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,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

COMBINED REPLY IN SUPPORT OF PLAINTIFFS' AND PLAINTIFF-INTERVENOR'S COMBINED BRIEF ON PRECLUSION AND *PULLMAN* ABSTENTION

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INTRODUCTION

This lawsuit is based exclusively on violations of the Commerce Clause of the U.S. Constitution. If, as Defendants now argue, actions comporting with state law could not be challenged as unconstitutional in federal court, Section 1983 would be a dead letter. Section 1983 exists for the sole purpose of challenging state actions, taken under "color of state law," but which, despite complying with state law, nonetheless are unconstitutional.

Defendants concede that none of the state proceedings has resulted, or will result, in any rulings whatsoever as to whether Defendants violated the Commerce Clause. Nonetheless, Defendants argue that state agency decisions—all made by individuals appointed to their positions by Defendant Inslee—simply affirming that certain of the state's actions comply with state law foreclose this federal suit. Defendants are wrong. As shown in Dkt. 314 and below, it is black letter law that a state action may be in complete accord with state law yet nonetheless violate the Constitution. As a result, preclusion and abstention provide no basis to avoid a trial.

The instant Commerce Clause claims are separate challenges, implicating different facts and circumstances, from the state law challenges to 401 Denial. For example, whether the 401 decision comports with state SEPA law or Washington state water quality standards is irrelevant to whether that decision burdens, discriminates against, or, in effect, bans interstate or foreign commerce to the tune of $6 billion in economic damages and 1,500 lost jobs annually. The Supreme Court has itself made clear that a state court's upholding a permit denial under state law is no bar to a federal court's finding that such action violates the Commerce Clause. In *H.P. Hood & Sons, Inc. v. Du Mond*, the Supreme Court invalidated, under the Commerce Clause, New York's denial of a permit to operate a milk plant even though state tribunals, like

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those here, upheld the permit denial under state law. 336 U.S. 525, 526-29 (1949). Recognizing this, just weeks ago Defendants themselves conceded that "Plaintiffs are free to make arguments about whether Ecology's decision violated the commerce clause [or that] Ecology misrepresented the FEIS in its § 401 decision." Dkt. 293 at 8 (further admitting that nothing "preclude[s] [Plaintiffs] from litigating the merits of their commerce clause challenge—which, of course, the administrative tribunals did not reach.") (emphasis added).

The critical issue of Defendants' intent also has not been resolved in any state proceeding. As this Court observed at oral argument on the motions for summary judgment, the parties disagree as to the intent behind Defendants' actions: whether, as Plaintiffs will prove, Defendants took action against the Millennium Bulk Terminal for the purpose of stopping any new coal export facilities or whether, as Defendants argue, the Defendants evaluated the Terminal in the same manner as other permit applicants not involving the transportation and export coal. Dkt. 315 at 30, Mar. 26, 2019 Mot. Hearing Tr. No state administrative body or court has examined that issue, nor any of the other core Commerce Clause issues presented by Plaintiffs.[1] Thus, this case must proceed to trial.

ARGUMENT

I. An action's validity under *state law* does not shield it from constitutional challenge.

[1] In addition to Defendants' intentions, no state tribunal has addressed: (1) whether Defendants' decision to block the Terminal has the practical effect of burdening and discriminating against interstate or foreign commerce; (2) whether Defendants' actions impose significant burdens on foreign and interstate commerce that are clearly excessive in relation to the putative local benefits; (3) whether Defendants can achieve their regulatory goals short of an outright ban on commerce, i.e., with less burdensome or discriminatory means, and; (4) whether Defendants interfered with the federal government's role concerning coal exports. *See generally* Dkt. 262, Plaintiffs' Opp. to Defs.' Mots. for Summ. Judg. Not one of these issues is or will be before any state tribunal. Dkt. 315-2, Table of Issues Actually Litigated and Decided in State Proceedings.

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Defendants' brief leads with a new argument—that federal courts cannot hear challenges to Section 401 decisions on any grounds. Dkt. 312 at 2-3. This is wrong. Federal courts routinely hear federal constitutional challenges to Section 401 decisions. *See, e.g., U.S. Steel Corp. v. Train*, 556 F.2d 822, 837 (7th Cir. 1977) (noting that a state's "[water quality] regulations, like any other state regulation or statue, can be challenged on federal constitutional grounds in a federal action against the appropriate state officials"), abandoned on other grounds, *City of West Chicago, Ill. v. U.S. Nuclear Regulatory Com'n*, 701 F.2d 632 (7th Cir. 1983); *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 10 (D.C. Cir. 2011) ("If [the plaintiffs] believe that a particular state's [Section 401 certification decision] imposes an unconstitutional burden on interstate commerce, they may challenge that law in federal (or state) court.") (internal citations omitted); *Exelon Generation v. Grumbles*, No. 18-1224, 2019 U.S. Dist. LEXIS at *22 (D.D.C. Mar. 29, 2019) (allowing a federal challenge to a Section 401 decision to proceed, even though a state proceeding was pending, stating "although [the plaintiff] is also challenging the certification in state administrative and legal processes, the immediate Complaint clearly only raises questions concerning the federal Constitution and laws.").

Defendants' novel theory has been repeatedly rejected because, if adopted, it would completely eviscerate federal protections guaranteed by Section 1983, which are expressly intended to "*override* certain kinds of state laws" and provide "a remedy *where state law was inadequate*." *Monroe v. Pape*, 365 U.S. 167, 173–74 (1961), rev'd on other grounds, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Section 1983 "authorizes private parties to enforce their federal constitutional rights, []against municipalities, state and local officials, and other

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defendants who acted under color of state law," and not, as Defendants now argue, only those actions that do not comply with state law. Schwartz, Section 1983 Litigation (3rd Ed. 2014).

As the Defendants correctly stated at oral argument, "if the 401 Denial is valid on its face under state law, it's actually completely valid, it could still violate the Constitution." Dkt. 315-1 at 10, Mar. 26, 2019 Mot. Hearing Tr. Defendants' string of inapposite cases does not undo this admission.[2] *See* Dkt. 312 at 2-3. None of the cited cases involves a denial of a Section 401 certification. None holds that a federal court cannot review a Section 401 decision for compliance with constitutional requirements. None holds that a state decision somehow strips a federal court of its ability to rule upon constitutional claims. Indeed, none even involved a constitutional challenge to a Section 401 decision.

The dormant Commerce Clause itself disproves Defendants' theory. Under this clause, courts must strike down otherwise valid state actions, including permit denials, that discriminate against or burden interstate or foreign commerce. *See, e.g.*, *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1257-60 (11th Cir. 2012) (county's application of its permit ordinance and denial of company's permit applications violated dormant Commerce Clause); *Walgreen Co. v. Rullan*, 405 F.3d 50, 57 (1st Cir. 2005) (statute requiring that all pharmacies seeking to open or relocate within Puerto Rico obtain a certificate of necessity and convenience

[2] *See Ackels v. EPA*, 7 F.3d 862, 867 (9th Cir. 1993) (no relevant constitutional challenge was brought; held that challenges to the modifications made by the state to its certification should be challenged in state court); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1300 (1st Cir. 1996) (no constitutional challenge was brought; held plaintiff could not dispute the state's water quality certification since plaintiff had only challenged the Forest Service's FEIS, not the state's certification); *Roosevelt Campobello v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) (no constitutional challenge was brought; held that the EPA, not the Court, lacked authority to review the appropriateness of a state's water quality certification); *Lake Erie All. for Prot. of Coastal Corridor v. U.S. Army Corps of Engineers*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (no constitutional challenge was brought; upheld state decision that the Ohio EPA is not bound by the regulations of the U.S. EPA).

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impermissibly discriminated against interstate commerce). Nothing in Section 401 changes this or requires Lighthouse to cede its constitutional claims to a state tribunal.[3]

II. Because none of the state proceedings has determined, or could possibly determine, the Commerce Clause issues before this Court, preclusion is impossible.

Defendants' claim that this case re-litigates state law challenges to the 401 Denial is false. In this case, Plaintiffs seek to litigate—for the first time in any forum—whether the Defendants intended to or actually discriminated against or burdened foreign or interstate commerce. It is undisputed that none of these issues has been or will be addressed in any of the state proceedings.[4]

None of the decisions in the state proceedings determined the state's motivations for its actions or whether, as Plaintiffs will prove at trial, the Defendants acted with the express intent to block all new exports of coal from Washington State. For example, the PCHB's decision that the 401 Denial was not clearly erroneous under SEPA and the CWA says nothing about (a) the federal Commerce Clause violations; (b) any burdens or effects on interstate or foreign commerce; or (c) why the Defendants treated the Terminal differently than all other permit applicants. *See* Dkt. 316 at ¶ 7, Decl. of B. Ginsberg (neither the PCHB decision nor the appeal raises or addresses "whether Ecology or Governor Inslee intended to or in fact discriminated

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[3] Defendants wrongly assert, without support and in a footnote, that there are no other permits at issue here. But as Plaintiffs explained in their complaint and against at oral argument, the thrust of this case is about whether Defendants must treat Plaintiffs fairly and like all other state permittees—for this permit and all others. *See* Dkt. 1 at § VII, Lighthouse Complaint; Dkt. 313 at 26-29, Mar. 26, 2019 Mot. Hearing Tr.

[4] Defendants also wrongly assert that Plaintiffs confuse the standards for collateral estoppel (issue preclusion) with res judicata (claim preclusion). "The general term res judicata encompasses claim preclusion, (often itself called res judicata) and issue preclusion, also known as collateral estoppel." Shoemaker v. City of Bremerton, 109 Wash. 2d 504, 507 (1987). Plaintiffs have not confused these standards, both of which are separately addressed in its opening brief. Dkt. 314 at 12-18.

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against or burdened foreign or interstate commerce"); Dkt. 317 at ¶ 11, Decl. of J. Vance (Millennium's public record act claim "does not raise or address whether the agency intended to or in fact discriminated against or burdened foreign or interstate commerce"); Dkt. 318 at ¶¶ 7, 14, Decl. of. T. Hobbs (challenges to sublease denial and denial of shoreline permits will not raise or address whether Defendants "intended to or in fact discriminated or burdened foreign interstate commerce").

Even the case cited by the Defendants concedes that preclusion only applies to "an issue ***identical*** in substance" to one previously litigated and determined.[5] *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (emphasis added) (cited in Defendants' filing, Dkt. 312 at 4). Other cases agree.[6] Defendants do not point to any *identical* issues between the state proceedings and this case for a simple reason: there is none. *See* Dkts. 316-318 (cited *supra*). As these cases show, PCHB's decision that the 401 Denial was a valid exercise of Ecology's authority under SEPA and the CWA, Dkt. 320 at 3, simply does not mean that it does

[5] *Shoemaker*, which Defendants also rely on heavily, Dkt. 320 at 2-3, is not on point. It simply stands for the proposition that, under principles of collateral estoppel, litigation of the exact same issue in a state forum cannot be re-litigated in a subsequent federal forum. In that case, the issue of why a person was demoted in rank had been adjudicated in a state proceeding, which prevented the re-litigation of that exact same issue in a federal court. But the standard applied is the one Plaintiffs set forth in our prior brief: "In the case of issue preclusion, only those issues actually litigated and necessarily determined are precluded." *Shoemaker*, 109 Wash. 2d at 507. "[I]identical issues" are required between the two matters. *Id.* The issues in that case were identical (whether retaliation was a substantial motive behind Shoemaker's demotion); in this case they are not, as the state proceedings had nothing to do with the state's intent or whether it burdened interstate or foreign commerce.

[6] *Sprague v. Spokane Valley Fire Dept.*, 189 Wash. 2d 858, 899 (2018) (issues adjudicated before the state courts or agencies must be "identical to the issues" presented in a subsequent proceeding); *Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 421 (3rd Cir. 2003) (a decision by a state court that a restaurant was a common nuisance and therefore properly subject to state regulation would not preclude a federal court from hearing equal protection and statutory discrimination claims relating to the reasons for the state's regulation of the restaurant); *L.A.M. Recovery, Inc. v. Department of Consumer Affairs*, 377 F. Supp. 2d 429, 437 (S.D.N.Y 2005) (state court's determination of state or federal statutory issues was not material to Commerce Clause claims and would not prevent a federal court from considering those constitutional claims).

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not violate the Commerce Clause or that Ecology did not take actions which, while legal under state law, were nonetheless violative of the Constitution.

Instead of arguing that the issues in the state proceedings are identical, Defendants merely assert, without explanation, that the PCHB's conclusion that the 401 Denial comports with the state's environmental laws precludes a determination that Defendants violated the Commerce Clause. Dkt. 312 at 3-4. This is wrong. The Commerce Clause issues—whether, among other things, the 401 Denial "discriminates against out-of-state entities on its face, in its purpose, or in its practical effect" —are simply not at play, even tangentially, in the state proceedings. *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) (internal quotations omitted). The PCHB neither considered nor determined anything related to—let alone identical to—whether Defendants discriminated against or burdened interstate or foreign commerce. Dkt. 316 at ¶¶ 11, 16, Decl. of B. Ginsberg.

For example, no state proceeding addressed why the State treated the Terminal differently than any other permit applicant. No state proceeding addressed why the FEIS co-lead agency and the Defendants' own environmental consultant have candidly admitted that the Terminal was subject to discriminatory treatment and, if it had the exact same environmental impacts but had been shipping something other than coal, it would have been permitted. *See, e.g.,* Dkt. 276 at ¶ 5, Decl. of Sen. Rivers; Dkt. 275 at ¶ 13, Decl. of E. Placido (according to Ecology's SEPA Co-Lead, "if Millennium proposed to ship anything other than coal, Ecology would have granted the Section 401 water quality certification"); Dkt. 262-62 at 22-24, Plaintiffs' Opp. to Defs. Mots. for Summ. Judg. Such evidence of discriminatory intent was

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never ruled upon in the state proceedings and, thus, cannot be precluded by any rulings on those proceedings.[7]

Other issues at the heart of the Commerce Clause claim were similarly never addressed in the rulings issued in the state proceedings. For example, Defendants' intent aside, whether Defendants burdened foreign or interstate commerce, or discriminated in practical effect, presents another issue wholly beyond the reach of the state proceedings. States may not discriminate in practical effect against interstate commerce where it "halts what apparently is the only viable means of commercial [port] activity…and places an impermissible barrier around the borders of the City, barring trade [with a foreign country], and inhibiting interstate commerce." *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653, 662 (W.D.N.Y. 1981). In *Pittston*, the court held that a city ordinance banning roll-on/roll-off trailer shipping from a port violated the Commerce Clause and that the City could not rely on alleged impacts from traffic and the like to ban the only viable commercial use of the port. This case is similar. Because the Terminal is the only viable project to export meaningful volumes of U.S. coal from the West Coast of the U.S. to Asia, Defendants actions lock interior states completely out of Asian coal markets. None of the state court proceedings has addressed or will address whether the Defendants' decision to block the Terminal has the practical effect of halting interstate or foreign commerce in coal to Asia.

[7] It is also a reason why summary judgment is not appropriate, as findings of intent are inherently fact based and must be determined at trial. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (intent to discriminate is a pure question of fact); *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1238 (D. Del. 1986) ("discriminatory intent cannot be determined on summary judgment" in Commerce Clause challenge); *Campbell v. Obayashi Corp., Inc.*, No. C08-181JLR, 2008 WL 5113647, at *6 (W.D. Wash. Nov. 25, 2008) ("genuine question of fact arises as to whether [the defendant] was motivated by discriminatory intent").

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To close their "preclusion" argument, Defendants argue the FEIS precludes *Pike* balancing. Dkt. 312 at 4. This is incorrect. Neither the FEIS nor the state proceedings have (or will) evaluate the burdens on U.S. commerce imposed by the failure to permit the Terminal, let alone weigh them against the putative local benefits. *Pac. Northwest Venison Producers v. Smith*, 20 F. 3d 1008, 1012 (9th Cir. 1994). That issue, which is not addressed in the FEIS or in any state proceedings, will be decided by this Court, and this Court only.

The FEIS, which evaluates the global market in coal, spends no time analyzing burdens on U.S. interstate or foreign commerce and, for this reason, cannot answer the constitutional questions posed here.[8] The federal Commerce Clause is solely concerned with burdens on federal—i.e., American—commerce, not the international coal market. Dkt. 262 at 28-29. "[C]ommerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations." *In re Trade-Mark Cases*, 100 U.S. 82, 96 (1879). That exports from the United States, if not made, may be replaced by exports from another country simply is not relevant to a Commerce Clause challenge.

III. *Pullman* abstention is not appropriate.

Defendants all but concede *Pullman* is inappropriate here, devoting just three sentences to their argument. Dkt. 312 at 6. None of the three *Pullman* factors are met here, as Defendants' half-hearted defense suggests. First, nothing in the state proceedings can possibly moot this matter. This is because no matter which way the state proceedings are decided this Court would still have to rule on the same issues presently before it. *See* Dkt. 314 at 20-22. Additionally,

[8] Tellingly, in the past, Defendant Intervenors conceded that Plaintiffs are entitled to "argue that Ecology misrepresented the findings of the FEIS in its § 401 decision." Dkt. 293 at 12.

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the relief in the state proceedings cannot moot this case, as only a federal declaratory and injunctive remedy outlining what can and cannot be done to burden interstate and foreign commerce can make Plaintiffs whole. If Millennium prevailed in all the state proceedings, Defendants could still deny the permits on other grounds (or refuse to process those permits), which would violate the Commerce Clause. The Court has the power to hold invalid state actions and, in doing so, to declare to the Defendants that they cannot burden or discriminate against interstate or foreign commerce by, for example, treating the Terminal in a manner different than other permit applicants. The Court can also declare that Defendants may not refuse to permit a facility because of alleged "impacts" emanating solely from instruments of interstate and foreign commerce (*e.g.*, trains and ocean-going vessels). Thus, this relief will have repercussions beyond any permits which have been denied.

Second, an as-applied challenge to treatment of a single permittee "bears scant resemblance to the politically delicate challenges…" *See K&S Devs. LLC v. City of SeaTac*, No. C13-499-MJP, 2013 U.S. Dist. LEXIS 14574, at *7 (W.D. Wash. Oct. 10, 2013).[9] Third, there are no relevant unknown or unclear issues of state law which, in any case, are completely irrelevant to the Commerce Clause challenge. The Court need not predict *at all* how a state tribunal will decide any state law issues: those tribunals already upheld the 401 Denial under state law.

[9] For the same reasons, *Park at Cross Creek LLC v. City of Malibu* does not support Defendants. No. LA-CV-15-00033-JAK, 2015 WL 9698236, at *1 (C.D. Cal. April 10, 2015). This case involved a challenge to any entire ballot initiative, approved by the voters, which governed land use in Malibu County by requiring voter approval for new commercial or mixed use development projects of more than 20,000 square feet of gross floor area. *Id.* Here, Plaintiffs do not challenge any such land use scheme, but only the misuse of state laws as a pretext for what is, in effect, a ban on any new coal export facilities.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, 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.

By: s/Kyle W. Robisch

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