The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, *et al.*,

Defendant-Intervenors.

No. 3:18-cv-05005-RJB

DEFENDANTS' JOINT RESPONSE TO ORDER REGARDING APPLICABLE LAW

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State Defendants Jay Inslee and Maia Bellon ("Ecology") and Defendant-Intervenors Washington Environmental Council *et al.* ("WEC") jointly respond to the Court's Order Regarding Applicable Law, Dkt. 309. It is unquestionable that all challenges to the substance of a § 401 denial must be brought in state court. Because the Pollution Control Hearings Board upheld Ecology's denial of the § 401 certification based on the unchallenged Final Environmental Impact Statement ("FEIS"), the Court cannot find that there has been discrimination. The undisputed findings of the FEIS resolve Lighthouse's *Pike* balance Commerce Clause claims as well. There are no relevant facts left for this Court to adjudicate; the Court should resolve the dormant and foreign commerce clause legal issues through the pending summary judgment motions. The factors for *Pullman* abstention have also been met.[1]

First, state tribunals are the exclusive fora for challenging § 401 decisions. *See Ackels v. EPA*, 7 F.3d 862, 867 (9th Cir. 1993) ("Petitioners' only recourse is to challenge the state certification in state judicial proceedings."); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1300 (1st Cir. 1996) (recognizing cases "hold[ing] that the state courts are the only fora in which to challenge whatever requirements the state adds, beyond the minimum required by the [Clean Water Act]"); *Roosevelt Campobello v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification"); *Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army*

[1] The Court stated (at 2) that "there are other permits and events at issue within the scope of the case." To the contrary, although Lighthouse's Complaint challenged actions by the Washington Department of Natural Resources ("DNR"), the Court dismissed those challenges and DNR's Director as a party. Dkt. 170. The only remaining action challenged in this case is Ecology's § 401 denial, and the only remaining challenge is under the Commerce Clause. While Lighthouse's prayer for relief asks the Court to enjoin Ecology from using SEPA "to block the terminal," Dkt. 290 at 6, this case does not (and could not) involve a challenge to the Washington SEPA process, the FEIS, or the Cowlitz County Hearing Examiner shoreline permit denial.

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Corps of Engineers, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) ("To the extent that this particular question may raise federal issues, we agree with the finding of the Administrative Review Board and the Ohio Court of Appeals that the state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government."); 40 C.F.R. § 124.55(e) ("Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part."). To be sure, this Court has jurisdiction over federal constitutional claims, but state courts have exclusive jurisdictional over substantive challenges to § 401 decisions.

Second, Lighthouse's Commerce Clause claim of "discrimination"—that there was a pretextual reason for the § 401 denial—is a substantive challenge to the merits of the § 401 denial that Lighthouse cannot prosecute here. It does not matter that Lighthouse frames its challenge under the Commerce Clause; as many of its hundreds of exhibits and witnesses show, Lighthouse seeks to undermine and question the § 401 decision-making process and the validity of the § 401 decision itself. In fact, Lighthouse's desired trial would lead to hundreds of exhibits and dozens of witnesses attempting to relitigate substantive environmental issues that the FEIS grappled with for years. That is not a proper role for this Court. Such challenges must be brought, if brought at all, in state court.[2]

The Hearings Board held that, under SEPA and the federal Clean Water Act, Ecology "lawfully employed its SEPA substantive authority to deny Millennium's § 401 Certification request based on the significant adverse environmental impacts identified in the FEIS." Dkt.

[2] Which Lighthouse has done, *see Millennium Bulk Terminals-Longview, LLC v. Wash. Dep't of Ecology*, No. 18-2-00994 (Cowlitz County Superior Court) (complaint filed at Dkt. 304-1).

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130-6 at 19. As the Court explained (at 2-4), the Board's order affirming the validity of Ecology's § 401 denial is entitled to preclusive effect under the Full Faith and Credit Act, 28 U.S.C. § 1738, the principles of collateral estoppel, and Washington state court precedent. *See also* Dkt. 211, WEC Motion for Summary Judgment at 8-11; Dkt. 227, Ecology Motion for Summary Judgment at 15.

Because the appropriate administrative tribunal has upheld the § 401 denial based on application of the unchallenged FEIS, Lighthouse may not relitigate the validity of the § 401 denial—which cuts out the heart of its dormant Commerce Clause claim. *See, e.g.*, Dkt. 262, Plaintiffs' Opp. to Summary Judgment on Commerce Clause at 2 ("The record is replete with factual issues concerning Defendants' discriminatory actions and shows that there is no legitimate basis for the 401 Denial."); *id.* at 14 ("The 401 Denial did not derive from—or even accurately reflect—the conclusions in the FEIS."); *id.* at 29 ("[T]he 401 Denial materially diverges from the FEIS on which it purports to rely, creating core fact issues that should be resolved at trial; *id.* at 51 ("The 401 Denial's reliance on non-water quality potential impacts … raises serious questions about whether the 401 Denial constitutes a valid exercise of Congress's delegated water quality authority under Section 401.") (emphasis omitted). Lighthouse's Commerce Clause theory violates the principle that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise," including "when the issue has been decided by an administrative agency … which acts in a judicial capacity. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991).

Third, the unchallenged findings of the FEIS foreclose Lighthouse's *Pike* balance Commerce Clause claims. The Court noted (Order at 5) that if this case proceeded to trial, there

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"might not be much left to do except, perhaps, a *Pike* balancing." With respect, defendants submit that there is nothing left to do at trial at all.

With no valid issue of discrimination, a *Pike* balancing only addresses two questions—(1) whether the § 401 denial imposes a significant burden on interstate commerce; and (2) whether the alleged benefits of the § 401 denial are illusory. On the first question, the unchallenged FEIS Coal Market Study (Dkt. 213-2) supplies the answer: there is no impact from the § 401 denial to the coal export market because U.S. exports "would mostly replace internationally produced coal." Market Study at 6-11. The FEIS, which extensively studied the impacts of operating the terminal to both coal production and consumption, found only modest change in the U.S. production from current levels if the terminal were not built. Market Study at 6-10. In fact, even using the calculations of Lighthouse's expert, Mr. Schwartz, the terminal at full build-out would add less than one quarter of one percent to the international coal import-export market. *See* WEC Motion for Summary Judgment at 14. Because the *Pike* analysis "protects the interstate market, not particular firms," *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127-28 (1978), the alleged impact to Lighthouse's ability to make money is not cognizable under the Commerce Clause.

On the second question, the reasons for the § 401 denial are real and significant, and Lighthouse can present no evidence to make them illusory.[3] The FEIS documented in detail the nine significant and unavoidable impacts that would be caused by the construction and operation of the coal terminal. Lighthouse may disagree with the numeric value of the public health, safety, and environmental benefits that flow from the § 401 denial, but even Lighthouse's experts

[3] Ecology denied the § 401 certification for two sets of reasons: the significant unavoidable harms found in the FEIS and Millennium's admitted failure to supply reasonable assurances that water quality standards would be met.

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acknowledge that there are benefits. *See, e.g.*, Berkman Rebuttal Report at 8-9 (Dkt. 213-14.) No witnesses or evidence are needed to address the benefits side of the *Pike* balance, particularly as the § 401 denial relied for part of its decision on the FEIS's unchallenged findings.

Fourth, if the Court is disinclined to conclusively resolve this case on summary judgment, this situation meets the test for *Pullman* abstention. Order at 5-6; Dkt. 62, Defendants' Motion to Dismiss and Abstain; Dkt. 105, Reply re Motion to Dismiss and Abstain. Denial of the § 401 involves state land-use law and is a sensitive area of social policy; Lighthouse's constitutional claims could be avoided by a state court ruling in its favor; and this Court cannot predict how the state law issues of first impression will be resolved. *See Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996). There is no point in having a 12-day trial with hundreds of exhibits and hundreds of hours of witnesses when ongoing state court litigation will either moot this case by giving Lighthouse the relief it seeks or present this case in a different posture for the Court's review. Order at 5-6, citing *Rollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984).

Respectfully submitted this 8th day of April, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 8th day of April, 2019.

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