1
2
3
4
5
6 The Honorable Robert J. Bryan
7

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 RESPONSE TO AMICUS BRIEFS ON DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND MOTION FOR ABSTENTION

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770

I. INTRODUCTION

The Court accepted four amicus filings from (1) the National Mining Association and other industry interests; (2) Wyoming and five other states; (3) the Association of American Railroads; and (4) the Western States Petroleum Association. Dkt. 111. Of these four, only the Association of American Railroads joins the Plaintiffs in arguing that the Washington State decisions being challenged are preempted by the Interstate Commerce Commission Transportation Act (ICCTA). Wyoming and the Petroleum Association oppose abstention by largely repeating the Plaintiffs' arguments in opposition to abstention. The Mining Association does not address the issues at all, and none of the amici address Commissioner Franz's immunity under the Eleventh Amendment. The State Defendants offer brief responses to each amicus brief.

II. ARGUMENT

A. The Association of American Railroads Fails to Show How Millennium's Proposal Differs From Other Non-Rail Owned Facilities

Courts and the Surface Transportation Board have repeatedly held that ICCTA preemption does not apply to transloading facilities operated by non-rail carriers. Dkt. 62, at 19–20; Dkt. 105, at 10 n.4. The Board recently applied this well-established rule when it concluded that the City of Benicia could rely on rail-related impacts to deny a land use permit to Valero, a non-rail carrier. *Valero Ref. Co.*, S.T.B. No. FD 36036 (2016), 2016 WL 5904757. The facts of *Valero* are on all fours with Millennium's case.

The Association of American Railroads tries to distinguish *Valero* by asserting, wrongly, that there was no existing rail service to Valero's facility, and that this was the reason that the Board found that no railroad service had been limited or interfered with by the City's decision to deny the permit. Dkt. 101, at 11. Not true. When the City denied a permit to expand Valero's terminal, Valero was already receiving and shipping goods by rail. *Valero*, 2016

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770

1 WL 5904757, at *2 n.5. There is no factual distinction between Valero's proposal and
2 Millennium's.

3 The Railroad Association cites to some of the same inapposite cases as do Plaintiffs to
4 try to get around the fact that Millennium is not a rail carrier. For example, it cites *CSX* for the
5 proposition that ICCTA preempts direct state regulation of what products may or may not be
6 carried by rail. Dkt. 101, at 12. That case, however, involved a direct ban on the transport of
7 certain hazardous commodities by rail. *CSX Transp.*, S.T.B. No. FD 34662 (2005), 2005
8 WL 1024490. Washington has not and could not ban the transport of coal by rail.

9 The Railroad Association then cites *Boston & Maine* for the proposition that state and
10 local governments cannot prohibit common carrier rail transportation. Dkt. 101, at 13 (citing
11 *Bos. & Me. Corp. & Springfield Terminal R.R. Co.*, S.T.B. No. FD 35749 (2013), 2013
12 WL 3788140). The Surface Transportation Board distinguished *Boston & Maine* in *Valero* by
13 noting that the former involved a direct ban on the continued operation of existing rail service
14 whereas the latter involved denial of a permit to a non-rail-carrier's transloading facility.
15 *Valero*, 2016 WL 5904757, at *3. Millennium, like Valero, falls under the latter scenario.

16 Last, the Railroad Association cites *Alexandria* for the proposition that state and local
17 governments cannot indirectly regulate rail carriers by regulating non-rail-carriers. Dkt. 101,
18 at 13 (citing *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010)). The
19 Surface Transportation Board also distinguished *Alexandria* in *Valero*, noting that the Town of
20 Alexandria had attempted to regulate a facility that was constructed and owned by the railroad
21 and operated under its auspices. *Valero*, 2016 WL 5904757, at *4. In contrast, Valero (like
22 Millennium) made no allegation that it would operate its facility under the auspices of a rail
23 carrier. *Id.*

24 As the Ninth Circuit recently and succinctly stated "In order for federal preemption to
25 apply under the ICCTA, the activity in question must first fall within the statutory grant of
26 jurisdiction to the Surface Transportation Board . . . ." *Or. Coast Scenic R.R. LLC v. Or. Dep't*

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770

of State Lands, 841 F.3d 1069, 1072 (9th Cir. 2016). This is a "threshold question requiring that the disputed activity meet three statutory prongs: it must be (1) 'transportation' (2) 'by rail carrier' (3) 'as part of the interstate rail network.' " *Id.* at 1073 (citing 49 U.S.C. § 10501(a)). Millennium's transloading facility does not meet these three prongs. There is no preemption under ICCTA.

B. Wyoming and the Western States Petroleum Association Simply Repeat Arguments Made by the Plaintiffs

Wyoming and the Petroleum Association do not argue that the State Defendants' actions are preempted under ICCTA or the Ports and Waterways Safety Act (PWSA). Dkts. 113, 114. Rather, they argue that the Court should not abstain from the remaining constitutional claims. The Petroleum Association's only point, contained in a single paragraph, is that State Defendants ignored arguments about a presumption against abstention in Section 1983 and Commerce Clause cases. Dkt. 113, at 11. In fact, Defendants did not ignore this argument and showed that none of the cases cited by Plaintiffs or Amici establish such a presumption. Dkt. 105, at 9–10. Wyoming largely repeats the Plaintiffs' arguments. Dkt. 114, at 10–17. These arguments are not compelling for the same reasons explained in the State Defendants' reply brief. Dkt. 105, at 9–13.

C. The National Mining Association Makes No Relevant Argument and Bases the Argument It Does Make on Incorrect Facts

Ignoring the actual issues presented by the State Defendants' motion, the National Mining Association makes arguments that are irrelevant at this stage. Dkt. 112. In doing so, the Mining Association makes a number of factual misstatements. A couple of those misstatements are addressed below.

First, the Mining Association argues that State Defendants denied approval for Millennium's terminal because of concerns over the global effects of consuming coal. *Id.* at 16. That is false. The Department of Ecology denied a water quality certification based on a number of local and statewide impacts; the global effects of consuming coal did not factor into

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770

Ecology's decision. Dkt. 1-1, at 4–14. In contrast, Cowlitz County, which is not a party to this case, did cite greenhouse gas emissions as an additional basis for denying a shoreline permit. Dkt. 1-3, at 3, 31–33. But the "global effects of consuming coal" did not factor into the *State Defendants'* decisions.

Second, the Mining Association argues that Ecology's denial of the water quality certification had "nothing to do with the water quality provisions of the Act, or indeed with water quality issues at all." Dkt. 112, at 16–17. Also false. In denying the certification, Ecology identified eleven areas where Millennium's application failed to demonstrate reasonable assurance that water quality standards would be met if the project were built. Dkt. 1-1, at 14–19.

These and other factual errors demonstrate that the Mining Association, like all of Plaintiffs' amici, have not familiarized themselves with the actual facts of the permit denials, opting instead to uncritically accept Plaintiffs' conspiracy theory. But even accepting the facts in the complaints and attachments as true, Plaintiffs' version of events is unfounded. Ecology denied a water quality certification based on eleven water quality grounds and nine categories of adverse environmental impacts identified in the final environmental impact statement (EIS) prepared by Cowlitz County and Ecology. Dkt. 1-1. The County independently reached the same conclusion when it denied a shoreline permit, Dkt. 1-3, yet nobody alleges that the County is part of some conspiracy. After receiving hundreds of thousands of pages from Ecology in discovery, Dkt. 83, at 4, the primary allegations that Millennium has leveled against Ecology are that Director Bellon used Twitter as a means to communicate about the project and that Director Bellon stated during an interview that the governor asked her to lead on sustainable energy and clean environment goals. Dkt. 1 ¶¶ 92–95. This is hardly the stuff of a vast anti-coal conspiracy.

The Mining Association does make one relevant point related to the State Defendants' request for abstention. It argues that Ecology abused its discretion under Section 401 of the

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770

Clean Water Act, and that this alleged abuse of discretion is relevant to the Commerce Clause claims. Dkt. 112, at 18 n.3. Whether Ecology abused its discretion is the exact issue currently being litigated before state tribunals. Dkt. 64-5. This further demonstrates why the Court should abstain from the remaining claims in the case after dismissing the statutory preemption claims.

III. CONCLUSION

To the extent they are relevant, Amici's arguments are legally and factually flawed. Plaintiffs' ICCTA preemption claim should be dismissed along with Millennium's PWSA preemption claim under the PWSA. The Court should then abstain from the remaining claims in the case.

DATED this 25th day of May 2018.

ROBERT W. FERGUSON
Attorney General

s/ Laura J. Watson
s/ Lee Overton
s/ Thomas J. Young
s/ Sonia A. Wolfman
LAURA J. WATSON, WSBA #28452
Senior Assistant Attorney General
H. LEE OVERTON, WSBA #38055
Assistant Attorney General
THOMAS J. YOUNG, WSBA #17366
Senior Counsel
SONIA A. WOLFMAN, WSBA #30510
Assistant Attorney General
Office of the Attorney General
Ecology Division
P.O. Box 40117
Olympia, WA 98504-0117
Telephone: 360-586-6770
Email: ECYOLYEF@atg.wa.gov
LauraW2@atg.wa.gov
LeeO1@atg.wa.gov
TomY@atg.wa.gov
SoniaW@atg.wa.gov

Attorneys for the Defendants
Jay Inslee, in his official capacity as Governor

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

of the State of Washington; and Maia Bellon, in her official capacity as Director of the Washington Department of Ecology

s/ Edward D. Callow
EDWARD D. CALLOW, WSBA #30484
Assistant Attorney General
Office of the Attorney General
Natural Resources Division
P.O. Box 40100
Olympia, WA 98504-0100
Telephone: 360-664-2854
Email: RESOlyEF@atg.wa.gov
tedc@atg.wa.gov

Attorney for Defendant Hilary S. Franz, in her official capacity as Commissioner of Public Lands

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 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 such filing to all counsel of record.

DATED this 25th day of May 2018.

s/ Laura J. Watson
LAURA J. WATSON, WSBA #28452
Senior Assistant Attorney General
360-586-6743

ATTORNEY GENERAL OF WASHINGTON
Ecology Division
PO Box 40117
Olympia, WA 98504-0117
360-586-6770