THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., *et al*,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, *et al*.,

Defendants,

WASHINGTON ENVIRONMENTAL COUNCIL, *et al*.,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

PLAINTIFFS LIGHTHOUSE RESOURCES, INC., *ET AL*.'S OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

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LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

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LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

INTRODUCTION

The Defendants' oddly timed motions for partial summary judgment raise—but do not resolve—the same factual questions that precluded dismissal of Lighthouse's federal preemption claims. That genuine factual disputes remain should come as no surprise, since discovery is not scheduled to close until mid-January of next year. Without further factual development, the Court cannot yet decide whether the State Defendants' actions affected rail transportation and maritime commerce in a manner that federal law prohibits.

The State Defendants also argue for summary judgment by claiming that rail and maritime commerce effects were not the only reasons they denied approvals sought by Lighthouse. That misses the point. Lighthouse has standing to pursue its claims as long as a victory would make ultimate relief more likely. A ruling that federal law prevents the State Defendants from unreasonably burdening rail and vessel traffic would do just that.

BACKGROUND

Lighthouse Resources Inc. and several of its subsidiaries (collectively, Lighthouse) initially filed their complaint in this case on January 3, 2018. BNSF Railway Co. (BNSF) moved to intervene, and filed its own proposed complaint, on February 27. The State Defendants—Governor Jay Inslee, Director Maia Bellon, and Commissioner Hilary Franz, all sued in their official capacities—initially responded to these complaints by moving to dismiss. They argued, among other things, that the ICC Termination Act (ICCTA) "preempts only activities conducted by a rail carrier or under the auspices of a rail carrier" and that the Ports and Waterways Safety Act (PWSA) "preempts only . . . vessel traffic regulations for localities

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

in which the Coast Guard has already promulgated regulations or decided that no regulation is needed."[1] The Court denied those motions on May 30, 2018.

The State Defendants answered Lighthouse's and BNSF's complaints on June 13.[2] Two days later, Lighthouse served its first sets of federal discovery requests on the State Defendants and Intervenor-Defendants.[3] On July 11, the State Defendants requested and received from Lighthouse a one-week extension of their deadline to respond.[4] After serving written answers and objections on July 23, they began to produce responsive documents on August 13—just three days before they filed the present summary judgment motion.[5]

Discovery in this case is just getting underway. So far, only Defendant Bellon has produced any responsive documents, most recently on August 29.[6] No depositions have been noticed, let alone taken, in this case.[7] The parties have in good faith started working through several disagreements over the scope and responsiveness of their respective productions.[8] Expert testimony—which will be an important part of Lighthouse's evidence—is not due to be disclosed until November 14, 2018.[9] Most important, the deadline for completing

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[1] Dkt. 62, Mtn. to Dismiss at 1-2. The Intervenor-Defendants likewise moved to dismiss, echoing the State Defendants' arguments. *See* Dkt. 63, Joinder in State Defendants' Am. Mtn. to Dismiss.

[2] *See* Dkt. 118, Answer to Lighthouse Compl.; Dkt. 119, Answer to BNSF Compl. in Intervention. The Intervenor Defendants did not serve their answers until June 18. *See* Dkt. 120, Answer to Lighthouse Compl.; Dkt. 121, Answer to BNSF Intervenor Compl.

[3] Declaration of Jay C. Johnson (Johnson Decl.) ¶ 7.

[4] *Id*. ¶¶ 9, 16. Under separate agreements with Lighthouse, the Intervenor-Defendants filed their initial discovery responses on August 1. *Id*. ¶ 11.

[5] The parties agreed that Lighthouse would appropriately consider documents and administrative records already available to it as a result of state court proceedings. *Id*. ¶ 12. The discovery requests in this case, however, seek information not produced in—or necessarily even relevant to—the state court proceedings. *See id*. ¶¶ 13-15.

[6] *Id*. ¶¶ 20-21. Neither Defendant Franz nor Defendant Inslee have ever been subject to discovery in the state court proceedings. *Id*. ¶ 14.

[7] *Id*. ¶¶ 24-25.

[8] *Id*. ¶ 23.

[9] *Id*. ¶¶ 28-30, 34-35.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

discovery in the Court's scheduling order is still four-and-a-half months away, on January 14, 2019.

Since discovery remains in its early stages, the Defendants' motions for summary judgment do not rely on information they obtained through discovery. Instead, the exhibits accompanying the State Defendants' motion include only facts that were available when they filed their motion to dismiss and copies of more recent decisions from state court litigation.[10] The Intervenor-Defendants' motion neither appends any evidence nor contains a statement of supporting facts.

ARGUMENT

A moving party is entitled to summary judgment if it can show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law."[11] If a genuine dispute of material fact does exist, or if the non-moving party shows that "it cannot present facts essential to justify its opposition,"[12] summary judgment should not be granted. Especially when "a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case," denial or deferral under Rule 56(d) should be granted "fairly freely."[13] The Defendants' summary judgment motions have neither proved the absence of disputed material facts nor allowed Lighthouse sufficient time to pursue discovery.

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[10] The State Defendants do not suggest that the state court decisions they cite affect the legal analysis of their summary judgment arguments.

[11] Fed. R. Civ. P. 56(a).

[12] Fed. R. Civ. P. 56(d).

[13] *Jacobson v. U.S. Dep't of Homeland Security*, 882 F.3d 878, 883 (9th Cir. 2018) (citation omitted).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

I. Deciding whether the State Defendants' actions have the effect of regulating rail transportation activities would require resolution of ongoing factual disputes.

A. ICCTA broadly preempts state actions that unreasonably burden rail transportation.

The starting point for any preemption analysis under ICCTA should be the recognition that "Congress intended to preempt a wide range of state and local regulation of rail activity."[14] The Defendants instead start by trying to downplay ICCTA's scope and effect. ICCTA, they say, "was intended to preempt state economic regulation of railroads."[15] That statement is inaccurate. Indeed, the very case that the Defendants cite in support of their narrow view specifically holds that ICCTA "preempt[s] not just economic but also ***environmental*** regulation . . . ."[16] The same case goes on to emphasize that "it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than the one found in ICCTA.[17] That unparalleled preemptive breadth is the true backdrop for Lighthouse's and BNSF's ICCTA claims.[18]

Setting aside their attempt to cast ICCTA as concerned only with economic regulation of railroads, the Defendants apparently agree that it grants the Surface Transportation Board

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[14] *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010).

[15] Dkt. 129, Defendants' Mtn. for Summ. J. on Preemption Issues (Defendants' Br.) at 7 (citing *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016)).

[16] *Or. Coast Scenic*, 841 F.3d at 1076 (emphasis added); *see also Ass'n of Am. R.R.*, 622 F.3d at 1098 ("Both we and our sister circuits have rejected the argument . . . that ICCTA preempts only economic regulation.").

[17] *Or. Coast Scenic*, 841 F.3d at 1076 (brackets, internal quotation marks, and citations omitted).

[18] The Defendants also passingly invoke the "presumption against preemption" that applies "[i]n areas where states have traditionally regulated." Defendants' Br. at 6. Railroad regulation is not among those areas. *See Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 160 n.12 (4th Cir. 2010). Indeed, "Congress and the courts have long recognized a need to regulate railroad operations at the federal level." *Or. Scenic Coast*, 841 F.3d at 1075 (internal quotation marks and citation omitted).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

(STB) "exclusive" jurisdiction over "transportation by rail carriers."[19] They also seem to concede that ICCTA preempts any state efforts to regulate activities that fall within the STB's exclusive jurisdiction.[20] The Defendants' basic argument, then, is that Washington State is not "regulating" rail carriers.[21] That argument rests on a misunderstanding of ICCTA and raises factual questions that cannot be resolved at this stage in the litigation.

B. The STB's exclusive jurisdiction under ICCTA is not limited to direct regulation of rail carriers.

ICCTA preempts more than just direct attempts to control the activities of rail carriers. The Ninth Circuit has made that clear: "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation."[22] Deciding whether a state regulation crosses this line is an unavoidably factual question. "What matters," as the Ninth Circuit has explained, "is the degree to which the challenged regulation burdens rail transportation."[23]

The State Defendants do not address the issue of rail transportation effects head-on. Instead, they focus on a "threshold" test from *Oregon Coast Scenic*, which indicates that the STB's exclusive jurisdiction is limited to "transportation by rail carrier."[24] Because neither Lighthouse nor its subsidiaries are rail carriers, they reason that their efforts to prevent

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[19] Defendants' Br. at 7; Dkt. 128, Wash. Envt'l Council *et al*. Mtn. for Partial Summ. J. on Preemption Claims (WEC Br.) at 3; *see* 49 U.S.C. § 10501(b).

[20] Defendants' Br. at 7-8; WEC Br. at 3.

[21] Defendants' Br. at 8 ("Here the regulated activity is Millennium's proposal to construct an export terminal in Cowlitz County.").

[22] *Ass'n of Am. R.R.*, 622 F.3d 1097 (citations and internal quotation marks omitted).

[23] *Id*. (citation omitted).

[24] Defendants' Br. at 8; *see* WEC Br. at 3.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

construction of the Millennium Bulk Terminal cannot be preempted by STB's exclusive jurisdiction.[25] *Oregon Coast Scenic* itself disproves that argument.

The question in *Oregon Coast Scenic*, straightforwardly stated in the decision's opening sentence, was whether the STB had "exclusive jurisdiction over railroad repair work done at the direction of a federally regulated rail carrier, but ***performed by a contractor*** rather than the carrier itself."[26] And even though the state was directly "regulating" a non-rail carrier for violating state law, the Ninth Circuit held that ICCTA preempted the state's actions.[27] Just as important, the Court of Appeals observed that ICCTA preemption "is a case-by-case, fact-specific determination."[28] So whatever threshold the Ninth Circuit employed in *Oregon Coast Scenic*, it was not saying that only direct regulation of rail carriers could fall within the STB's exclusive jurisdiction.

C. ICCTA preemption is not limited to regulation of activities conducted by, or under the auspices of, a rail carrier.

To the extent the Defendants must acknowledge that ICCTA preempts both direct and indirect regulation of rail transportation, they argue that the STB's exclusive jurisdiction extends no further than activities "conducted by a rail carrier or under the auspices of a rail carrier."[29] This is another misreading of ICCTA and the relevant cases.

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[25] *Id*. at 8 ("Neither Lighthouse nor Millennium are 'rail carriers' as defined by the Act nor does the project constitute 'transportation by rail carrier.'").

[26] 841 F.3d at 1070-71 (emphasis added). Further, what the Defendants present as a "threshold question" in every ICCTA case was actually an inquiry specific to the facts of *Oregon Coast Scenic*. As the court explained, "under ***the factual scenario presented by this case***, [STB] jurisdiction under § 10501(b) is a threshold question requiring that the disputed activity meet three prongs: it must be (1) 'transportation' (2) 'by a rail carrier' (3) 'as part of the interstate rail network.'" *Id.* at 1073 (emphasis added). The Defendants do not mention the case- and fact-specific nature of the ICCTA preemption test articulated in *Oregon Coast Scenic*.

[27] *Id*. at 1073.

[28] *Id*. at 1074.

[29] Defendants' Br. at 8; WEC Br. at 3.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

The Defendants point to several decisions permitting states to regulate transloading facilities not operated by rail carriers.[30] As in their motion to dismiss, their centerpiece is an STB decision, *Valero Refining Co.*, which the Defendants characterize as "remarkably similar to the instant case."[31] But that assertion itself highlights the factual nature of ICCTA preemption. Like the Ninth Circuit, the STB noted in *Valero* that preemption "is a case-by-case, fact-specific determination."[32] Valero lost because it failed to "demonstrate[] that the Planning Commission's decisions unreasonably interfere[d] with [Union Pacific]'s common carrier operations."[33] Even so, the STB observed that if a "locality were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with the railroad's common carrier operations, those actions would be preempted under § 10501(b)."[34] The fact-specific holding in *Valero* thus does not preclude Lighthouse and BNSF from proving in this case that the State Defendants' actions "unreasonably interfere" with BNSF's operations.

The State Defendants' failure to discuss cases that do not fit their favored fact pattern underscores this point.[35] For example, in *Norfolk Southern Railway Co. v. City of Alexandria*, the City passed an ordinance that prohibited trucks from hauling certain bulk materials on its streets without a permit.[36] Some of those trucks took on their cargo at a Norfolk Southern rail transload facility, but they were operated by private trucking companies, ***not*** under the

[30] *See* Defendants' Br. at 8-9; WEC Br. at 3-5.

[31] Defendants' Br. at 6 (citing *Valero Refining Co.—Petition for Declaratory Order*, 2016 WL 5904757, STB Dkt. No. FD 36036 (Sept. 20, 2016)).

[32] *Valero*, 2016 WL 5904757, at *3.

[33] *Id.* at *4.

[34] *Id.* (internal quotation marks omitted).

[35] The Intervenor-Defendants mention these cases, but argue that they "involved vastly different facts not present here." WEC Br. at 8. Of course, the continued dispute between Lighthouse and the Defendants over the facts here, and whether they are meaningfully different from other cases, is precisely what prevents summary judgment at this time.

[36] 608 F.3d at 154.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

"auspices" of a rail carrier.[37] The Fourth Circuit nonetheless concluded that by imposing conditions on the non-rail carrier trucks that served Norfolk Southern's transloading facility, the City was unreasonably burdening rail transportation.[38] The same thing is happening in this case, with a slight twist. The State Defendants here are unreasonably burdening rail transportation by imposing conditions on a non-rail carrier's transloading facility, preventing it from receiving service from a rail carrier. At a minimum, this parallelism precludes summary judgment in the Defendants' favor.

A similar scenario unfolded in the STB's *Springfield Terminal Railroad* decision.[39] Although the facts of that case were in dispute, the STB explained that a town's zoning rules would be preempted even if it "construed the Town's action narrowly as directed solely at Tighe," a customer who had requested common carrier service.[40] The STB further held that ICCTA prohibited "states and localities" from regulating rail transportation "under the guise" of actions directed at non-carriers, including customers like Tighe.[41] Such aggressive application of ICCTA preemption is the only way to prevent "the patchwork of conflicting local regulations that Congress sought to avoid" when it enacted ICCTA and its predecessors.[42]

The same principles apply here. The State Defendants' actions are aimed at a customer—Lighthouse—not directly at a rail carrier. But they still have the "effect of

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[37] *Id*.

[38] *Id*. at 158-59.

[39] *Boston & Maine Corp. & Springfield Terminal R.R. Co.—Petition for Declaratory Order*, 2013 WL 3788140 STB Dkt. No. FD 35749 (July 19, 2013)

[40] *Id*., at *4. A rail customer plainly is not operating "under the auspices" of a rail carrier.

[41] *Id*.

[42] *Id*.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

managing or governing rail transportation." In fact, Defendant Bellon's explicitly listed reasons for denying Lighthouse's water quality certification clearly involve the effects of rail transportation—including air pollutants from locomotives, noise and vibration from unit trains, and lack of rail system capacity.[43] Denying a project in order to prevent air emissions, noise, and increased traffic from trains has the same prohibited effect of managing or governing rail transportation as directly regulating the air emissions, noise, and traffic from trains.[44] Whether those burdens on rail transportation are unreasonable, as Lighthouse and BNSF argue, or incidental, as the Defendants claim, is at least a factual dispute that cannot be resolved today.

II. Whether the Defendants properly exercised authority over national and international maritime commerce depends on the resolution of factual disputes.

A. The State Defendants lack authority over maritime commerce except when, as a factual matter, they are regulating the peculiarities of local waters.

As discussed in Lighthouse's opposition to the State Defendants' motion to dismiss, the federal government has always enjoyed paramount authority over national and international maritime commerce.[45] Given the strong federal interest in a consistent maritime regulatory regime, the U.S. Constitution[46] and a complex scheme of federal statutes and regulations[47]—including the PWSA and its implementing regulations[48]—work together to achieve a uniform system of maritime and admiralty law.

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[43] Compl. Ex. A at 5-11.

[44] *See Springfield Terminal R.R.*, 2013 WL 3788140, at *4.

[45] *See* Dkt. 75, Lighthouse Opp. to Defendants' Rule 12(b)(6) Mtn. at 10; *United States v. Locke*, 529 U.S. 89, 99 (2000) (describing the historical federal interest in a comprehensive and consistent regulatory scheme governing maritime trade and transport). As with rail transportation, the historical primacy of federal regulation of maritime commerce means that there is no presumption against preemption in this area.

[46] U.S. Const. art. II, § 8, cl. 3; *id*. art. III, § 2, cl. 1.

[47] *See* Titles 33 and 46 of the U.S. Code; Chapters 33 and 46 of the Code of Federal Regulations.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

The Defendants do not mention this well-established federal framework, focusing instead on Washington State's police powers as the source of its authority over vessel traffic in the Columbia River.[49] But as the U.S. Supreme Court has explained, the federal government's historically pervasive role in regulating maritime commerce means that state actions "bear[ing] upon national and international maritime commerce" do not benefit from a "beginning assumption" that they are "a valid exercise of [the state's] police powers."[50] Rather, because the states' "vast" powers in this area are inherently "residual," any state regulation of maritime commerce must be "based on the peculiarities of local waters that call for special precautionary measures."[51] Such "peculiarities" may include only "local circumstances and problems, such as water depth and narrowness, idiosyncratic to a particular port or waterway."[52]

The fundamental, disputed factual question underlying Lighthouse's PSWA claim is whether the Defendants' actions have affected national and international maritime commerce in a way that infringes on federal authority. The State Defendants quietly admit this crucial limit on their authority, acknowledging that "states may adopt regulations that relate to vessel traffic ***and*** are ***directed at local circumstances*** unless the Coast Guard has already adopted

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[48] *See* 33 U.S.C. Ch. 25 (Title I); 46 U.S.C. Ch. 37 (Title II); *see also* 46 U.S.C. § 3306 (requiring the Coast Guard to prescribe regulations governing (among other things) the "operation" of all vessels).

[49] Defendants' Br. at 13. The Columbia River is a significant corridor for interstate and international vessel traffic. *See* Columbia River Steamship Operators' Ass'n, *About* (Sept. 3, 4:48 PM) ("[t]he Columbia River trade corridor is the lifeblood of our regional economy, supporting 50 million tons of foreign trade at a value of $24 billion annually") *available at* https://www.crsoa.net/.

[50] *Locke*, 529 U.S. at 108.

[51] *Id.* at 109 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171 (1978)).

[52] *Id.*

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

regulations on the same subject or determined that particular regulation is unnecessary."[53] But their argument focuses entirely on possible conflict with Coast Guard regulations and never addresses the question of whether their actions in this case were in fact "directed at local circumstances."[54]

Lighthouse's argument that the State Defendants' actions do not stem from the "peculiarities of local waters" distinguishes the present case from *Beveridge v. Lewis*[55] and *Chevron U.S.A, Inc. v. Hammond*.[56] In *Beveridge,* Santa Barbara passed an ordinance that prohibited anchoring in certain areas during the winter in order to protect a wharf from damage.[57] And in *Hammond*, a state law intended to protect the Alaskan marine environment from harm caused by ballast discharges.[58] By contrast, the Defendants here have not pointed to any local conditions in the relevant part of the Columbia River, leaving open factual questions as to whether such conditions exist (they do not) and whether the State Defendants were aiming to address those conditions (they were not).

B. Federal maritime law preempts direct and indirect regulation of vessel traffic.

The Defendants also argue that Lighthouse's PWSA claim fails because they have not sought to directly regulate vessels in the Columbia River.[59] Relying exclusively on *Portland Pipe Line Co. v. City of South Portland*,[60] the Defendants essentially argue that States are free

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[53] State Defendants Motion for Summary Judgment at 11-12 (emphasis added); *see also id*. at 12 (acknowledging that "state regulation of vessel traffic is permissible if aimed at addressing local conditions . . . ").

[54] *See* Defendants' Br. at 12-13; WEC Br. at 11.

[55] 939 F.2d 859 (9th Cir. 1991)

[56] 726 F.2d 483 (9th Cir. 1984)

[57] *Beveridge*, 939 F.3d at 861, 864.

[58] *Hammond*, 726 F.2d at 486.

[59] Defendants' Br. at 12; WEC Br. at 22.

[60] 288 F. Supp. 3d 321 (D. Me. 2017).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

to take any action with regard to on-shore facilities, so long as the impacts to vessel traffic can be characterized as "incidental."[61] But neither *Portland Pipe Line* nor any other case has rejected a claim of PWSA preemption because the defendant's actions only had "incidental impacts" to vessel traffic.

As discussed above, any state or local regulation that "bears upon national and international maritime commerce . . . must be based on the peculiarities of local waters."[62] Consistent with this principle, the court in *Portland Pipe Line* employed a standard PWSA preemption analysis, looking to whether the ordinance at issue—which prohibited the storing and handling of petroleum and/or petroleum products for the bulk loading of crude oil onto any marine tank vessel—was directed at local circumstances and conditions.[63]

Particularly significant for purposes of the present motion, the *Portland Pipe Line* decision followed extensive factual development. The court's decision spent almost 30 pages discussing the deliberations behind the city ordinance and the objectives that ordinance sought to achieve,[64] ultimately concluding that the ordinance was based on local health and land use considerations—including impacts to the community from incompatible adjacent uses, impacts to waterfront scenic values and property values, and air quality impacts caused by on-shore bulk loading facilities themselves.[65] And there apparently was not any evidence showing that the City acted to limit vessel traffic or that the ordinance would unreasonably burden or impact vessel traffic.

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[61] WEC Motion at 11.

[62] *Locke*, 529 U.S. at 108-09.

[63] *Portland Pipe Line*, 288 F. Supp. 3d at 434. The Court also addressed whether the regulation was preempted by Title II of the PWSA, which applies only to marine tank vessels and, therefore, is not at issue in this case.

[64] *See id*. at 332-408.

[65] *Id*. at 382-83.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

Here, by sharp contrast, the State Defendants have not offered any facts—must less undisputed facts—regarding the extent to which their actions "bear upon maritime commerce" or were directed at specific "peculiarities of local waters" or "local conditions or circumstances." Indeed, their section 401 decision relies on plainly non-local concerns about vessel congestion on the Columbia River.[66] Because such factual disputes remain open, Lighthouse's PWSA claims cannot be resolved at this time.

III. Under Rule 56(d), further factual development is necessary before summary judgment can be considered.

As discussed in the preceding sections, there remain several genuine, material factual disputes that preclude summary judgment at this stage in the case. Those disputes exist at least in part because the Defendants filed their motion in the middle of discovery, without giving Lighthouse sufficient time to collect and review the hundreds of thousands of documents potentially relevant to its claims, much less take depositions or designate experts. Rule 56(d) expressly provides for this sort of premature attempt to win summary judgment by allowing the Court to deny or defer a motion filed before the non-moving party has been able to collect "facts essential to justify its opposition."[67]

The scope of discovery in this case is substantial. Lighthouse is currently reviewing around 850,000 documents from state proceedings and public records requests to determine their relevance in this federal case.[68] Because those documents were produced in

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[66] Compl. Ex. A at 10-11.

[67] Fed. R. Civ. P. 56(d); *see Jacobson*, 882 F.3d at 883 ("Where a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(d) motion fairly freely." (quoting *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) (brackets and ellipsis omitted))).

[68] Johnson Decl. ¶¶ 12-13.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

circumstances where ICCTA, PWSA, and the dormant Commerce Clause were not at issue, Lighthouse has also propounded dozens of discovery requests designed to elicit information specifically relevant to its federal claims.[69] Nearly all of those federal discovery requests have yet to be answered.[70]

Again, Lighthouse's ICCTA and PWSA claims raise several factual questions. Most broadly: Do the State Defendants' decisions blocking construction of the Millennium Bulk Terminal have the effect of managing or governing rail transportation—i.e., do they impose an unreasonable burden on BNSF, a rail carrier? Do the State Defendants' decisions affect national and international maritime commerce? If so, were those decisions based on peculiarities of a particular stretch of the Columbia River that require special precautionary measures? For the reasons explained above, evidence showing that the State Defendants' actions unreasonably burden rail transportation or impermissibly affect national and international maritime commerce will result in federal preemption of those actions.[71]

Lighthouse is actively pursuing tailored discovery that should help to resolve these factual questions. Among other things, Lighthouse seeks evidence that the Defendants' actions would impose special limits on the number of trains that BNSF could operate in Washington State, the air emissions permissible from those trains, and the noise and vibration that those trains could cause.[72] Lighthouse also seeks evidence that the Defendants attempted to circumvent federal prohibitions on regulating rail and maritime commerce (potentially with the assistance of the Intervenor-Defendants), and evidence that the Defendants' actions would

[69] *Id.* ¶¶ 7-8.
[70] *Id.* ¶¶ 16-17, 20-22.
[71] *See supra* at 4-13.
[72] Johnson Decl. ¶¶ 27-32.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

restrict the number of vessels in national and international maritime commerce that could operate on the Columbia River.[73] In addition, Lighthouse anticipates retaining experts to further explain how the Defendants' actions, as a matter of fact, create significant burdens on rail and maritime commerce.[74]

Lighthouse recognizes the value in addressing the legal claims in this case piecemeal. But there are still many months left in the discovery process. Under these circumstances, the Defendants' summary judgment motions simply are not timely. Lighthouse accordingly requests that the Court either deny or defer the Defendants' motions under Rule 56(d).

IV. Lighthouse's claims are redressable under Article III of the U.S. Constitution.

In addition to their substantive arguments for summary judgment—which are largely recycled from their Rule 12(b)(6) motion—the State Defendants move for summary judgment on a newly raised Article III standing issue. "Ecology denied Millennium's request for section 401 certification on two separate and independent grounds," they claim, only one of which involved rail and vessel impacts.[75] From there, they reason that even if Lighthouse were successful on its ICCTA and PWSA claims, their other ground for denying the section 401 certification would be unaffected.[76] Citing almost no Ninth Circuit authority, they conclude that Lighthouse cannot prove its injuries are redressable by a favorable decision, an essential element of Article III standing.

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[73] *Id.* ¶¶ 33-36.

[74] *Id.* ¶¶ 28-30, 35.

[75] Defendants' Br. at 13.

[76] *Id.* at 15.

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1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

The State Defendants' deduction is inconsistent with settled law in the Ninth Circuit. To establish standing, "plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision . . . ."[77] Instead, they "must show only that a favorable decision is likely to redress their injuries, not that a favorable decision will inevitably redress their injuries."[78]

It is not difficult to satisfy this redressability standard. "Where there are legal impediments to the recovery sought, it is enough for standing that the relief sought will remove ***some*** of those legal roadblocks, even if others may remain."[79] In other words, a plaintiff is "entitled to tackle one roadblock at a time."[80] An agency cannot short-circuit legal challenges to its actions by claiming it would make the same decision even in the face of an unfavorable court decision. As long as the decision would eliminate a "legal roadblock," thereby making the plaintiffs' desired outcome "more likely" than before, that plaintiff has adequately demonstrated redressability.[81]

Here, an ICCTA or PWSA ruling in Lighthouse's favor would unquestionably remove legal roadblocks.[82] Ecology acknowledges that its State Environmental Policy Act (SEPA)

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[77] *Ibrahim v. Dept. of Homeland Security*, 669 F.3d 983, 993 (9th Cir. 2012) (internal quotations omitted) (quoting *Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir. 2005)); *see also California Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1181 (9th Cir. 2018).

[78] *Id*. (brackets and emphasis omitted).

[79] *California Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1181 (9th Cir. 2018) (emphasis added).

[80] *Ibrahim*, 669 F.3d at 993.

[81] *See id*.; *see also Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 920 (9th Cir. 2018) (finding redressability where there was a "reasonable probability" the agency's decision "could be influenced" by a favorable court decision).

[82] As explained throughout this brief, Lighthouse does not accept the State Defendants' premise that ICCTA and PWSA preemption would affect only those parts of the state's decisions that explicitly rely on rail or vessel effects. Rather, it is the overall effect of those decisions on rail and vessel traffic that ICCTA and PWSA prohibit. *See, e.g., infra* at 18-19.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

findings regarding rail and vessel effects formed up to half of the grounds for its water quality certification denial.[83] Removing these grounds from consideration would make certification "more likely" than it was before, even if the ultimate outcome remains uncertain.[84] On top of that, Ecology admitted in state proceedings that SEPA—i.e., rail and vessel effects—was the sole reason it denied the section 401 certification with prejudice.[85] If ICCTA or PWSA precludes Ecology from relying on SEPA, the remaining grounds for denying section 401 certification hinge on an alleged failure to provide sufficient information for Ecology to make a decision.[86] Ecology's standard practice is to make such denials ***without*** prejudice,[87] meaning that Lighthouse would at least have an opportunity to reapply for section 401 certification and to provide additional information at that time.

Success on ICCTA and PWSA claims would also help in the ongoing state court challenge to the section 401 certification denial. In fact, the State Pollution Control Hearings Board (PCHB) recently upheld Ecology's section 401 certification denial based solely on its SEPA findings.[88] The PCHB specifically declined to address arguments relating to Lighthouse's alleged failure to demonstrate reasonable assurance of compliance with state water quality standards.[89] So if Lighthouse prevails on its ICCTA or PWSA claims in this

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[83] Defendants' Br. at 15.

[84] *See Ibrahim* at 993. The basic premise of Lighthouse's lawsuit is that the State Defendants will use any legal authority available to them prevent construction of the Millennium Bulk Terminal. Application of ICCTA and PWSA would make such denial that much more difficult.

[85] *See* Johnson Decl. ¶ 37 & Ex. A, Declaration of Sally Toteff in Support of Ecology's Reply to Millennium's Response to Ecology's Motion for Summary Judgment on Issue 2, *Millennium Bulk Terminals – Longview, LLC v. State of Washington, Department of Ecology*, PCHB No. 17-090 (Toteff Decl.) ¶¶ 7-8.

[86] *See* Toteff Decl. ¶ 7.

[87] *See id.*

[88] *See* Dkt. 130-6, Declaration of Tom Young at 17-22

[89] *Id.* at 21.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

litigation, Ecology would be left with justifications for its decision that, by its own admission, would have resulted in a certification denial without prejudice. This presumably would invalidate Ecology's entire order, which was made with prejudice.

In addition, Lighthouse has in this case explicitly challenged all of the grounds on which the 401 certification could be denied—including Millennium's failure to demonstrate reasonable assurance of compliance with state water quality standards—under the Commerce Clause. Under Ninth Circuit precedent, Lighthouse has standing on that basis alone.[90]

V. Because DNR's decisions unreasonably burden rail transportation and regulate maritime commerce, they are also preempted.

Finally, the State Defendants briefly argue that Lighthouse's ICCTA and PWSA claims against Defendant Franz should be dismissed because DNR "did not rely on vessel or rail impacts in making either of its decisions at issue in this matter."[91] To begin with, whether DNR actually considered rail or vessel effects is a factual question that will be developed through discovery. But even assuming DNR gave no thought to rail or vessel impacts in making its decisions, its argument does not explain why that fact entitles Defendant Franz to judgment as a matter of law.

As noted above, "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation . . . ."[92] This is a practical test that does not depend on the state regulators' rationale. Indeed, state regulators rarely are explicit about

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[90] *See Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886 (9th Cir. 2007) (finding standing where the Plaintiff explicitly challenged all other grounds for denial upon which an agency could rely).

[91] Defendants' Br. at 16. The Defendants acknowledge that DNR mentioned "access to the Columbia River being blocked by project related trains" in one of its decisions. *Id*. at 16-17.

[92] *Ass'n of Am. R.R.*, 622 F.3d 1097. Whether a state's actions "bear upon national and international maritime commerce" is likewise a question of fact. *Locke*, 529 U.S. at 108.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

their intent to affect rail transportation.[93] The regulations at issue in *City of Alexandria*, for example, were directed at non-rail carrier trucks hauling a "highly flammable and volatile" chemical, and "commendably" were intended "to enhance public safety."[94] Nonetheless, because those regulations "unreasonably burden[ed] rail carriage," they could not "escape ICCTA preemption under the police power exception."[95] Regardless of the agency's motives, DNR's decisions in this case should meet the same end.

Perhaps the evidence will show that DNR's decisions are somewhat further removed from rail and vessel effects than Ecology's section 401 certification. Lighthouse belives it will show that DNR was well aware of the decisions' potential rail and vessel effects, even though it did not specifically mention those effects in its decision documents. Either way, this is another question of fact that will be the subject of discovery and cannot be resolved at this stage in the litigation.

VI. The amicus brief filed by six coastal states forcefully underscores the need for federal preemption and the dormant Commerce Clause.

Earlier in this case, six states—Wyoming, Kansas, Montana, Nebraska, South Dakota, and Utah—filed an amicus brief arguing that "[t]he interests of interior states in developing foreign trade" should not be "subject to the barriers erected by the policy whims of states that control access to international markets through their ports."[96] Now, six coastal states—

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[93] The extensive discussion of rail transportation effects in Ecology's section 401 water quality certification decision is an obvious exception that clearly reveals the State Defendants' intentional efforts to regulate rail.

[94] 608 F.3d at 155, 160.

[95] *Id*. at 160.

[96] Dkt. 78-2, Amicus Curiae Br. in Opp. to Defendants' Abstention Mtn. by Wyoming, Kansas, Montana, Nebraska, South Dakoa & Utah at 9.

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GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

California, Maryland, New Jersey, New York, Oregon, and Massachusetts—have responded with their own amicus brief.[97]

The coastal states' amicus brief adds little to the Defendants' substantive discussion of ICCTA and PWSA. The overarching message, however, is clear. As much as the interior states believe that they should have access to coastal ports, the coastal states believe that they should have absolute control over those ports.[98] This is precisely the kind of intractable inter-state dispute that the Constitution's Commerce Clause definitively resolves by giving the federal government exclusive authority to regulate trade with foreign nations.[99] Federal law allows coastal states some authority over their ports. But they cannot use that authority to set export policy for the entire nation.

It is also highly significant to Lighthouse—and anyone else who wants to export to Asia—that California and Oregon are supporting Washington State's position in this case. If these three states on the Pacific Coast aggressively "regulate" export terminals, as the State Defendants have done in this case, they can effectively prevent the Asian export of whatever commerce they choose. Again, the Commerce Clause, ICCTA, and PWSA are designed to prevent just this sort of commercial discrimination.

CONCLUSION

It is no secret what is happening here. The State Defendants oppose coal exports to Asia. In preventing Lighthouse from opening a new coal export facility, they are choking off

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[97] *See* Dkt. 136, States of California, Maryland, New Jersey, New York, and Oregon, and the Commonwealth of Massachusetts's Corrected Amicus Br. in Support of Defendants' Mtn. for Summ. J. on Preemption Issues.

[98] *Id.* at 1-2.

[99] *See Gibbons v. Ogden*, 22 U.S. 1, 193-94 (1824) ("No sort of trade can be carried on between this country and any other to which this [Commerce Clause] power does not extend.").

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

the rail and vessel traffic that would move coal to and from that facility. Federal law, including ICCTA and PWSA, prohibits such actions. Because discovery to prove Lighthouse's factual allegations is underway, the Defendants' premature motions for summary judgment should be denied.

Dated this 4th day of September, 2018.

VENABLE LLP

By: s/Kathryn K. Floyd
Kathryn K. Floyd, DC Bar No. 411027
(Admitted *pro hac vice*)
kkfloyd@venable.com

By: s/Jay C. Johnson
Jay C. Johnson, VA Bar No. 47009
jcjohnson@venable.com
(Admitted *pro hac vice*)

By: s/Kyle W. Robisch
Kyle W. Robisch, DC Bar No. 1046856
KWRobisch@Venable.com
(Admited *pro hac vice*)

600 Massachusetts Ave NW
Washington DC 20001
202-344-4000

GORDON THOMAS HONEYWELL, LLP

By: s/Bradley B. Jones

Bradley B. Jones, WSBA No. 17197
bjones@gth-law.com
1201 Pacific Ave, Ste 2100
Tacoma, WA 98402
(253) 620-6500

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

By: s/Savanna L. Stevens
Savanna L. Stevens
sstevens@gth-law.com

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565