The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,

Plaintiffs,

vs.

JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands,

Defendants.

No.: 3:18-CV-05005-RJB

BRIEF OF AMICUS CURIAE COWLITZ COUNTY IN OPPOSITION OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR ABSTENTION

I. INTRODUCTION

Defendants' rendition of the underlying facts of proceedings involving Amicus Curiae County comport with County's position in these proceeding by stating "[p]laintiffs (hereinafter Millennium) seek to build a coal export terminal in Longview, Washington." Dkt# 20, ¶ I, 1 at 2-3. Thereafter, Defendants' and County's factual understandings diverge. Defendants' statements that "[m]ultiple state and local decision-makers have denied necessary approvals for

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the project for various reasons, including inability to meet the requirements of state and federal law…and the existence of several significant adverse environmental impacts that would result from the project" is accurate only in part. As set forth in its SHB Petition (Exhibit 1, County's **Petition for Review**, p,3 21-26, p.4 1-5), County concluded the Examiner's denials were:

> . . . an unlawful and unjust application of the facts and evidence submitted at hearing on the Application, and unlawful and unjust application of the Cowlitz County Shoreline Master Program ("SMP") and the Shoreline Management Act ("SMA"). The Decision was unlawful and unjust because it contains a clearly erroneous application of the State Environmental Policy Act ("SEPA") and SMA and implementing regulations, fails to analyze the Application for consistency with the SMP, is outside of the scope of authority provided in the SMA, fails to fully consider and evaluate the facts and evidence presented at hearing, and is arbitrary and capricious. Finally, Petitioner is aggrieved by the Decision of the Hearing Examiner which conflicts with Petitioner's interpretations and applications of its shoreline permitting and its SMP, and which misapplies and erroneously applies Petitioner's interpretation and application of SEPA.

See also, the statements in County's **Joinder of Summary Judgment Motion**:

> County staff of the Department of Building and Planning is tasked with evaluating a [Shoreline Substantial Development Permit] SSDP and [Conditional Use Permit] CUP proposal under [Cowlitz County Code] CCC 19.20.020, and the Director, specifically, is tasked under local code with "determin[ing] whether the information submitted meets the requirements of WAC 173-27-180, Application requirements for substantial development, conditional use, or variance permit, RCW 90.58.140 . . .". As addressed in the attached Staff Report, Exhibit County-1, County staff and the department Director expressly and specifically reviewed the proposal under the County's Shoreline Master Program (SMP).

[Exhibit 2, County's **Joinder, ¶**2 ("The Hearing Examiner Failed to Analyze…"), p.3 3-9].

And finally, see County's **Response to Ecology's Motion for Summary Judgment**:

> As set forth in the attached Declaration of Elaine Placido, the County would challenge Ecology's interpretation of the FEIS and staff presentation of the SMP…Although Ecology willingly conceded that the " . . . [F]EIS is not on trial . . . " [fn omitted], it nevertheless reconstituted and restated the content of that document (see, Wolfman Dec, cited in Ecology's Motion) in such harsh contrast to the plain wording of the document, and the interpretations and understandings of its co-lead agency in its staff report (see, Placido Dec., at 3-5) so as to place the FEIS before this Board to adjudicate a divergence in wording, interpretations and understandings of the FEIS as it applied to the Hearing Examiner's decision, and Issues 1-9 of the Board's Prehearing Order.

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[Exhibit 3, County's **Response**, ¶1 ("Challenged Representations and Mischaracterizations Renders Arguments Presented by Ecology Inadequate for Summary Judgment."), p.2 16-22, p.3. 1-6]. In sum, the County as a "local decision maker" has consistently argued that its 'local discretion' was disregarded by the Hearing Examiner, based in part on representations and mischaracterizations of the state agencies, that were then carried over before the Shorelines Hearings Board. While Defendants have alleged a "false narrative" by the Plaintiffs in furtherance of their arguments (Dkt# 20, at 9), similar assertions were previously raised by the County in state proceedings regarding Ecology. See, above and Exhibit 3.

II. IDENTITY AND INTEREST IN AMICUS CURIAE

Cowlitz County is a political subdivision of the State of Washington, possessing those powers expressly conferred by the state constitution and state statutes, or reasonably or necessarily implied from such authority. *State ex rel. Taylor v. Superior Court*, 2 Wn.2d 575, 98 P.2d 985 (1940); AGO 1996 No. 17. County possesses statutory authority over land use development approvals within its jurisdictional boundaries under Washington State's Shorelines Management Act (SMA) and State Environmental Policy Act (SEPA), Chs. 90.58 and 43.21C RCW, respectively. In Washington, where state statutes and administrative regulations, or portions thereof, provide for a "general grant" of authority or a general "statutory direction", respectively, on counties, "unaccompanied by definite directions as to how the power is to be exercised, [this] implies the right and duty on the part of individual [county] officials to employ the means and methods necessary to comply with statutory requirements." *Smith v. Greene*, 88 Wn.2d 363, 372, 545 P.2d 550 (1976). In the context of these proceedings, the application of authority by county officials under state laws and regulations is colloquially and commonly, and hereunder referred to as 'local discretion'.

As previously addressed by the County, as recognized (and unopposed) before the Shorelines Hearings Board (SHB) proceedings on these matters, the County was and is a proper

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party to separately challenge the final decision of an independent Hearing Examiner[1] and defend County's legislative and administrative, interpretations and applications of its laws and permitting. [2] See, Cowlitz County Code 2.05 (Hearing Examiner):

> **CCC 2.05.060 – Reconsideration and appeal**
> A. *Any aggrieved person or agency who disagrees with the decision of the Examiner* may make a written request for reconsideration…***
> C. Except as otherwise provided, *an Examiner's decision* shall be final and conclusive, and *may be reviewable* [under any code, statute or regulation], as shall thereto be applicable. (*Emphasis added*).

Also noteworthy is that Defendants, in their Motion (Dkt# 20 at 12, 14, 21, 25, FN6, 31), represent the local Shorelines decisions solely as "the County's denial"—treating County's separate Petition and challenges of these denials as a Soviet-era 'unperson'.[3] While Defendants "do not concede" (Dkt# 20 at 25, FN6) that Plaintiffs can address these denials (and decline to argue they cannot) without 'the County' as a necessary party [4], Defendants fail to factually address their representations of 'the denial'.

For purposes of state court proceedings, the County regularly seeks to participate as a third-party in state proceedings where its authority, regulations and public interests are involved. *See, e.g.*, State v. Fitch, Cowlitz Superior Court No. 17-1-00233-7 (spcl. appearance to quash

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[1] Dkt# 1-3; Mark C. Scheibmeir, Hearing Examiner, 299 N.W. Center St., Chehalis, Lewis County, WA.

[2] See also, e.g., *City of Gig Harbor v. North Pacific Design, Inc*., 149 Wn.App. 159, *rev.den.* 166 Wn.2d 1037 (2009) (City appealed its Hearing Examiner approval (CUP); *In re King Cty Hrg Exmnr*, 135 Wn.App. 312 (Div 1, 2006) (County wastewater division could challenge authority of County Hearing Examiner to conduct SEPA appeal of environmental group); *Palmer Coking Coal Co. v. City of Newcastle*, 2005 WL 583698 at *5, *rev. den.* 156 Wn.2d 1002 (2006) (Developer argued City, and not Examiner issued final decision re: 'vesting'. "In determining whether a land use decision is clearly erroneous, the reviewing court must [determine and defer to] the highest forum below that exercised fact-finding authority. In this case, that is the hearing examiner."); *City of University Place v. McGuire*, 102 Wn.App. 658 (2000) (City appealed the City Hearing Examiner's reversal of the City's administrative denial of a permit).

[3] "World: Becoming an Unperson". TIME Vol. 85, No. 4. Jan. 22, 1965. "Eight million Russians received a new 'April 17' in the mails last week, with a succinct instruction to insert it in their official Communist Party calendars for 1965. The new date was nothing like the old. Gone was the photo of the bald head, the round face unsmiling above the five medals, the six-line biography describing his rise to Chairman of the Council of Ministers and First Party Secretary. Even the fellow's inspirational quote on the back gave way to an anonymous poem praising party modesty. Thus, by having his birthday wiped from the state calendar, did Nikita Sergeevich Khrushchev become an 'unperson'."

[4] See also, Dkt# 20 at 12: "While the County was not named as a defendant in the present case, Millennium seeks relief against it in the form of a declaration that its denial of the shoreline permits . . ."

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subpoena on district court), and Silva v. Morton, Cowlitz Superior Court No. 16-2-01300-8 (limited appearance to oppose adjudication of septic system dispute without County health officer and department).

In order to fully represent the nature of its authority and 'local discretion' under discussion in these proceedings, regardless of the extent such representations may necessarily be in opposition with the Defendants representations and arguments in their Motion, the County has both a governance interest and a statutory interest in apprising the Court of such matters.

III. ARGUMENT

As previously noted, a federal District court benefits from accepting amicus briefs from non-parties "concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. 2013) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). The role of an amicus from an informative, non-party is to assist the Court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991). In the present case, the Court must decide, in part, whether there is merit to the Defendants' summary assertions that Plaintiffs allegations "rest[ ] on the false narrative" that state decision-makers are motivated by animus against coal" (Dkt# 20, at 9), while alluding to, but not factually vetting 'the County' as such decision-maker with such animus.

A. Disagreements Over the Draft and Final Environmental Impact Statements and Local and State Permit Reviews.

As discussed in Exhibit 3 to the *Declaration of Douglas Jensen in Support of Amicus Curiae*, County and the Plaintiffs' state Department of Ecology (Ecology) served as co-lead

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agencies under the State Environmental Policy Act, and jointly prepared and approved for issuance a Draft EIS (DEIS) on April 30, 2016. County and Ecology then jointly prepared and approved issuance of a Final EIS (FEIS) that included responses to each comment received on the Draft EIS to satisfactorily address all of the substantive responses and questions received. See, Dkt# 1, ¶72, FN7. Cowlitz County Code (CCC) required an appeal of the adequacy of the FEIS be filed by August 18, 2017, under CCC 19.11 (per Ch. 43.21C RCW). BNSF Railway Co. filed a precautionary appeal on May 12, 2017, but then withdrew its appeal on August 24th. MBT-L issued a Notice of Action under RCW 43.21C.080, which established a deadline for appealing the FEIS. No other FIES appeal was filed, which remained as jointly written and approved by County and Ecology. As set forth in Exhibit 1 to the *Declaration of Douglas Jensen in Support of Amicus Curiae*, at p.3, ¶6-b, 11-13, the County, separately approved a Critical Areas Permit (CAP) for coal terminal project on July 19, 2017. CAP was not appealed.

Despite being co-lead agencies in creating the DEIS and FEIS, and following Ecology's representations of those documents in state proceedings, County and Ecology now differently read the SEPA documents. Again, as discussed in Exhibit 3 to the *Declaration*, containing the statements of County's SEPA, 'responsible official', the County has challenged recent Ecology recitations of FIES contents and meanings in state proceedings. That County official has taken additional umbrage at Ecology's attempts to utilize a local, health assessment project associated with the coal terminal its castigation of the project under SEPA-EIS, even though the assessment project goals expressly state that it was to be uses as a broader, preliminary examination of area wide health and quality of life which could draw upon the FEIS information, but was not intended to supplant or expand upon the FEIS.

IV. CONCLUSION

Defendants have failed in their Motion to adequately discuss or to express the County's challenges and disagreements over the positions and actions of Ecology in local permitting. For these reasons, County believes there is an overriding public interest for the Court understanding

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that there are countervailing facts and rejoinders brought forward in the County's Amicus briefing, associated with the Plaintiffs' challenges and Defendants' responses, which are relevant to this Court's review of Defendants' Motion.

DATED this 20th day of April, 2018.

RYAN JURVAKAINEN, Prosecuting Attorney

/s/ Douglas E. Jensen
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel/parties of record:

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SIGNED this 20th day of April, 2018, in Kelso, WA.

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