors during their review of the Gateway Pacific Terminal.