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 MOTION FOR PROTECTIVE ORDER **NOTED FOR: NOVEMBER 30, 2018 9:30 a.m.**

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 26(c) and Local Rule 7(d)(2)(b), Plaintiffs Lighthouse Resources Inc. *et al.* (collectively, "Lighthouse") request a protective order barring Defendants from conducting a fishing expedition into a wide range of lobbying and other protected speech for an unlimited time period that is irrelevant to the claims and defenses at

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issue in this case and that does not make any fact of consequence more or less probable. Fed. R. Evid. 401. As required, Lighthouse certifies that it has conferred in good faith with Defendants to resolve the dispute without the Court's involvement, but those conferences were unsuccessful.[1]

In a series of document requests (Requests #30–33) and a substantively identical 30(b)(6) deposition topic (Topic #7), for an unrestricted time period Defendants seek "all documents" regarding "any attempts" by Lighthouse to influence any federal officials, legislators, and agencies (none of whom was involved in the Washington State decisions at issue) to support the proposed Millennium coal export facility, "coal export generally," and a variety of tangential topics such as "legislation that would amend the Clean Water Act," "NAFTA, GATT, or other international trade agreements," or "the placement of coal export facilities on federal properties including military bases."[2]

As a coal energy supply chain company, Lighthouse likely will have hundreds of documents concerning its protected speech to the federal government regarding the mining, transportation, and export of coal – but none of those documents is relevant to the Defendants' decision to deny Lighthouse a Section 401 permit for the proposed facility or its refusal to continue processing permits for Lighthouse's proposed coal export facility. Because the Defendants seek documents and information that involve protected speech, are irrelevant to the claims and defenses at issue in the case, and that are disproportionate to the needs of the case in that the requested discovery will not resolve any issue and the burdens

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[1] *See* Declaration of Jay Johnson In Support of Motion for Protective Order ("Johnson Decl.") ¶¶ 2-5.
[2] State Defendants' Second Set of Requests for Production to the Plaintiffs at 5–6, attached as Exhibit ("Ex.") A to Johnson Decl.; State Defendants' Notice to Plaintiffs of Deposition Under Fed. R. Civ. P. 30(b)(6), Topic 7, attached as Ex. B to Johnson Decl. (Oct. 26, 2018).

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and expenses associated with complying with the discovery will outweigh its likely benefit, the Court should enter a protective order barring the discovery sought by Requests #30–33 and Rule 30(b)(6) Deposition Topic #7.

II. BACKGROUND

On October 26, 2018, Defendants served Lighthouse with a second set of requests for production and with notice of a Rule 30(b)(6) deposition.[3] Document requests #30–33 and 30(b)(6) topic #7 seek "all documents" for an unrestricted time frame regarding "any attempts" by Lighthouse to influence any federal officials, legislators, and agencies (all of which are in Washington, D.C., and none of which participated in the challenged decisions by the Washington State Defendants) to support the proposed Millennium coal export facility, "coal export generally," and a variety of topics that bear no relationship to the challenged state decisions.[4]

These requests seek the exact same types of documents and information that the Court has previously ruled are entitled to heightened protection. On July 3, 2018, Defendant-Intervenors Washington Environmental Council moved for a protective order barring discovery of its own lobbying efforts and strategies, the very discovery the Defendants' now seek from Lighthouse.[5] For example, both sets of discovery requests seek all attempts to lobby or influence federal agencies.[6] On July 30, 2018, the Court granted Defendant-Intervenors' motion and ruled that Defendant-Intervenors need not produce internal

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[3] Ex. A to Johnson Decl. at RFP # 30–33; Ex. B to Johnson Decl. at Topic # 7.
[4] *Id.*
[5] Motion for Protective Order (July 3, 2018), Dkt. No. 123.
[6] *See* Order on Defendant-Intervenors' Protective Motion at 3 (July 7, 2018), Dkt. No. 127; Ex. A. to Johnson Decl. at RFP # 30–33.

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documents, including documents relating to "WEC strategy documents, position or policy papers, lobbying efforts, letters, documents, communications, and/or other attempts to lobby, influence, or persuade."[7] Under *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), the Court ruled that despite the fact that Lighthouse alleged the Defendant-Intervenors had successfully influenced State decision-making regarding the very decisions at issue in this case, Defendant-Intervenors had made a prima facie showing that requiring production of such documents could have a chilling effect on Defendant-Intervenors' right to expressive association, that the documents sought were not highly relevant, and that the document requests were not carefully tailored to avoid unnecessary interference with the right to associate.[8]

During the meet and confer conferences regarding the instant discovery, Lighthouse pointed out that the at-issue discovery is substantially similar to those requests that were previously curtailed by the Court. Lighthouse has also pointed to the public availability of its Lobbying Disclosure Act filings, which describe Lighthouse's lobbying in support of the Millennium coal export facility and coal exports. Lighthouse has also previously offered to provide more detailed information regarding those lobbying efforts. Defendants, however, have unreasonably refused to make any restrictions at all to their requests, and have refused to recognize any First Amendment protections applicable to Lighthouse's lobbying and protected speech. They also failed to identify what relevance Lighthouse's federal lobbying efforts have to the State's decisions that form the basis of this lawsuit.

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[7] *Id.* at 3–4.
[8] *Id.* at 10–11.

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III. ARGUMENT

Pursuant to Fed. R. Civ. P. 26(c), trial courts are conferred broad discretion to decide when a protective order is appropriate and what degree of protection is required to prevent annoyance, embarrassment, oppression, and undue burden or expense.[9]

Discovery is allowed on non-privileged matters that are "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."[10] Therefore, "[a] protective order can be properly issued where the discovery requests seek information that is not relevant,"[11] or that will not resolve any issues and the burdens and expenses associated with complying with the discovery will outweigh its likely benefit.[12]

The gravamen of this case is whether the Defendants properly denied Lighthouse's Section 401 application for the Project, and otherwise refused to process Lighthouse's permit applications, or whether those actions violated Lighthouse's constitutional rights under the dormant interstate and foreign clauses, or were preempted by federal law.[13] States violate the dormant commerce clause if their actions discriminate against or unduly burden foreign or

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[9] *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984).
[10] Fed. R. Civ. P. 26(b)(1).
[11] *F.D.I.C. v. Killinger*, No. C11–459 MJP, 2011 WL 4440410, at *1 (W.D. Wash. Sept. 21, 2010).
[12] *Cabell v. Zorro Prods.*, 294 F.R.D. 604, 609 (W.D. Wash. 2013) ("Where the relevance of the requested information is low, avoiding the harm that comes with the burden of overbroad discovery constitutes 'good cause' for a protective order.") (citing *Defreitas v. Tillinghast*, No. 2:12-CV-00235-JLR, 2013 WL 209277, at *3 (W.D. Wash. 2013).
[13] Complaint at ¶¶ 3–11 (Jan. 3, 2018), Dkt. No. 1.

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interstate commerce.[14] In addition, states violate the foreign commerce clause if their actions: (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to speak with "one voice" concerning foreign commercial affairs.[15] State actions are preempted by the ICC Termination Act (ICCTA) if they have the effect of managing or governing rail transportation.[16] And under the Ports and Waterways Safety Act, states are prohibited from regulating national and international maritime commerce except in very narrow circumstances.[17]

Therefore, relevant to this case is what the Defendants did and did not consider and act upon when denying Lighthouse its Section 401 permit on or about September 26, 2017; and when they decided to discontinue processing of Lighthouse's other permits on or about October 23, 2017; what the federal government's connections with foreign governments were with respect to coal exports; and what the federal government's "voice" was with respect to coal and coal exports at or around the time of the denial.

The discovery at issue seeks none of these things. As an initial matter, the Defendants' discovery requests are unlimited in time. The requests would require Lighthouse to produce documents, and to educate a 30(b)(6) witness, regarding "coal export generally" and other far-afield topics that are years distant in time from the Project or otherwise not at all connected with it.

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[14] *Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1087-88 (9th Cir. 2013); Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006).
[15] *Piazza's Seafood World,* 448 F.3d at 750 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)).
[16] *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).
[17] *United States v. Locke*, 529 U.S. 89, 108 (2000).

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Moreover, irrelevant are Lighthouse's external communications with its own lobbyists about the proposed Millennium coal export facility, "coal export generally," and such topics such as "legislation that would amend the Clean Water Act," "NAFTA, GATT, or other international trade agreements," or "the placement of coal export facilities on federal properties including military bases."[18] That Lighthouse may have communicated with its federal lobbyists about any of these topics, or any other topics, does not make any fact of consequence to the claims or defenses at issue in the case more or less probable. Fed. R. Evid. 401. Similarly irrelevant are Lighthouse's external communications with federal officials, agencies, and/or legislators regarding those topics. That Lighthouse, a coal energy supply chain company, advocated the federal government in favor of the Project and for coal exports is of no moment. What matters are the energy and coal policies of the federal government, whether the Defendants' permit denial was consistent with those policies, and whether, among other things, Defendants' denial of the permit interfered with the federal government's ability to speak with one voice concerning energy and coal exports. Moreover, Defendants are and always have been able to request this information from the federal government through the Freedom of Information Act. Their failure to do so is further evidence that this information is irrelevant and the request is being made solely to annoy, embarrass, or oppress. Fed. R. Civ. P. 26(c).

Even further removed and irrelevant to the claims and defenses at issue in the case are Lighthouse's own internal documents and communications concerning lobbying strategy or

[18] In some instances, such documents and communications can be privileged. *See A & R Body Specialty and Collision Works, Inc. v. Progressive Cas. Ins. Co.*, 2013 WL 6044342, at * (D. Conn. Nov. 14, 2013) (holding that documents that "either reflect confidential requests for legal advice from [the company] to its attorney-lobbyists, or reflect the attorney-lobbyists providing confidential legal advice, such as the interpretation and/or analysis of legislation" are protected under attorney-client privilege).

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attempts to lobby, influence, or persuade federal officials, agencies, or legislators. That Lighthouse may have planned to meet with federal officials, agencies, and/or legislators does not make any fact of consequence to the claims or defenses at issue in the case any more or less probable. Lighthouse has a constitutional right to engage in the political process, including petitioning the government.[19] It should be able to do so without fear of intrusive discovery into these activities, which will chill internal discussions concerning such protected speech and will further chill the lobbying itself.[20] To prevent any infringement on such protected activity, in light of the irrelevance of the documents sought, in light of the wide-ranging nature of the discovery propounded, and that certain of the documents and information are available from Lighthouse's public filings, the Court should grant Lighthouse's protective order, much as the Court granted Defendant Intervenors' requested protective order. *See* Order, Dkt #127 at 6 (reasoning that the Court "'balances the burdens imposed on individuals and associations against the significance of the...interest in disclosure'") (quoting *Perry*, 591 F.3d at 1140)); *id.* at 9 (reasoning that disclosure of documents could "chill speech immediately, not just in the future for other possibly lobbying targets"); *id.* (reasoning that internal documents are "not *highly* relevant" and that the discovery requests are "not carefully tailored to avoid unnecessary interference with protected activities"); *id.* at 10 (reasoning that "information is not 'otherwise unavailable' at present"). Given the utter irrelevance of these categories of internal and external documents, Defendants' discovery requests appear not to be bona fide efforts at obtaining discoverable

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[19] "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 355 (2010) (*citing First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.31 (1978)).

[20] *See* Declaration of Michael Klein In Support of Motion for Protective Order.

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information, but rather appear to be efforts to extract information regarding Lighthouse's lobbying strategies so that Defendants can launch their own counter-lobbying.[21]

The Defendants have claimed during meet and confer discussions that they need to know more about Lighthouse's lobbying activities because those activities may have influenced the federal government's policy regarding coal exports. Setting aside the factual inaccuracy of that suggestion, there is nothing in the cases interpreting the dormant foreign commerce clause that suggests that attempts to influence federal policy are legally relevant. What is more, the Defendants' requests would reach far beyond Lighthouse's efforts to influence official federal policy, and seek details of Lighthouse's specific discussions with federal officials on a variety of tangential topics. The only possible purpose of such discovery is to thwart Lighthouse's current and future lobbying efforts, not to uncover information relevant to the claims and defenses in this litigation.

IV. CONCLUSION

Defendants seek broad and intrusive discovery into a wide range of Lighthouse's lobbying and political activities. Such discovery is not relevant to the claims and defenses at issue in this litigation, and Lighthouse respectfully requests the Court to grant the motion for protective order.

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[21] *See Perry v. Schwarzenegger,* 591 F.3d 1147, 1163 n.10 (9th Cir. 2010) (*citing In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 415 (D. Kan. 2009)) ("Disclosure of the associations' evaluations of possible lobbying and legislative strategy certainly could be used by plaintiffs to gain an unfair advantage over defendants in the political arena.").

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Dated this 26th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 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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