The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al.,

Plaintiffs,

v.

JAY INSLEE, et al.,

Defendants.

NO. 3:18-cv-05005-RJB

DEFENDANTS' MOTION FOR PARTIAL DISMISSAL UNDER ELEVENTH AMENDMENT AND FRCP 12(b)(6) AND MOTION FOR ABSTENTION

NOTE ON MOTION CALENDAR:
Tuesday, May 15, 2018
ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Millennium Bulk Terminals seeks to build a coal export terminal in Longview, Washington. Multiple state and local decision-makers have denied necessary approvals for the project for various reasons, including inability to meet the requirements of state and federal law; failure to provide evidence of financial viability; and the existence of several significant adverse environmental impacts that would result from the project.

Unhappy with these denials, Millennium has already filed five different lawsuits against the State, including the present action. The present suit rests on the false narrative that state decision-makers are motivated by animus toward coal rather than a desire to protect state residents from the harmful environmental and public health impacts of the proposal. Based on this false narrative, Millennium and its associated company plaintiffs argue that state actions to deny approvals violate the Commerce Clause and are preempted by the Interstate Commerce Commission Termination Act (ICCTA) and the Ports and Waterways Safety Act (PWSA). Intervenor-plaintiff BNSF Railway argues that state actions violate the Commerce Clause and are preempted by ICCTA and the foreign affairs doctrine. Together, Plaintiffs try to convert garden variety land use and proprietary decisions for a specific proposal, in a specific, domestic location within state jurisdiction, into regulation of foreign commerce and intrusion into the nation's foreign policy. The State's exercise of its traditional authorities within its traditional sphere of jurisdiction does neither, either directly or indirectly.

At any rate, neither ICCTA nor the PWSA preempt the state actions at issue in this case. ICCTA preempts only activities conducted by a rail carrier or under the auspices of a rail carrier. Millennium is neither, and BNSF has made it clear that it would play no part in the

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project other than to deliver goods to a potential customer. Dkt. 22-1 ¶ 45. The PWSA preempts only certain regulations pertaining to "tank vessels" or vessel traffic regulations for localities in which the Coast Guard has already promulgated regulations or decided that no regulation is needed. Millennium's proposal does not fall under any of these scenarios. The Court should dismiss both statutory preemption claims.

In addition, all claims against Commissioner of Public Lands Hilary Franz should be dismissed under the Eleventh Amendment because she is immune from suit in federal court for her management decisions regarding state-owned aquatic lands. Such lands are of a unique and fundamentally sovereign nature, and accordingly the State's management decisions over those lands fall under the exception to *Ex parte Young* established by the Supreme Court in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

Finally, the Court should abstain from the remaining Commerce Clause and foreign affairs doctrine claims under *Pullman* or *Colorado River*. Millennium has filed four state actions that could moot or substantially alter these constitutional claims. The state actions are significantly ahead of this federal case. All *Pullman* factors are met and the applicable *Colorado River* factors weigh heavily for abstention. The Court should abstain from the remainder of Plaintiffs' case after dismissing Commissioner Franz as a defendant and dismissing the statutory preemption claims.

II. STATEMENT OF FACTS AND BACKGROUND

A. Development of Environmental Impact Statement and State Permitting Process

Millennium proposes to build an export facility in Longview that would transfer up to 44 million metric tons of coal per year from trains to vessels for overseas transport. Dkt. 1-1, at 2. Before considering permits for the proposal, Cowlitz County and the state Department of

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Ecology completed an environmental impact statement (EIS) under the State Environmental Policy Act (SEPA), Wash. Rev. Code § 43.21C. The EIS identified nine categories of unavoidable and significant adverse environmental impacts that could not reasonably be mitigated. Dkt. 1-1, at 4. Under SEPA, permitting agencies can deny permits if the EIS identifies significant environmental impacts that cannot be mitigated. Wash. Rev. Code § 43.21C.060 ("[a]ny governmental action may be conditioned or denied pursuant to this chapter"). Millennium did not appeal the EIS; the document is now final. Dkt. 1-3, at 2; Wash. Rev. Code § 43.21C.080(2)(b).

Some of the significant impacts identified in the EIS are linked to increased rail transportation, especially localized impacts within Cowlitz County. For example, the EIS revealed that the diesel emissions from trains would increase the cancer risk of residents living near the project site. Dkt. 1-1, at 5-6. There would also be significant automobile traffic delays at rail crossings in Cowlitz County, significantly increased noise levels in nearby residential areas, and a 22 percent increase in train accidents along the rail routes. *Id.* at 6-11. The EIS also identified significant impacts associated with increased vessel traffic in the Columbia River, including risk of increased collisions, groundings, fires, and oil spills. *Id.* at 11-12. And the EIS identified impacts that were unrelated to rail or vessel traffic, such as demolishment of a historic district, interference with tribal fishing rights, impacts to fish from dredging and construction at the project site, and the entry of coal dust into the Columbia River. *Id.* at 12-13.

After completion of the EIS, Millennium applied to the Department of Ecology for a Clean Water Act section 401 certification, *id.* at 2, needing it to obtain a federal permit from the Army Corps of Engineers for dredging and construction activity in the Columbia River. *See*

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33 U.S.C. § 1341(a) (any applicant for a federal permit that will result in a discharge into navigable waters must first obtain a certification from the affected state).

After reviewing Millennium's 401 application and the EIS findings, Ecology denied the 401 on two grounds. First, Ecology exercised its authority to deny it based on adverse environmental impacts under SEPA. Dkt. 1-1, at 4-14. Second, Ecology determined that the application failed to demonstrate the required "reasonable assurance" that Millennium's activities would not violate applicable water quality standards. *Id.* at 14; 40 C.F.R. § 121.2(a)(3). Specifically, Ecology identified eleven areas where Millennium's application fell short. Dkt. 1-1, at 14-19. In the present lawsuit, Plaintiffs challenge Ecology's decision to deny the 401 under SEPA but not Ecology's determination that the 401 application did not demonstrate the required reasonable assurance. Dkt. 1 ¶¶ 134, 161-66.

Millennium also applied to Cowlitz County for a shoreline substantial development permit and conditional use permit. After conducting an evidentiary hearing, the County's hearing examiner denied the permits under SEPA, for failure to meet mandatory criteria under the state Shoreline Management Act, and for numerous unresolved issues associated with the permit applications.[1] Dkt. 1-3, at 49-56. In reaching his decision, the hearing examiner identified ten categories of unmitigated impacts, where nine had been identified in the EIS. *Id.* at 2-3, 50-52. The tenth was based on testimony by Millennium representatives that they did not intend to mitigate for the significant greenhouse gas emissions caused by the proposal as previously assumed. *Id.* at 3, 31-32. While the County was not named as a defendant in the present case, Plaintiffs seek relief against the County in the form of a declaration that its denial

[1] Cowlitz County has delegated final County decision-making authority on shoreline permit applications to its hearing examiner. Cowlitz Cty. Code § 19.20.050. *See also* Cowlitz Cty. Code § 2.05.060C (County hearing examiner's decision is final and conclusive).

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of the shoreline permits was unconstitutional and/or preempted. Dkt. 1 ¶ VII.F; Dkt. 22-1 ¶ 127.

B. The State's Management Decisions Regarding Millennium's Proposed Use of State-Owned Aquatic Lands

In addition to needing these several regulatory approvals, Millennium also needs a land use authorization for state-owned aquatic lands. Management authority over the State's aquatic lands is under the Department of Natural Resources (DNR) and its Commissioner of Public Lands. *See, e.g.*, Wash. Rev. Code § 79.105.010; Wash. Rev. Code § 43.12.075. Northwest Alloys, Inc., currently leases the property in question from the state and Millennium has sought to sublease that property. Dkt. 1, at 12-13; Declaration of Lee Overton (Overton Decl.) Ex. 1, at 9-12. On January 5, 2017, former Commissioner of Public Lands Peter Goldmark denied Millennium's request for a sublease. *Id.*[2] In the denial letter, the Commissioner explained that Millennium had failed to provide financial documents that DNR had repeatedly requested relating to Millennium's ability to perform under Northwest Alloys' lease. DNR had significant concerns regarding Millennium's ability to perform given, among other things, the bankruptcy filing of Arch Coal Company, which at the time owned a significant stake in Millennium. *Id*. In addition to requesting a sublease, Northwest Alloys also requested approval from DNR for construction of substantial new improvements on state property to allow for the expansion of its proposed terminal. Dkt. 1-2, at 1-11. Commissioner of Public Lands Franz denied this request, and that denial was not appealed. *Id.*

[2] A court may take judicial notice of proceedings and filings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). It may take notice of a document or its contents relied on in the complaint, where the document's authenticity is not in question and there are no disputed issues as to the document's relevance. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

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C. Lawsuits Filed Against State Decisions

Millennium challenged the State's decisions in five separate lawsuits. First, Millennium challenged DNR's denial of its sublease in the Cowlitz County Superior Court, and that court reversed DNR's decision. Overton Decl. Ex. 1, at 1; Ex. 2. Despite finding that DNR had legitimate concerns regarding Millennium's financial ability to perform under the lease, the superior court concluded that it was not adequate for DNR to request audited financial records. Overton Decl. Ex. 2, at 5-6. The superior court ordered DNR to reconsider the sublease request. Overton Decl. Ex. 3. DNR has appealed this decision to the Washington State Court of Appeals. Overton Decl. Ex. 4.

Second, Millennium appealed Ecology's 401 decision to the state Pollution Control Hearings Board.[3] *See* Overton Decl. Ex. 5, at 2. Among other things, Millennium alleges that Ecology's decision: (1) is preempted by ICCTA; (2) is preempted by the PWSA; and (3) violates the interstate and foreign commerce clauses. Overton Decl. Ex. 5, at 17-25. *See also* Overton Decl. Ex. 6, at 2-5. This case is well underway, and currently proceeding with motions practice. *See* Overton Decl. Ex. 7.

Millennium also began a lawsuit against Ecology in state superior court. *See* Overton Decl. Ex. 8. The superior court dismissed the case for failure to exhaust administrative remedies, and Millennium has appealed that dismissal. *See* Overton Decl. Exs. 9, 10.

Then, in December 2017, Millennium appealed Cowlitz County's denial of its shoreline permits to the state Shorelines Hearings Board. Overton Decl. Exs. 11, 12. Along with various allegations of state law violations, the appeal alleges that the County's decision violated the

[3] The Pollution Control Hearings Board is a state administrative tribunal created under Wash. Rev. Code § 43.21B for the purpose of providing efficient dispositions of environmental appeals.

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ICCTA and the interstate and foreign commerce clauses. Overton Decl. Ex. 12, at 4-5. The Board affirmed the County Hearing Examiner's denial of the shoreline permits sought by Millennium.[4] *See* Overton Decl. Ex. 13.

III. ARGUMENT

A. Standard of Review

Federal Civil Rule 12(b)(6) allows for dismissal when the complaint fails to "state a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When ruling on a Rule 12(b)(6) motion, the court must accept the allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court shall not consider facts outside the complaint. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). However, when a plaintiff has attached exhibits to the complaint, those exhibits may be considered without converting the motion to one for summary judgment. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). And a court may consider matters of judicial notice without converting the motion to summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

B. Commissioner Franz Is Immune From Suit Under the Eleventh Amendment for Her Management Decisions Regarding State-Owned Aquatic Lands

Under the Eleventh Amendment, "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Eleventh Amendment immunizes states from suit in federal court regardless of the relief sought,

[4] The Shorelines Hearings Board is a state administrative board created for the purpose of hearing appeals of state and local decisions made under the state Shorelines Management Act, Wash. Rev. Code § 90.58. *See* Wash. Rev. Code § 90.58.170; Wash. Rev. Code § 43.21B.005.

barring suits for equitable relief as well as suits for damages. *E.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996). For purposes of sovereign immunity, a suit against a state official acting in her official capacity is treated as if it is a suit against the state. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984).

In determining whether Eleventh Amendment immunity applies, the Court must " 'examine each *claim* in a case to see if the court's jurisdiction over that claim is barred . . . .' " *Kruse v. State of Hawai'i*, 68 F.3d 331, 334 (9th Cir. 1995) (quoting *Pennhurst*, 465 U.S. at 120-21). Accordingly, the Eleventh Amendment can bar some claims in an action, while allowing others to proceed. *Kruse*, 68 F.3d at 335. In the present matter, Millennium's claims against Commissioner Franz go right to the heart of the State's sovereign interest in the management of its aquatic lands. As discussed below, under *Coeur d'Alene Tribe*, these claims are therefore barred by the Eleventh Amendment.

There are a few exceptions to Eleventh Amendment immunity, none of which apply to Commissioner Franz in this case. First, a state can waive its Eleventh Amendment immunity. *E.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 778-79 (1991). Second, Congress can abrogate the immunity, *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). And third, the immunity does not apply where the United States is a plaintiff. *United States v. Mississippi*, 380 U.S. 128, 140 (1965). In addition, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), a claim for prospective injunctive relief against a state official for an alleged ongoing violation of federal law can, under some circumstances, proceed in federal court. *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

Here, none of these exceptions apply to Commissioner Franz because the State has not

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waived its immunity; Millennium has not sued the State under any federal statute that purports to waive the State's immunity; and the federal government is not a plaintiff in this case.[5] Moreover, while Plaintiffs may argue that their claims against Commissioner Franz can proceed under *Ex parte Young*, such claims are nevertheless barred because they challenge the State's management authority over its aquatic lands. This exception to *Ex parte Young* was articulated by the Supreme Court in *Idaho v. Coeur d'Alene Tribe*.

Coeur d'Alene Tribe involved an action, by the Coeur d'Alene Tribe against the State of Idaho and several Idaho officials, for declaratory and injunctive relief establishing the Tribe's ownership over portions of the bed of Lake Coeur d'Alene. In holding that the Tribe's claims were barred by the Eleventh Amendment, the Supreme Court recognized the uniquely sovereign nature of a state's ownership of its aquatic lands. *Coeur d'Alene Tribe*, 521 U.S. at 283. The Court determined that the Tribe's requested relief amounted to a quiet title action that implicated Idaho's sovereignty interests. *Id.* at 281. The Court emphasized that a state's ownership of submerged lands is "an essential attribute of sovereignty." *Id.* at 283. "The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters." *Id.* at 282. The Court therefore held that the Eleventh Amendment barred the Tribe's claims. *Id.* at 287–88.

[5] *See* Wash. Rev. Code § 4.92.010 (Legislature has directed that suits may *only* be brought against the State in Washington State courts). Neither the ICCTA nor the PWSA contain a sovereign immunity waiver. Moreover, while Millennium brings claims under 42 U.S.C. § 1983, section 1983 does not abrogate states' Eleventh Amendment immunity. *See Quern v. Jordan*, 440 U.S. 332, 341-45 (1979). Indeed, unless *Ex parte Young* applies, the Eleventh Amendment also bars section 1983 claims against state officials acting in their official capacity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65-71 (1989) ("neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). Accordingly, Millennium's section 1983 claims, and their associated 42 U.S.C. § 1988 claims, against Commissioner Franz are also barred.

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As with the facts of *Coeur d'Alene Tribe*, Millennium is seeking declaratory and injunctive relief that would prevent Commissioner Franz from exercising her authority over state-owned aquatic lands. Dkt. 1, at 51-53. *See Coeur d'Alene Tribe*, 521 U.S. at 282. Indeed, Millennium's claims against Commissioner Franz "implicate[] the exact issues of *Coeur d'Alene* itself, namely . . . the state's control over submerged lands." *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1074 (9th Cir. 2014) (citations and internal quotation marks omitted). *See also Hood Canal Sand & Gravel, LLC v. Brady*, No. C14-5662 BHS, 2014 WL 5426718, at *4 (W.D. Wash. Oct. 22, 2014) (dismissal of gravel company's claims against the Commissioner of Public Lands under the Eleventh Amendment, concluding that the company's requested relief would "prevent the State's officers from exercising their authority over the [State's] bedlands"). The effect of Plaintiffs' relief, if granted, would be to remove the State's management discretion over its aquatic lands. This goes right to the heart of the State's sovereign interests in its navigable waters. For these reasons, the Eleventh Amendment bars Plaintiffs' claims against Commissioner Franz.

C. The Interstate Commerce Commission Termination Act Does Not Apply Because Millennium Is Not a Rail Carrier or Acting Under the Auspices of a Rail Carrier

Plaintiffs allege that the Defendants' actions are preempted by the ICCTA. Dkt. 1 ¶¶ 216-19. As a threshold matter, ICCTA preemption can apply only if the activity regulated falls within the statutory jurisdiction of the Surface Transportation Board. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). If the activity does fall within Board jurisdiction, the next question is whether that jurisdiction is exclusive, preempting state regulation. *Id.* at 1073.

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Here, the regulated activity is Millennium's proposal to construct an export terminal in Cowlitz County. This activity does not constitute "transportation by rail carrier"—the prerequisite to Board jurisdiction. *Id.* at 1072 (citing 49 U.S.C. § 10501(a)(1)). A "rail carrier" is defined, in pertinent part, as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Although BNSF is a rail carrier, BNSF has made it clear that "the BNSF rail system is not part of the Project and no permits are required of BNSF for this Project." Dkt. 22-1 ¶ 45.

Under these statutory provisions, the Surface Transportation Board has long held that its jurisdiction extends only to activities conducted by a rail carrier or under the auspices of a rail carrier. *See, e.g.*, *Valero Refining Co.*, No. FD 36036, 2016 WL 5904757, at *3 (STB Sept. 20, 2016).[6] Courts answering the same question agree. *Or. Coast*, 841 F.3d at 1073-74 (Board had jurisdiction over entity contracting with railroad to perform rail repairs); *N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71-75 (2d Cir. 2011) (no jurisdiction over transloading facility that was not operated by a rail carrier or on behalf of a rail carrier); *Hi-Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2004) (no jurisdiction over solid waste disposal facility leasing land from railroad but not operating facility on behalf of railroad); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1332-37 (11th Cir. 2001) (no jurisdiction over zoning decision that prohibited facility on land leased by the railroad). In so holding, courts have noted that an alternative interpretation would allow any entity to claim ICCTA preemption if the entity handles goods that are, at some point, carried by rail. *Hi-Tech*, 382 F.3d at 309. However, "[t]he language of the ICCTA pre-emption

[6] Surface Transportation Board decisions provide guidance in determining the scope of ICCTA preemption and are accorded *Chevron* deference within the Ninth Circuit. *Or. Coast*, 841 F.3d at 1074.

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provision in no way suggests that local regulation was to be so thoroughly disabled." *Fla. E. Coast*, 266 F.3d at 1332.

Millennium proposes to operate a transloading facility that will accept goods by rail and load those goods onto vessels for shipping. Millennium does not claim to be a rail carrier nor does it seek to operate its facility on behalf of a rail carrier. ICCTA is not implicated.

The crux of Plaintiffs' claim is that ICCTA preemption applies because the Defendants cited rail impacts as one reason to deny Millennium's permit applications. Dkt. 1 ¶¶ 165, 177. Dkt. 22-1 ¶ 95. Courts have resoundingly rejected similar claims by transloading facilities. *Hi-Tech*, 382 F.3d at 310 (rejecting such a claim as "untenable" and "meritless"); *N.Y. & Atl.*, 635 F.3d at 71-75 (no ICCTA preemption when rail carrier simply transported goods to and from transloading facility); *CFNR Operating Co. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1118-19 (N.D. Cal. 2003) (no ICCTA preemption when rail carrier simply carries goods to bulk transfer operator).

These decisions are consistent with the Surface Transportation Board's own interpretation of its jurisdiction, as extending to activities at transloading facilities only if: (1) those activities are performed by a rail carrier; (2) the activities are performed by a third party acing as the rail carrier's agent; or (3) the rail carrier exerts control over the third party's operations. *SEA-3 Inc.*, No. FD 35853, 2015 WL 1215490, at *4 (STB Mar. 16, 2015). If none of these circumstances apply, there is no ICCTA preemption. *Id.* at *5.

The Board recently reiterated this holding in a case involving a similar fact pattern to the present case. *Valero Refining*, 2016 WL 5904757. Valero, a non-rail carrier, proposed to build a facility to offload crude oil from trains. *Id.* at *1. It submitted a land use permit

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application to the City of Benicia, and the City's environmental impact report found environmental impacts associated with rail operations. *Id.* The City did not propose mitigation for the rail impacts, having concluded that such mitigation measures would likely be preempted. *Id.* The City then denied the permit based in part on rail impacts that could not reasonably be mitigated. *Id.* at *2.

Valero challenged the City's decision on the same basis that Plaintiffs challenge the State's decisions here. Specifically, Valero argued that the City impermissibly relied on rail impacts as a basis for permit denial and that the denial was therefore preempted. *Id.* The Board disagreed, finding the City's denial is not preempted because Valero is neither a rail carrier nor performing functions on behalf of a rail carrier. *Id.* at *3. The Board reached this conclusion even though the City might have been preempted from mitigating for the same impacts that formed the basis for the City's denial. *Id.* at *4. Whereas mitigation might have unreasonably interfered with a rail carrier's operations, and therefore been preempted, denial of a permit to a non-rail carrier does not raise similar preemption concerns. *Id.*

Here, Ecology denied a 401 certification to Millennium based on numerous environmental impacts, including rail impacts, and on Millennium's failure to demonstrate reasonable assurance that its activities would not violate water quality standards. Dkt. 1-1, at 5-19. DNR denied a sublease to Millennium based on DNR's conclusion that Millennium failed to provide sufficient information about its finances. Dkt. 1 ¶ 156. DNR also denied, without prejudice, Millennium's request to make alterations to the site under the existing lease because the proposed alterations were not consistent with the lease. Dkt. 1-2, at 3-6. And Cowlitz County has since denied necessary shoreline development permits for the project.

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Dkt. 1-3. None of these denials regulate transportation by a rail carrier. Plaintiffs' ICCTA preemption claim therefore fails and should be dismissed.

D. The Ports and Waterways Safety Act Does Not Preempt State Decisions to Deny Millennium's Permit for an Export Terminal

Millennium also alleges preemption under the Ports and Waterways Safety Act (PWSA) because Ecology cited vessel impacts as one of nine bases for denying Millennium's 401 certification under SEPA. Dkt. 1 ¶¶ 220-23. This claim, like Millennium's ICCTA claim, is "untenable" and "meritless." *Hi-Tech*, 382 F.3d at 310.

The PWSA's two titles aim to ensure vessel safety and protection of navigable waters and shorelines. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 161 (1978). Title I focuses on traffic control at local ports. *Id.* (citing 33 U.S.C. §§ 1221-27). Title II covers "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning" of tanker vessels. *United States v. Locke*, 529 U.S. 89, 111 (2000) (citing 46 U.S.C. § 3703(a)).

The PWSA lacks an express preemption provision. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 487 (9th Cir. 1984). Instead, any preemption under the PWSA must be implied either through conflict or field preemption. States are preempted from adopting laws or regulations that fall within the exclusive federal field of Title II. *Locke*, 529 U.S. at 111. In contrast, state regulations implicating Title I are analyzed under conflict preemption principles. *Id.* at 109. Consistent with Title I, states may adopt regulations that relate to vessel traffic and are directed at local circumstances unless the Coast Guard has already adopted regulations on the same subject or determined that particular regulation is unnecessary. *Id.*

The State's decision to deny approval for Millennium's export terminal does not implicate Title I or II because the State does not seek to regulate vessels or vessel traffic.

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Millennium's argument appears to be that denying a permit application based in any part on vessel impacts is akin to preempted regulation of vessels. Neither the language of the PWSA nor case law supports that interpretation.

First, the field occupied by Title II relates only to the regulation of tank vessels. 46 U.S.C. § 3702(a). A "tank vessel" is "a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue." 46 U.S.C. § 2101(39). "Hazardous material" is then defined as "a *liquid* material or substance that is: (A) flammable or combustible; (B) designated a hazardous substance under section 311(b) of the [Clean Water Act]; or (C) designated a hazardous material under [the Hazardous Materials Transportation Act]." 46 U.S.C. § 2101(14) (emphasis added). The coal that Millennium seeks to transport is not a liquid hazardous material and the vessels that would transport the coal are not tank vessels. Thus, Title II and field preemption do not apply. *See Fednav, Ltd. v. Chester*, 547 F.3d 607, 622 (6th Cir. 2008) (Title II does not apply to non-tanker vessels).

That leaves conflict preemption. Under Title I of the PWSA, state regulation of vessel traffic is permissible if aimed at addressing local conditions and the Coast Guard has neither adopted a regulation on the same topic nor determined that regulation is unnecessary. *Locke*, 529 U.S. at 109. Allowing states to exercise their "vast residual powers" under Title I recognizes the "important role for States and localities in the regulation of the Nation's waterways and ports." *Id*. Thus, the Ninth Circuit has upheld state and local laws that regulate aspects of vessel safety absent a clear indication that Congress intended to preempt such regulation. *Beveridge v. Lewis*, 939 F.2d 859, 864-65 (9th Cir. 1991) (upholding city ordinance that prohibited the mooring or anchoring of vessels in certain areas during winter);

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Chevron, 726 F.2d at 495-501 (upholding Alaska statute that prohibited nearshore discharge of ballast water by oil tankers).

The State's decisions regarding Millennium's proposal do not regulate vessel traffic in any way. Also, the Coast Guard has not promulgated vessel traffic regulations for the Columbia River nor has the Coast Guard designated the Columbia River as an area that does not need such regulations. 33 C.F.R. §§ 161.1-.70. Thus, even if the State had adopted vessel traffic regulations for the Columbia River, which it has not, such regulations would not be preempted. Millennium's PWSA preemption claim fails both factually and legally. This claim should be dismissed under Rule 12(b)(6).

E. The Court Should Abstain From Deciding the Remainder of the Case

Millennium also brings claims under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, alleging violations of the foreign affairs doctrine and the Commerce Clause of the U.S. Constitution. The Court should stay these constitutional claims under either *Pullman* or *Colorado River.*

1. Under *Pullman*, the Court should abstain in order to allow state courts to settle the underlying state law claims

The "cases that call most insistently for abstention" are those in which a federal constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law. *Harris Cty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975). "[W]hen a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris Cty.*, 420 U.S. at 83 (citing *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)).

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Pullman abstention rests on three criteria: (1) the complaint must touch upon "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open," (2) the "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy," and (3) the "possibly determinative issue of state law is doubtful." *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996).

The Ninth Circuit has consistently held that land use planning is a sensitive area of social policy that meets the first *Pullman* criterion. *Sinclair Oil*, 96 F.2d at 401; *see also Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (states have "traditional and primary power over land and water use"). The application of state environmental laws is likewise an area of sensitive social policy into which a federal court should be reluctant to intrude. *United States v. State of Cal.*, 639 F. Supp. 199, 207 (1986).

Plaintiffs challenge four state and local decisions: (1) a proprietary decision by the Commissioner of Public Lands to deny a sublease to Millennium; (2) a second proprietary decision by the Commissioner to deny, without prejudice, a request to make alterations to the property; (3) a decision by Cowlitz County to deny shoreline development permits based on the application of two state statutes (SEPA and the Shoreline Management Act)[7]; and (4) a decision by the Director of Ecology to deny a 401 certification based in part on the application of state law (SEPA) and state water quality standards. In each of these decisions, the state or local decision-maker was exercising a quintessential and traditional state function, making each decision within the State's proprietary capacity or within the regulatory capacity of state

[7] Plaintiffs have not joined the County as a defendant in this lawsuit and, therefore, the state Defendants do not concede that Plaintiffs can challenge the County's decision in the present case. However, whether Plaintiffs have failed to join a necessary party is neither argued nor waived for purposes of this motion.

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and local officials applying state land use and environmental laws. Application of these laws touches upon sensitive areas of social policy. This meets the first *Pullman* criterion.

The second criterion is met because Plaintiffs' federal constitutional claims would be mooted or presented in a different posture by the state court's resolution of the state law claims. *See, e.g.*, *Harris Cty.*, 420 U.S. at 88 (abstaining because federal claim is "entangled in a skein of state law that must be untangled before the federal case can proceed"); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976) (resolution of state law questions could eliminate the need for federal adjudication). The state court determination need not completely do away with, but must at least partially eliminate or alter the nature of, the federal constitutional issues. *C-Y Dev. Co v. City of Redlands.*, 703 F.2d 375, 379 (9th Cir. 1983); *see also Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 481 (1977).

Millennium's four state actions raise a range of state law issues. For example, in the state superior court case challenging Ecology's 401 decision, Millennium argues that Director Bellon and the Department of Ecology acted "outside [their] statutory authority," "misinterpreted and misapplied SEPA" and engaged in an "unexplained departure from prior practice," violating the state Administrative Procedure Act. Overton Decl. Ex. 8, at 20, 21, 23. A state court decision in favor of Millennium on any of these claims would likely moot the constitutional challenges to those same decisions pending before this Court. A state court decision in favor of Ecology would alter the nature of the issues in the present case because Plaintiffs' federal complaints are premised on an assumption that Ecology abused its discretion or otherwise violated state law. *See, e.g.*, Dkt. 1 ¶¶ 9-10; Dkt. 22-1 ¶ 123.

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Millennium raised virtually identical state law claims in its appeal of the 401 decision to the state Pollution Control Hearings Board. *See* Overton Decl. Ex. 5. The claims appear again in Millennium's appeal of the County's denial of the shoreline permits to the state Shorelines Hearings Board. *See* Overton Decl. Ex. 10, at 2-3. The state boards' decisions may be appealed to state court. Wash. Rev. Code § 43.21B.180; Wash. Rev. Code § 90.58.180(3). The resolution of either case could moot or otherwise alter the federal constitutional questions that Plaintiffs seek to raise in this case. The only claim not raised in state board or court proceedings is BNSF's foreign affairs doctrine claim, but this claim, like the others, rests on an allegation that state law was violated. *See* Dkt. 22-1 ¶ 123. A decision by the state court could thus also moot this federal constitutional question. This meets the second *Pullman* criterion.

In applying the third criterion, "[u]ncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City & Cty. of S.F.*, 774 F.2d 1460, 1465 (9th Cir. 1985). *Pullman* does not require that issues be particularly extraordinary or unique, but simply that their ultimate determination be uncertain. *Sinclair Oil*, 96 F.3d at 410; *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979) ("We do not claim the ability to predict whether a state court would decide that the [local government] here abused its discretion"). This standard is met here. At issue is whether the state actors violated SEPA, the Shorelines Management Act, or the state Administrative Procedure Act by acting outside their statutory authority, misinterpreting and misapplying the law, or making arbitrary and capricious decisions. In the action against DNR, the issue is whether DNR's denial of Millennium's request to sublease state property, due to Millennium's failure to provide

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financial information showing its ability to perform under the lease, was arbitrary or capricious. While Defendants are confident in their defense of these issues, the issues are novel enough that it is not certain how they will be resolved. The *Pullman* criteria are met; this Court should abstain from the Commerce Clause and foreign affairs doctrine issues.

2. Under *Colorado River*, the Court should abstain in deference to pending, parallel proceedings in state court

In exceptional circumstances, a federal court may decline to exercise its jurisdiction in deference to pending, parallel state court proceedings, resting its decision "on considerations of '(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' " *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). The Ninth Circuit considers eight factors: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum-shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1166 (9th Cir. 2017). Here, the factors weigh heavily in favor of abstention.[8]

The eighth factor—essentially the threshold question of whether the state proceeding sufficiently parallels the federal—asks "whether the state proceedings will resolve the federal action." *R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 982 (9th Cir. 2011) (quoting *Smith v.*

[8] The first two factors are not applicable to this case and need not be considered. *See R.R. St. & Co. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011).

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Cent. Ariz. Conservation Dist., 418 F.3d 1028, 1033 (9th Cir. 2005). Substantial similarity is all that is required to establish parallel proceedings. So long as the state court proceedings can adequately protect the rights of the litigants in the federal case, exact identity of parties and issues is not necessary. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). If it were otherwise, "only litigants bereft of imagination would ever face the possibility of an unwanted abstention order, as virtually all cases could be framed to include additional issues or parties." *Ambrosia Coal & Constr. Co. v. Pagés Morales*, 368 F.3d 1320, 1329-30 (11th Cir. 2004).[9] Because this case is a mere spin-off of the more comprehensive litigation pending before state tribunals, it easily passes the threshold. *Nakash*, 882 F.2d at 1417. Millennium's lawsuit in state superior court challenging Ecology's section 401 denial, its appeal of that same decision to the Pollution Control Hearings Board, and its appeal to the Shorelines Hearing Board challenging the related shorelines permit denial, raise substantially all the federal constitutional and preemption claims regarding the state actions at issue here. *See* Overton Decl. Ex. 8, at 30-31; Ex. 6, at 4-5; Ex. 11, at 5.[10]

The sixth factor also weighs in favor of abstention. While a stay under *Colorado River* is not appropriate if there is a possibility that the parties will not be able to raise their claims in the state proceeding, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983), that is not a problem here. The state court is competent to hear federal constitutional claims, Millennium has already raised all but the foreign affairs doctrine claim there, and there

[9] Although none of the state cases name Governor Inslee as a defendant, this is not required for purposes of establishing parallel suits. *Interstate Material Corp. v. City of Chi.*, 847 F.2d 1285 (7th Cir. 1988) (parallel suits existed where plaintiff filed in federal court against the same defendants as in the state court *plus* the Secretary of the U.S. Department of Transportation and two federal agencies).

[10] As discussed *supra*, BNSF's foreign affairs doctrine claim rests on an allegation that state law was violated, *see* Dkt. 22-1 ¶ 123, and a decision by the state court may moot or alter this issue.

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is no doubt as to the adequacy of the state court to protect Plaintiffs' rights.

The third factor, avoidance of piecemeal litigation, was the most important in the Supreme Court's decision to abstain in *Colorado River*. *Moses H. Cone*, 460 U.S. at 16. Piecemeal litigation occurs when different tribunals consider the same issue, duplicating efforts and possibly reaching different results. *Montanore*, 867 F.3d at 1167. Piecemealing is easy to spot when the state and federal actions would duplicate efforts; the federal action seeks to adjudicate issues implicated in a more comprehensive state action; and there is a "highly interdependent" relationship between the federal and state cases. *R.R. St.*, 656 F.3d at 979-80. Like the government in *Colorado River*, and like the plaintiffs in *Montanore* and *R.R. Street*, Millennium asks this Court to adjudicate rights already adequately presented in a more comprehensive, pending state action, where a highly interdependent relationship exists between the claims in the different forums. Even though the state and federal courts in *Montanore* did not consider precisely the same issue, "Montanore's decision to file two separate actions in two different courts resulted in piecemeal litigation of its singular goal." 867 F.3d at 1167. Millennium does the same here, filing separate actions in pursuit of a singular goal—namely, to invalidate state and local decisions denying approval for its proposed export terminal. This factor weighs heavily in favor of abstention.

The fourth factor also weighs heavily for abstention. The state court was first to exercise jurisdiction over the subject matter raised in this action. *See R.R. St.*, 656 F.3d at 980. Of course, priority is not measured exclusively by which complaint was filed first, but also in terms of how much progress has been made in the two actions. *Moses H. Cone*, 460 U.S. at 21. Millennium filed its superior court challenge to the State's denial of its sublease request in

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February 2017. The case has advanced to the court of appeals. The appeal to the Pollution Control Hearings Board and the lawsuit in superior court, virtually identical challenges to the State's denial of Millennium's section 401 application, were filed in October 2017 and have already had considerable motions practice. Millennium challenged the County's denial of its shorelines permit applications in December 2017, and the Shorelines Hearings Board recently affirmed the County's denial.

The order in which the courts obtained jurisdiction may be additional evidence of piecemealing. The court in *R.R. Street* found that the avoidance of piecemeal litigation weighed more heavily in favor of abstention because the state court proceedings had begun earlier and were further along. 656 F.3d at 980. As noted in *Nakash*, allowing the federal suit to go forward would "undeniably result in piecemeal litigation" because the state case had progressed far beyond the federal case, "indicating that it would be highly inefficient to allow the federal litigation to proceed," and the plaintiff had "not suggested any reason why the state court cannot adequately protect his rights." 882 F.2d at 1415. Similarly, here, the cases before the state courts and boards have been proceeding for months, and Plaintiffs can give no reason for why the state court cannot adequately protect its rights.

While the claims before this Court are issues of federal law, this is significant under the fifth factor only where *exclusive* federal jurisdiction is at issue. *Silberkleit v. Kantrowitz*, 713 F.2d 433, 435-36 (9th Cir. 1983). That is not the case here. Because this factor is less significant where the state and federal courts have concurrent jurisdiction over the federal claims, *Nakash*, 882 F.2d at 1416, this factor does not weigh against abstention.

Forum-shopping occurs "when a party attempts to have his action tried in a particular

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court or jurisdiction where he feels he will receive the most favorable judgment or verdict." Forum-shopping, *Black's Law Dictionary* (6th ed. 1990). Federal courts discourage the practice. *Nakash*, 882 F.2d at 1417. To determine whether it exists, courts may consider "the vexatious or reactive nature of either the federal or the state litigation." *R.R. St.*, 656 F.3d at 981 (quoting *Moses H. Cone*, 460 U.S. at 17 n.20). Here, Plaintiffs' forum-shopping has a unique flavor. Rather than focusing efforts in the forum it deems most favorable, Plaintiffs fling their claims across as many forums as possible in the hopes of finding a sympathetic one. The result is vexatious litigation in which Plaintiffs pursue five lawsuits simultaneously. This factor also weighs in favor of abstention. *See Wittenburg v. Russo & Steele, LLC*, No. SACV 13–510–JLS (RNBx), 2013 WL 12190424, at *7 (C.D. Cal. Oct. 8, 2013).

The applicable *Colorado River* factors support abstention. Several of them—the state court's adequacy, the spin-off character of this case, the certainty that all issues can be resolved in state court, the desire to avoid piecemeal litigation, and greater advancement of the parallel state cases—weigh especially heavily. Moreover, the number of parallel state cases already advancing suggests that the present case is an attempt to hedge against potentially adverse rulings in those cases. This Court should abstain from the remainder of Plaintiffs' case.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss both statutory preemption claims under Fed. R. Civ. P. 12(b)(6); it should dismiss all claims brought against Commissioner Franz under Eleventh Amendment Immunity; and it should abstain under *Pullman* or *Colorado River* from the remainder of the case.

DATED this 24th day of April 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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:

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