

THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

WASHINGTON ENVIRONMENTAL
COUNCIL, *et al.*,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE
RESOURCES, INC., *ET AL.*'S
SUMMARY OF DISCOVERY
DISPUTES

NOTED FOR TELEPHONIC HEARING
OCTOBER 31, 2018 AT 10:30 A.M.

BACKGROUND

The Defendants have had nearly five months to produce documents responsive to Lighthouse’s June 15 discovery requests. During that time, they have slow-walked every aspect of their document production, including by inventing technological problems that they suddenly resolved when Lighthouse moved to modify the schedule. It took until yesterday—October 29—for them to admit that they still have 100,000 responsive documents they have not yet produced, and another 80,000 potentially responsive documents they have not yet fully searched.

Depositions demand documents.¹ During yesterday’s call, the Defendants said that “the Governor is not a fan of coal,” and that “it does not matter how many documents you get that may indicate that.” Lighthouse vehemently disagrees. Those are exactly the kind of documents Lighthouse would use in depositions. Lighthouse’s Complaint argues that because the Defendants are politically opposed to coal and coal exports, they have illegally blocked construction of Lighthouse’s proposed coal export facility. The Defendants’ delays in producing documents responsive to discovery aimed at their opposition to coal and coal exports is prejudicing Lighthouse.

Lighthouse needs certainty that the Defendants will produce all documents responsive to its June 15 discovery requests on or before November 21, 2018. It will use those documents to depose the Defendants’ witnesses before the deadline for discovery-related deposition motions.

The Defendants’ production delays are summarized in the table below.

¹ See, e.g., *City of Colton v. Am. Promotional Events, Inc.*, 2011 U.S. Dist. LEXIS 61205, at *35 (C.D. Cal. Jun 7, 2011) (“in addition to requiring time to analyze the produced documents . . . [a party] must receive relevant documents in time to prepare for and conduct depositions”); American Bar Association, Section of Litigation, Civil Discovery Standards, Std. 16(e) (rev. 2004); *Marin v. King Cnty.* 194 Wash. App. 795, 807 (2016) (upholding monetary sanctions against attorney who knew of responsive documents prior to a deposition, but did not turn them over until afterward); see also *In re Washington Mut. Mort.*, 2011 U.S. Dist. LEXIS 162861, at *6 (W.D. Wash. Dec. 27, 2011); *Ivy v. Outback Steakhouse, Inc.*, 2007 WL 1655116, at *5 (W.D. Wash. June 6, 2007).

1	June 15	Lighthouse served its first set of discovery requests on Defendants.
2	July 23	Defendants responded to many of Lighthouse's discovery requests by
3		indicating that they would produce documents "within an estimated 60
4		days," i.e., by September 21. In some cases, Defendant Bellon indicated that
5	August 6	Lighthouse warned Defendants that slow discovery responses "would
6		jeopardize the Court's expeditious scheduling order."
7	August 31	Lighthouse proposed a discovery conference to address, among other
8		things, "Timing of productions."
9	September 10	The parties held a discovery conference at which they all "agreed the pace
10		of productions should pick up" and Lighthouse agreed to provide search
11		terms to "facilitate faster productions" by Defendants.
12	September 14	Lighthouse sent Defendants a letter that included 32 search terms and
13		offered to further refine and "tailor" those terms "using Boolean searches"
14		as needed.
15	September 25	Defendants asked for a conference "to discuss some issues affecting the
16		speed of [their] discovery response" and stated that when their searches
17		using Lighthouse's terms "far exceed the ESI Agreement limits."
18	September 27	In a teleconference, Defendants stated for the first time that, except for
19		emails, they were incapable of performing the Boolean searches that would
20		have narrowed their results. In addition, they acknowledged that they had
21		only run about 5 of Lighthouse's proposed 32 terms, even though they
22		received those terms nearly two full weeks prior to the call.
23	September 28	Lighthouse sent an email narrowing its search terms for emails, which could
24		be searched using Boolean modifiers.
25	October 2	Defendants sent a letter to Lighthouse reiterating that its "software for
26		searching <i>non-email</i> documents is limited in its ability to conduct
		sophisticated Boolean searches," and further stating that their "[s]earches of
		email documents also have limitations."
	October 9	Lighthouse sent Defendants a letter stating clearly that Defendants'
		"approach to searching non-email documents violates the Federal Rules of
		Civil Procedure, the Local Rules, and the ESI Agreement." The letter
		further stated that without a change in the schedule, Lighthouse would "be
		forced to use motions to compel much more aggressively."
	October 11	Lighthouse filed a motion to modify the Court's scheduling order.

1 2	October 17	In Defendants' response, they said <i>for the first time</i> that they had "resolved [their] search issues" but would not commit to completing their production until the close of discovery on January 14, 2019.
3 4	October 23	The Court denied Lighthouse's motion to modify the scheduling order.
5 6	October 25	Lighthouse sent Defendants a letter asking them complete their production by November 21, so that depositions could occur before the Court's discovery motion deadline on December 24.
7 8	October 26	Defendants responded to Lighthouse's letter, but did not commit to producing documents by November 21.
9 10 11	October 29	Defendants stated during a teleconference that Lighthouse's search terms had identified 100,000 responsive documents that they could "probably" produce by November 21. They further stated that they had identified an additional 80,000 potentially responsive documents that they would not produce before November 21.

12 If the Defendants had simply run the searches Lighthouse proposed six weeks ago, when
13 Lighthouse proposed them, discovery would already have been complete. By instead forcing
14 Lighthouse to write letters, hold multiple "meet and confer" conferences, and move to compel,
15 they have already made it extremely difficult for Lighthouse to prepare for depositions. That
16 appears to have been their intention.

17 At this point, the Defendants have begrudgingly agreed to produce the documents
18 identified using Lighthouse's search terms. Yesterday, they informed Lighthouse that 28 of those
19 29 terms had returned a total of approximately 100,000 documents. All that is left for them to do
20 is review those documents for privilege. But given the time left in the discovery period,
21 Lighthouse can no longer rely on the Defendants' promises to "probably" produce those 100,000
22 documents by November 21.

23 As for the other 80,000 documents, the Defendants stated that they had only searched the
24 final term—number 27 in the list below—without the Boolean limiting phrase "w/100 (preemp*
25
26

1 or coal or fossil or export or greenhouse or climate or Asia*)." Lighthouse is confident that using
2 the limiting phrase will significantly reduce that number. Even if it does not, the Defendants
3 should be able to produce those documents by November 21 as well.

4 **REQUESTS**

5 1. To ensure that it can be prepared for depositions, Lighthouse asks that the Court
6 order the Defendants to complete their production by November 21.

7 2. To further ensure that the Defendants do not produce over 100,000 documents on
8 November 21, Lighthouse asks that the Court order the Defendants to produce a substantial
9 portion of the documents responsive to Lighthouse's search terms every Tuesday and Friday
10 between now and November 21.

11 3. Finally, to ensure that there is adequate time to review tens-of-thousands of
12 unproduced documents, take depositions on those documents, and resolve disputes, Lighthouse
13 asks that the deadline for discovery motions related to depositions be moved to January 14,
14 2019, the scheduled close of discovery.

15 * * *

16 For the Court's information, Lighthouse's requested search terms are shown below.

17 **Terms relevant to the Millennium Bulk Terminal Project:**

- 18 1. Millennium
19 2. MBTL
20 3. MBT-L
21 4. MBT-Longview
22 5. Lighthouse
23 6. Ambre

1 7. Amber w/300 coal

2 **Terms relevant to the Defendants' treatment of coal and other coal projects:**

3 8. Coal not w/1 creek

4 9. RailAmerica

5 10. Hoquiam and coal

6 11. John Henry and coal

7 12. Centralia and coal

8 13. TransAlta and coal

9 **Terms relevant to the Defendants' treatment of other coal export projects:**

10 14. Gateway Pacific and coal or export

11 15. GPT

12 16. Pacific International

13 17. PIT and coal or export

14 18. SSA and coal or export

15 19. Cherry Point and coal or export

16 20. Colstrip

17 **Terms relevant to the Defendants' treatment of interstate and foreign commerce:**

18 21. commerce clause

19 22. interstate w/10 commerce

20 23. inter-state w/10 commerce

21 24. foreign w/10 commerce

22 25. international w/10 commerce

1 26. (Asia* or Japan or Taiwan or Korea or China) w/100 (coal or fossil or fed* or
2 export* or greenhouse or climate or GHG)

3 27. (fed* or Trump or president* or repub* or GOP) w/100 (preemp* or coal or
4 fossil or export or greenhouse or climate or Asia*)

5 28. ICCTA or “ICC Termination Act”

6 29. PWSA or “Ports and Waterways Safety Act”
7

8 Dated this 30th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30th, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

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