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 REPLY RE ORDER REGARDING APPLICABLE LAW

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The Pollution Control Hearings Board (Hearings Board) upheld Ecology's § 401 denial, and no one challenged the Final Environmental Impact Statement (FEIS) that found significant, unavoidable impacts from the proposed Millennium coal terminal. Lighthouse cannot re-litigate claims about the FEIS, the State Environmental Policy Act (SEPA) process, or the validity of the § 401 decision here, yet that is precisely what it seeks to do. For the reasons explained below and in prior submissions of State Defendants and Defendant-Intervenors (collectively Defendants), the Court should stop Lighthouse's collateral attack on those binding administrative determinations now.

1. Lighthouse spends much of its brief—and four accompanying declarations—reiterating that none of its state court cases raise Commerce Clause claims. That fact is not in dispute, nor is it relevant to the questions posed by this Court. The Court invited the parties to briefly address the role of the Hearings Board's decision affirming the validity of the § 401 denial. Defendants submit that this Court must give preclusive effect to the factual and legal determinations of the Hearings Board under the Full Faith and Credit Act, 28 U.S.C. § 1738, and the Washington law of collateral estoppel (issue preclusion). That a Commerce Clause claim was not before the Hearings Board is irrelevant, and Lighthouse's repeated arguments to the contrary "confuse claim and issue preclusion." *Shoemaker v. City of Bremerton*, 745 P.2d 858, 863 (Wash. 1987). For this reason, citations to *Matson Navigation Co. v. Hawai'i Public Utilities Commission*, 742 F. Supp. 1468 (D. Haw. 1990), and *Valley Disposal v. Central Vermont Solid Waste Management District*, 31 F.3d 89 (2d Cir. 1994) are inapposite, for those cases involved questions of whether preclusive effect disposed of entire Commerce Clause claims. Here, while the Hearings Board did not adjudicate constitutional claims, collateral estoppel asks whether the prior tribunal decided common factual or legal issues. *See Shoemaker*,

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745 P.2d at 863 ("While the Commission could not have adjudicated the section 1983 claim, it may have decided an issue of fact that is common to both [claims]. If it did, and if the adjudication was adequate . . ., then the issue has been decided for all purposes."). In short, the standard for identical issues is separate from the legal claims alleged, and the factual issues before this Court and the state tribunal—the findings and evidence in the FEIS and the validity of the § 401 denial—are the same. As recently as last month, the parties in the § 401 state court case agreed to use all the same discovery materials from this case, and the Cowlitz County complaint contains the same factual allegations of bias and discrimination. Dkt. 304-1. Lighthouse is "entitled to one bite of the apple, and they took that bite. That should have been the end of it." *Reninger v. State Dep't of Corrections*, 951 P.2d 782, 791 (Wash. 1998).

2. The fact that the Court must give the Hearings Board decision full faith and credit does not end Lighthouse's case, but it does severely narrow it and eliminates any need for a trial. Lighthouse's Commerce Clause discrimination claim directly attacks the validity of the § 401 denial, alleging that "the 401 Denial did not derive from—or even accurately reflect—the conclusions in the FEIS" and that "there is no legitimate basis for the 401 Denial." Dkt. 262, at 14, 1. Because those allegations are impossible to reconcile with the Hearings Board's conclusion that the § 401 denial was a valid exercise of Ecology's authority under SEPA and the federal Clean Water Act, which cannot be re-litigated here, Lighthouse's discrimination claim fails.[1] The remainder of the Commerce Clause claim, the *Pike* balance, can be decided by the Court through the pending summary judgment motions, because, again, the unchallenged findings of the FEIS, and its Coal Market Study in particular, conclusively establish both that the

[1] The Court does not have to give the Hearings Board's decision preclusive effect to rule that Lighthouse cannot show discrimination under the Commerce Clause, *see* Dkt. 211, at 4-8; Dkt. 227, at 16-20; Dkt. 293, at 3-7 (Commerce Clause Summary Judgment briefing).

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market impacts of this single permit denial are negligible and the environmental, public health, and safety benefits from the denial are significant.

3. Ecology has not "refuse[d] to permit all new interstate and foreign commerce in coal." Lighthouse Response, Dkt. 314, at 6. This case challenges a single permit for a single proposed coal terminal, and Lighthouse's attempt to establish a pattern, presumably to justify its requested relief, fails. Other proposed coal terminals have been blocked by entirely separate actors: the U.S. Army Corps of Engineers denied a requisite permit for the Gateway Pacific coal terminal north of Bellingham, Washington, Dkt. 213-15, and the Oregon Department of State Lands denied a necessary permit for Lighthouse's other venture at the Port of Morrow, Dkt. 213-9, a decision upheld by the Oregon state courts in a Commerce Clause challenge. This case does not involve a "ban," a "coastal 'wall,'" Dkt. 214, at 2, or any of the other hyperbolic images Lighthouse has used to dramatize the denial of a single water quality certification.

4. Lighthouse shows little confidence in its own state court challenges when it asserts that "even if an individual state permit were set aside in one or more of the state court cases, that would not moot the instant case." Dkt. 314, at 20. But of course it would. If Lighthouse were to succeed in reversing the § 401 denial through its state court action, this case would be moot, and there would be no final agency action to further challenge under the Commerce Clause or any other legal theory.

5. Lighthouse is also simply wrong when it states that "[f]rom the start, this case was about more than a single permit denial." Dkt. 314, at 20. Lighthouse and BNSF brought three types of claims (federal preemption, foreign affairs doctrine, and dormant Commerce Clause) against two final state agency actions (DNR's aquatic land sub-lease denial and Ecology's § 401 denial). This Court has dismissed DNR and its final agency action from the case as well as the

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preemption and foreign affairs doctrine claims against Ecology. The relief available to Lighthouse on this single claim challenging a single permit denial is judicial vacatur of that denial. Yet Lighthouse seeks an order from this Court controlling how the FEIS can and cannot be used for any current or future permits for the coal terminal, including the shoreline permits denied by the Cowlitz County Hearing Examiner that are not properly part of this case.[2] Lighthouse also asks the Court to enjoin Ecology to continue processing any and all current and future coal terminal permit applications. Lighthouse goes so far as to assert that "[t]he state proceedings cannot provide the broader relief that this Court can offer applying *across* permits and approvals, including future permits and approvals." Dkt. 314, at 21 (emphasis in original). Lighthouse is mistaken; the Court does not have the power to provide such broad relief, unhinged from the remaining claims and single action being reviewed. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *see also Reninger*, 951 P.2d at 790 ("disparity of relief … is not the gravamen of the decision whether to apply collateral estoppel to the findings of an administrative board").

6. Finally, in their attempt to avoid *Pullman* abstention, Lighthouse takes a position diametrically opposed to its earlier argument against preclusion. After acknowledging that it seeks a broad injunction against unnamed current and future permits, Lighthouse in the next breath downplays its claims as "tailored," "particularized," and "plaintiff-specific," Dkt. 314, at 23. In fact, this case is far from a "straightforward Commerce Clause challenge," *id.*, but one

[2] Although Cowlitz County is not a defendant, both Lighthouse's and BNSF's complaints seek an order vacating Cowlitz County's denial of shorelines permits. This Court has already ruled that "[t]here is no showing that this Court has the remedial power to issue such relief." Dkt. 200, at 10 (Order on Defendants' and Intervenor-Defendants' Motions for Partial Summary Judgment) (internal quotation omitted).

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that strikes at the heart of Washington's ability to apply overarching state and federal statutes to protect its natural resources and residents from environmental and public health harms. The Court in its discretion can abstain; the factors for *Pullman* abstention are met, as Defendants have previously explained. Dkt. 62, at 24-28; Dkt. 105, at 14-18. Lighthouse (at 21) cites *Park at Cross Creek LLC v. City of Malibu*, 2015 WL 9698236 (C.D. Cal. April 10, 2015) to argue against abstention. Yet not only does that case confirm that land-use is a sensitive area of social policy (the first *Pullman* factor), but the district court granted *Pullman* abstention because, like here, if plaintiffs won on their state law claims, they "would be able to obtain all of the relief that they are seeking through this action. Consequently, it would not be necessary to decide the federal constitutional issues." *Id*. at *5. Such is the case here.

While the Court has the discretion to abstain, there is no need for a trial (even without considering the preclusive effect of the Hearings Board decision and the unchallenged FEIS), and Defendants ask the Court to grant their pending summary judgment motions and dismiss the remainder of this case.

Respectfully submitted this 10th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 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 10th day of April, 2019.

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