UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC., *et al.*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al.*,

Defendants,

and

WASHINGTON ENVIRONMENTAL COUNCIL, *et al.*,

Defendant-Intervenors.

No. 3:18-cv-05005-RJB

WEC REPLY IN SUPPORT OF MOTION FOR PARTIAL DISMISSAL AND ABSTENTION

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. THE COURT SHOULD DISMISS THE ICCTA PREEMPTION CLAIMS BECAUSE MILLENNIUM IS NOT A RAIL CARRIER AND BNSF IS NOT PART OF THE MILLENNIUM PROJECT. 2

A. ICCTA Preemption Only Applies to Rail Carriers. 3

B. Denial of Millennium's Permits Is Not Indirect Rail Regulation. 7

II. THE PORTS AND WATERWAYS SAFETY ACT DOES NOT PREEMPT ANYTHING HERE. 10

CONCLUSION 12

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

TABLE OF AUTHORITIES

Page(s)

Cases

Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.,
622 F.3d 1094 (9th Cir. 2010) 8

City of Auburn v. United States,
154 F.3d 1025 (9th Cir. 1998) 7, 8

Fla. E. Coast Ry. Co. v. City of W. Palm Beach,
266 F.3d 1324 (11th Cir. 2001) 7

Green Mountain R.R. Corp. v. Vermont,
404 F.3d 638 (2d Cir. 2005) 7

Humboldt Baykeeper v. Union Pac. R.R. Co.,
2010 WL 2179900 (N.D. Cal. 2010) 7

Norfolk S. Ry. Co. v. City of Alexandria,
608 F.3d 150 (4th Cir. 2010) 8

Oregon Coast Scenic R.R. LLC v. Or. Dep't of State Lands,
841 F.3d 1069 (9th Cir. 2016) 3, 8

Portland Pipe Line Co. v. City of South Portland
288 F. Supp. 3d 321 (D. Maine 2017) 11, 12

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 10

United States v. Locke,
529 U.S. 89 (2000) 10, 12

United States v. Massachusetts,
493 F.3d 1 (1st Cir. 2007) 10

Statutes

49 U.S.C. § 10501(b) 3, 5, 7

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Surface Transportation Board Orders

Bos. & Marine Corp. and Springfield Terminal R.R. Co.,
S.T.B. 34662, 2013 WL 3788140 (July 19, 2013).....8

Hi Tech Trans, LLC—Petition for Declaratory Order,
S.T.B. 34192, 2003 WL 21952136 (Aug. 14, 2003) 3

SEA-3,Inc.—Petition for Declaratory Order,
S.T.B. 35853, 2015 WL 1215490 (Mar. 17, 2015).....3

Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order,
S.T.B. 35057, 2008 WL 275697 (Feb. 1, 2008) 5

Valero Refining Company—Petition for Declaratory Order,
S.T.B. 36036, 2016 WL 5904757 (Sept. 20, 2016) 4, 5, 6

Washington & Idaho Railway—Petition for Declaratory Order,
S.T.B. 36017, 2017 WL 1037370 (Mar. 15, 2017).....6

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

INTRODUCTION

Defendant-Intervenors Washington Environmental Council *et al.* ("WEC") joined with state defendants in their amended motion to dismiss, focused primarily on the statutory preemption claims. On those preemption issues, Lighthouse Resources *et al.* (hereinafter "Millennium") and BNSF mount a tepid defense at best. All parties agree that Millennium is not a rail carrier under the Interstate Commerce Commission Termination Act ("ICCTA"), and that BNSF is not part of this proposed Project. For ICCTA preemption, that agreement is enough to defeat Surface Transportation Board jurisdiction. For the Ports and Waterways Safety Act preemption claim, Millennium asserts almost no defense at all, for not one of the actions here conflict with or interfere with that federal statute.

Instead, Millennium and BNSF offer conspiracy theories and hyperbole. The state of Washington, we are told, aims "to regulate coal use anywhere in the world." BNSF Opp. at 13. Backpedaling from its own complaint, BNSF further asserts that the preemption issues transcend the permit denials that have been challenged in this case. The effort to reframe the claims should be rejected. The state agencies, and a local government not before the Court, followed state law and reviewed the environmental and public health impacts of one proposed coal export terminal on the banks of the Columbia River; these state and local jurisdictions also denied several permits and authorizations for that project based on the significant, harmful impacts the project would cause to the region's air, water, fish, and people. Some of those impacts were related to rail traffic to the proposed terminal, some were not. And while the state defendants considered impacts of rail traffic to and from the terminal, as required by state law, they did not seek in any way to regulate or control

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

rail. To the contrary—they explicitly recognized that they could not do so.

Millennium and BNSF fail to identify a single case, from any jurisdiction anywhere, that finds preemption in a situation like this one. Nor have they given this Court grounds to be the first. Indeed, when the Surface Transportation Board has addressed similar factual situations, it has found no federal preemption of state and local land-use laws. Because there is no set of facts that plaintiffs could prove under which their preemption theories could succeed, both the rail and marine transit preemption claims in this case should be dismissed.[1]

ARGUMENT

I. THE COURT SHOULD DISMISS THE ICCTA PREEMPTION CLAIMS BECAUSE MILLENNIUM IS NOT A RAIL CARRIER AND BNSF IS NOT PART OF THE MILLENNIUM PROJECT.

Millennium is not a rail carrier engaged in rail transportation. Millennium Complaint ¶¶ 16-20. In its opposition, Millennium acknowledges that it is not a rail carrier; it "manages or arranges" coal mining, "secures" rail service, "transfers" coal to ships, and "sells" the coal overseas. Millennium Opp. at 1. BNSF, in turn, is not a part of the Millennium project. BNSF Complaint ¶ 45; BNSF Opp. at 12 ("uncontested fact that BNSF's rail system is not part of the Project"). The actions challenged here are ordinary permits and authorizations for a single proposed coal shipping terminal to be owned and operated by a private limited liability corporation. Because Millennium is

[1] The Court has before it three separate motions to file amicus briefs from the National Mining Association *et al.*, a group of states led by Wyoming, and the Association of American Railroads. Dkt. 69, 78, 100. (The Court previously granted Cowlitz County's motion for leave to file an amicus brief, *see* Dkt. 60, 61.) The National Mining Association brief does not address the issues before the Court at all, instead discussing potential constitutional claims. The Wyoming brief only discusses the abstention portion of the pending motion and does not address dismissal of the preemption claims. WEC briefly addresses the railroad association's preemption argument *infra* at 5.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

not a rail carrier, the Surface Transportation Board does not have jurisdiction over the terminal, and the ICCTA preemption claims should be dismissed.

A. ICCTA Preemption Only Applies to Rail Carriers.

The ICCTA gives the Surface Transportation Board exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b)(1). As discussed in the opening briefs (WEC Motion at 3-5; State Defendants' Motion at 10-12), to fall under the Surface Transportation Board's jurisdiction, an activity must "be both (1) transportation and (2) performed by, or under the auspices of, a rail carrier." *Hi Tech Trans, LLC—Petition for Declaratory Order,* S.T.B. 34192, 2003 WL 21952136, at *3 (Aug. 14, 2003) (emphasis added); *SEA-3, Inc.—Petition for Declaratory Order,* S.T.B. 35853, 2015 WL 1215490, at *3 (Mar. 17, 2015); *Or. Coast Scenic R.R. LLC v. Or. Dep't of State Lands,* 841 F.3d 1069, 1073 (9th Cir. 2016).[2] Permitting decisions for Millennium do not come under the jurisdiction of the Surface Transportation Board because Millennium is not a rail carrier.

Millennium argues that "[w]hether the entity directly regulated qualifies as a rail carrier is irrelevant," Millennium Opp. at 7-8, but this is flatly incorrect. To the contrary, the ICCTA gives the Surface Transportation Board jurisdiction for activities that are both "transportation" and "by a rail carrier," and the Surface Transportation Board has rejected jurisdiction and preemption arguments in very similar situations as those here. In one recent example, the Surface Transportation Board denied a petition for a declaratory order that the ICCTA preempted local permits for proposed construction at a liquefied petroleum gas transloading facility that would be

[2] The Ninth Circuit has noted that decisions of the Surface Transportation Board on ICCTA preemption properly provide guidance and are due deference by the courts. *Or. Coast Scenic R.R.*, 841 F.3d at 1073.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

served by rail. *SEA-3, Petition for Declaratory Order*, S.T.B. 35853, 2015 WL 1215490 at *3-4 (March 16, 2015). When SEA-3, a fuel terminal company, and two railroads argued that the city of Portsmouth, New Hampshire should be precluded from seeking a study of the risks and impacts of the proposed project, the Surface Transportation Board confirmed that local regulation was not preempted because the fuel terminal company was neither a rail carrier, nor acting under the auspices of a rail carrier. In short, the Surface Transportation Board agreed that the local permitting statutes and accompanying environmental review applied to the project—even though the gas would be brought to the facility by rail.

The Surface Transportation Board's decision in *Valero Refining Company—Petition for Declaratory Order*, S.T.B. 36036, 2016 WL 5904757 (Sept. 20, 2016), is also precisely on point. In *Valero*, the City of Benicia's Planning Commission denied permits for Valero to build a facility that would bring oil to the refinery by rail. The City based its permit denial in part on an environmental impact review that found environmental harms and risks caused by the project, including impacts related to rail traffic. *Id.* at *1. Valero argued that the City was preempted by the ICCTA from denying the permits because rail impacts formed part of the basis for its decision. *Id.* at *2. The Surface Transportation Board rejected the refinery's position, because Valero was not a rail carrier, nor acting on behalf of a rail carrier. *Id.* at *3.

The parallels to *Valero* are striking. As in *Valero*, the Department of Ecology, Department of Natural Resources ("DNR"), and Cowlitz County denied permits and approvals to Millennium to build a facility that would bring eight mile-and-a-half long coal trains to the site every day. The state and county decision makers denied approvals for Millennium based, in part, on environmental and public health risks and harms found in the final environmental impact statement, including

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

some impacts related to rail traffic, just as in *Valero*. Like Valero, Millennium and BNSF argue that the state defendants are preempted from denying any permits or authorizations because rail impacts form part of the basis for some of those decisions. As the Surface Transportation Board dismissed Valero's petition, the Court should dismiss the preemption claims here.

Amicus applicant Association of American Railroads ("AAR") distinguished the Surface Transportation Board's *Valero* decision by arguing that "[t]here was no existing rail service to the facility," while rail already served the Millennium site. AAR Br. at 11. Not only is this point wrong, it is an argument that makes no difference to the Court's analysis. First, AAR is incorrect that Valero was not served by rail; the Valero refinery received isobutene by rail and shipped out petroleum coke, liquefied natural gas, and other products by rail. *Valero* at *2 n.5. Second, the fact that Valero was not at that time receiving crude oil by rail played no part in the Surface Transportation Board's decision; the Surface Transportation Board found "no preemption because the Planning Commission's decision does not attempt to regulate transportation by a 'rail carrier.'" *Id.* at *4. In fact, Valero raised the same preemption issues as Millennium and BNSF. "Valero maintains that the Planning Commission's refusal to certify the [Environmental Impact Review] and denial of the land use permits are federally preempted under § 10501(b) because they prevent rail transportation of crude oil to the refinery, deny Valero its right to receive rail service, and prevent [Union Pacific] from providing such rail service." *Id.* at *3. This is precisely the argument raised by Millennium and BNSF that the Court should similarly reject. Third, whatever rail service currently calls at the Millennium site, it is not coal deliveries for this export project that hasn't yet been built. Denying land-use permits for a new project that would be connected to a railroad if

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

constructed does not impact existing ongoing operations related to rail.[3]

In the only portion of the *Valero* opinion Millennium addresses, the Surface Transportation Board noted in dicta that the City might be preempted from requiring mitigation for the rail impacts that formed part of the basis for permit denial. *Id.* at *4. This dicta offers little aid to Millennium's position, as the state and local agencies never prescribed mitigation of any sort for the rail-related impacts. Seeking to manufacture a sufficient factual dispute to avoid dismissal, Millennium asserts (at 9) that *Valero* involved a factual determination about interference with a rail carrier's operation. Millennium Opp. at 9. This too is incorrect. The Board in *Valero* observed that "[t]he Board's jurisdiction extends to rail-related activities that take place at transloading (or, as here, off-loading) facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agency, or the rail carrier exerts control over the third party's operations." *Id.* (parentheses in original). The Surface Transportation Board dismissed Valero's petition because those factors were absent. S*ee also Washington & Idaho Railway—Petition for Declaratory Order*, S.T.B. 36017, 2017 WL 1037370, *5 (Mar. 15, 2017) ("Federal preemption does not apply to a transload facility, however, where the activities are not being performed by or on behalf of a rail carrier, even if those activities fall 'within the broad definition of transportation.'"). *See also Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order*, S.T.B. 35057, 2008 WL 275697, at *4 (Feb. 1, 2008) (no preemption of state or local regulation of transloading facility where the railroad had no involvement in facility operations, even though the railroad owned the property). Here too it is undisputed that the transloading activities are not performed by a rail carrier, either directly or indirectly, nor does a rail carrier "exert control"

[3] AAR lodged its amicus brief one day before defendants' reply briefs were due.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

over Millennium's operations.[4] There is no need to further develop the record. The ICCTA preemption claims should be dismissed.

B. Denial of Millennium's Permits Is Not Indirect Rail Regulation.

Even if Millennium were a rail carrier—which it is not—state decisions on land-use permits or lease authorizations are not preempted simply because a proposed facility would be served by rail. The ICCTA expressly preempts state law related to the regulation of rail transportation, 49 U.S.C. § 10501(b). *See Humboldt Baykeeper v. Union Pac. R.R. Co.*, 2010 WL 2179900 (N.D. Cal. 2010) at *2 ("ICCTA preemption only displaces '"regulation," i.e., those state laws that may reasonably be said to have the effect of "managing" or "governing" rail transportation' and permits 'the continued application of laws having a more remote or incidental effect on rail transportation.'"); *see Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (application of local zoning and occupational license ordinances against a company leasing property from a railroad does not constitute "regulation of rail transportation" and was not preempted by the ICCTA). Denial of water quality certification or aquatic lands sub-lease (the two state actions challenged here)—does not in any respect "manage" or "govern" rail transportation, either directly or indirectly. Accordingly, it is not preempted by ICCTA.

BNSF tries to justify its ICCTA preemption claim by portraying any consideration of rail

[4] In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit addressed the question of whether local governments could impose substantive environmental controls on a rail line regulated by the STB. *Id.* at 1030-31. The Ninth Circuit upheld the Surface Transportation Board's finding that federal law preempted direct local environmental permit requirements because it was a rail carrier's proposed expansion, not a non-rail transloading facility that was served by rail. *Id.* at 1031. Similarly, in *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642-643 (2d Cir. 2005), the appellate court found a substantive environmental land use permit process for a rail carrier to be preempted. Because there is no rail carrier being permitted or operating a facility in this case, these precedents offer little guidance.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

issues as "regulation" of a rail carrier. *See* BNSF Complaint ¶¶ 92-95; BNSF Opp. at 10-11. Yet the cases BNSF cites without exception involve regulation of actual rail carriers. *See, e.g., Oregon Coast Scenic R.R.*, 841 F.3d 1069 (rail road track repair); *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998) (proposed rail road operations); *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010) (local rules specifically enacted to limit air pollution from idling trains). Because the "ICCTA preempts activities within the STB's jurisdiction," BNSF Opp. at 9; the Surface Transportation Board only has jurisdiction over activities concerning rail carriers; and since Millennium is not a rail carrier, even BNSF's presence in this case cannot force ICCTA preemption.

The various state and local permitting decisions here do not directly regulate the railroad. They involve protection of the shoreline environment and water quality, and the authority to construct on leased aquatic lands. As for "indirect" regulation, cases which found indirect regulation to be an issue involved vastly different facts than present here. In *Boston & Marine Corp. and Springfield Terminal Railroad Co.*, for example, a town used a zoning decision to completely ban all rail traffic in a certain area. *Bos. & Marine Corp. and Springfield Terminal R.R. Co.*, S.T.B. 34662, 2013 WL 3788140 (July 19, 2013). Unsurprisingly, the Board found that a rail traffic ban impermissibly "regulated" a rail carrier. *Id.* at *4. In another case, a city passed an ordinance regulating how trucks could service a rail carrier's ethanol transloading facility. *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 154 (4th Cir. 2010). These cases and others cited by BNSF that address indirect regulation of a rail carrier (at 15-16), are inapplicable, as the permitting decisions at issue neither ban any rail traffic, involve a rail carrier as part of the proposed project,

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

nor even indirectly attempt to control or regulate rail traffic.[5]

Moreover, while the final environmental impact statement considered and disclosed rail impacts, those impacts formed only one of multiple reasons the various permits were denied. The Cowlitz County Hearing Examiner denied Millennium's permit under the Washington Shoreline Management Act based on both the multiple "serious, unmitigatable impacts" found during the State Environmental Policy Act review, as well as the project's failure to comply with the Shoreline Management Act and the Cowlitz County Shoreline Master Plan.[6] Ecology denied Millennium's Clean Water Act § 401 certification because Millennium failed to demonstrate "reasonable assurance" that its activities would not cause a violation of water quality standards, as well as the harms identified in the final environmental impact statement. DNR's obligations as the steward of Washington's state-owned aquatic lands required it to examine Millennium's request to sublease under the terms of the existing sublease, and, after doing so, the agency denied the request because Millennium and Northwest Alloys (the lessee) had failed to provide requested financial and other information bearing on the suitability of Millennium as a subtenant. Unavoidable indirect impacts arising from rail transportation to and from the coal export terminal played some role in these

[5] WEC did not "ignore" the factual nature of properly presented ICTTA preemption claims, BNSF Opp. at 16 n.39; again, as there is no rail carrier involved in this Project, the Surface Transportation Board does not have jurisdiction, there is no preemption, and there is no need for the Court to address factually specific indirect regulation allegations.

[6] The serious harms found during the environmental and public health review included significant adverse impacts on Tribal treaty-protected fishing access, impacts on Tribal fishing harvest due to adverse effects on fish and aquatic habitat, increased risk of vessel collision or allusion, moderate to severe increased noise, increased cancer risks for the neighborhood closest to the terminal, and millions of tons of greenhouse gas emissions per year, all in addition to increased and serious delays at railroad crossings and an increased risk of train accidents. These are significant, cumulative impacts that the community strenuously opposed and that collide with state and local regulatory standards for the protection of human health and the environment.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

decisions, but plainly not the only one.

In sum, the state and local permitting actions challenged in this case do not apply to a rail carrier, or even to a non-rail project that is controlled by a rail carrier. They do not directly or indirectly seek to manage, regulate, or otherwise govern the use of rails. Instead, they are everyday state and local environmental review and land-use permitting decisions that are required by state law. The Court should dismiss the ICCTA preemption claims.

II. THE PORTS AND WATERWAYS SAFETY ACT DOES NOT PREEMPT ANYTHING HERE.

Millennium's defense of its Ports and Waterways Safety Act ("PWSA") claim highlights the depth of its misunderstanding of the doctrine of federal preemption. Simply because a federal statute discusses ports and marine vessels in some manner does not mean that any local permitting that incidentally involves ports and marine vessels is preempted. The statutory language matters, and here there is no preemption—express, implied, conflict, or field—between the state actions and the PWSA. In fact, Millennium barely makes an argument in support of preemption, instead relying on broad policy statements about the need for uniformity in maritime trade. Millennium Opp. at 10. Its half-hearted defense of its own claim speaks volumes.

The PWSA contains two distinct sections. As the U.S. Supreme Court summarized in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 161 (1978), "[t]he focus of Title I [of the PWSA] ... is traffic control at local ports" and "Title II's principal concern is tanker design and construction." PWSA preemption applies only if a state or local government action either (1) directly conflicts with Title I of the Act, or (2) concerns an area where Title II of the Act has completely occupied the field. *See United States v. Locke*, 529 U.S. 89, 109-111 (2000) (discussing PWSA conflict and field preemption); *United States v. Massachusetts*, 493 F.3d 1 (1st Cir. 2007) (summarizing U.S.

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Supreme Court direction as conflict preemption for Title I and field preemption for Title II). The state actions here neither conflict with traffic control on the Columbia River (Title I) nor regulate within the field of tanker design and construction (Title II).

As previously discussed, Ecology denied a water quality permit for the project based on Millennium's inability to demonstrate reasonable assurance that water quality standards would be met and on the numerous environmental impacts, including from in-river vessel traffic, identified in the Final Environmental Impact Statement. DNR denied a request to assign a sub-lease for state-owned aquatic lands, citing financial and environmental concerns. These actions do not involve either vessel traffic control or tanker design and construction in even the remotest respect.

Millennium invokes Title I preemption, arguing that because this single facility will not be built, the state has limited the number of vessels and type of cargo on the Columbia River. Millennium Opp. at 11. There is no authority to support an argument that either denying or granting permits for proposed facilities, which would have some indirect impact on vessel traffic, makes up a *de facto* type of vessel traffic control. Indeed, virtually any aspect of state and local regulation touching on the production or movement of goods could arguably have some incidental impact on the "amount and type" of vessels in transport. The district court in *Portland Pipe Line Co. v. City of South Portland* recently rejected an identical argument to the one made here, finding that a city ordinance banning loading oil onto tankers and building oil shipping terminals did not conflict with Title I and was not preempted. 288 F. Supp. 3d 321, 438 (D. Maine 2017). "A ban on one kind of transfer and new structures associated with that transfer does not conflict with the goal of promoting

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

uniform tanker specifications or navigation and traffic rules." *Id.*[7]

Millennium's argument under PWSA Title II, which concerns regulations for tanker vessels, fares no better. There are no such regulations at issue here, nor does Millennium present the Court with a field preemption analysis. In fact, Millennium does not address Title II at all—plainly dropping any notion that PWSA Title II preemption applies. *See Portland Pipe Line Co.*, 288 F. Supp. 3d at 439 (no PWSA Title II preemption of city ordinance banning the loading of crude oil into tankers and building related terminal facilities even though ordinance as a practical matter had an impact on tanker operations. "But especially where preemption under the PWSA is not express, the Ordinance does not conflict with specific provisions of the PWSA to such an extent that the Court may imply preemption."). The Court should dismiss Millennium's PWSA claim.

CONCLUSION

For the reasons stated above, in its opening brief, and in the opening and reply briefs of state defendants, WEC asks the Court to dismiss the ICCTA and PWSA claims brought by Millennium and BNSF.

//

//

[7] Washington could, if it wished, enact vessel traffic regulations for the Columbia River—without triggering any preemption concerns—because the Coast Guard has not done so. Without Coast Guard regulations, there is no possibility for conflict preemption analysis. *Locke*, 529 U.S. at 110 ("relevant inquiry for Title I preemption is whether the Coast Guard has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all.").

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

Respectfully submitted this 15th day of May, 2018.

Kristen L. Boyles, WSBA #23806
Jan E. Hasselman, WSBA #29107
Marisa C. Ordonia, WSBA #48081
EARTHJUSTICE
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
Ph.: (206) 343-7340
Fax: (206) 343-1526
kboyles@earthjustice.org
jhasselman@earthjustice.org
mordonia@earthjustice.org

Attorneys for Defendant-Intervenors Washington Environmental Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Climate Solutions, and Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated this 15th of May, 2018.

s/ Kristen L. Boyles
Kristen L. Boyles, WSBA #23806
EARTHJUSTICE

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340