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 PARTIAL SUMMARY JUDGMENT ON PREEMPTION CLAIMS

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

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. NEITHER MILLENNIUM NOR BNSF MEET THE THRESHOLD REQUIREMENTS TO BRING AN ICCTA PREEMPTION CLAIM. 2

A. Millennium Is Not A Rail Carrier. 3

B. BNSF Is Not An Operational Part of the Millennium Project. 4

II. THERE IS NO PORTS AND WATERWAYS SAFETY ACT PREEMPTION. 10

CONCLUSION 12

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

TABLE OF AUTHORITIES

Cases **Page(s)**

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

Green Mountain R.R. Corp. v. Vermont,
404 F.3d 638 (2d Cir. 2005).....9

Norfolk Southern Railway Corp. v. City of Alexandria,
608 F.3d 150 (4th Cir. 2010) 6, 7

Oregon Coast Scenic R.R., LLC v. Or. Dep't of State Lands,
841 F.3d 1069 (9th Cir. 2016) 3, 4, 5, 6

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

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

United States v. Locke,
529 U.S. 89 (2000).....11

United States v. Massachusetts,
493 F.3d 1 (1st Cir. 2007).....11

Surface Transportation Board Orders

City of Alexandria, Va.—Petition for Declaratory Order,
S.T.B. 35157, 2009 WL 381800 (Feb. 17, 2009) 7

Hi Tech Trans, LLC—Petition for Declaratory Order,
S.T.B. 34192, 2003 WL 21952136 (Aug. 14, 2003) 2, 5

SEA-3,Inc.—Petition for Declaratory Order,
S.T.B. 35853, 2015 WL 1215490 (Mar. 16, 2015).....2

Valero Refining Company—Petition for Declaratory Order,
S.T.B. 36036, 2016 WL 5904757 (Sept. 20, 2016) 4, 5, 8, 9

Washington & Idaho Ry.—Petition for Declaratory Order,
S.T.B. 36017, 2017 WL 1037370 (Mar. 15, 2017).....4

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

Statutes

Interstate Commerce Commission Termination Act
49 U.S.C. § 10101 *et seq.* ..... *passim*

Ports and Waterways Safety Act
33 U.S.C. § 1221 *et seq.* 1, 10, 11, 12

State Environmental Policy Act
RCW Chapter 43.21C 8

Regulations

33 C.F.R. §§ 160-68 10

33 C.F.R. § 162.230 10

Other Authorities

Fed. R. Civ. P. 56(d) 3, 9

S. Rep. No. 92-724 (1972) 10

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

INTRODUCTION

Two uncontested facts control this motion for partial summary judgment with respect to railroad preemption. First, plaintiffs Lighthouse Resources *et al.* (collectively "Millennium") are not rail carriers; they do not provide common carrier railroad transportation for compensation nor do they claim to. Second, although plaintiff-intervenor BNSF is a rail carrier, it is not part of the proposed project—by its own testimony, it has no control over operations at the project, and it does not have an agency or employment relationship with Millennium. Neither Millennium nor BNSF need any further discovery to rebut these facts; indeed, any information about Millennium's rail carrier status and BNSF's operational involvement in the project is fully within plaintiffs' control. Because there is no genuine dispute of material facts that none of the plaintiffs are rail carriers with integral control over the proposed coal terminal, defendant-intervenors Washington Environmental Council *et al.* ("WEC") respectfully ask the Court to grant the motions for partial summary judgment on the Interstate Commerce Commission Termination Act ("ICCTA") preemption claims (Millennium Count III; BNSF Count I).

On the issue of marine vessel preemption, Millennium has dropped its claim under Title II of the Ports and Waterways Safety Act ("PWSA"), *see* Millennium Opp. at 12, n.63, leaving it to argue that the challenged decisions (a water quality certification and an aquatic lands sub-lease assignment) directly conflict with traffic control at local ports under PWSA Title I. As there is no direct conflict, and no amount of discovery can show any such conflict, defendants are entitled to summary judgment on that claim as well (Millennium Count IV).[1]

It is worth emphasizing that there are only two specific state actions being challenged

[1] There is nothing "oddly timed" (Millennium Opp. at 1) about these motions for partial summary judgment. The complaints present several purely legal claims that are suitable for summary judgment resolution. WEC and state defendants (with an eye on the ultimate trial date) are following the Court's suggestion to address issues one at a time to narrow the scope of the case for the convenience of the Court and parties. As no further discovery is needed on the preemption claims, defendants chose to pursue this motion first.

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

here—Ecology's denial of a water quality certification and DNR's denial of consent to an aquatic lands sub-lease. Both denials are specific to this project—there is no state or local statute or regulation at issue in this case.[2] Yet plaintiffs' briefs are exercises in arguments taken out of context, jumping to allegedly factual questions about indirect regulation of rail that are not germane to these facts or these specific claims. *See, i.e.*, Millennium Opp. at 5 (discussing "a state regulation"). In fact, Millennium and BNSF often seem to be arguing under other theories of the case, stressing alleged unreasonable burdens on rail transportation or questioning whether the permit denials affect international trade. These are not the questions here. Instead, the focus of this motion for partial summary judgment is solely on the rail and marine vessel federal preemption claims.

ARGUMENT

I. NEITHER MILLENNIUM NOR BNSF MEET THE THRESHOLD REQUIREMENTS TO BRING AN ICCTA PREEMPTION CLAIM.

Contrary to Millennium's representations, ICCTA preemption applies only to activities that fall under the jurisdiction of the Surface Transportation Board, not to vague notions of activities may that indirectly impact rail. 49 U.S.C. § 10501(a). The Surface Transportation Board has exclusive jurisdiction over activities that are "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, *3 (Aug. 14, 2003); *SEA-3, Inc.—Petition for Declaratory Order*, S.T.B. 35853, 2015 WL 1215490, *3 (Mar. 16, 2015); 49 U.S.C. § 10501(a), (b). No other facts or discovery about alleged indirect effects on rail transportation are needed to ascertain Surface Transportation Board jurisdiction and preemption.

[2] BNSF appears to be challenging the 2017 decision of DNR denying terminal construction under the existing aquatic lands lease with Northwest Alloys. *See* BNSF Opp. at 1, 4. This action is not properly before the Court; the construction denial was made without prejudice, as Millennium did not yet have all necessary permits in hand, and it has not been challenged by Millennium itself.

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

A. Millennium Is Not A Rail Carrier.

Millennium is not a rail carrier. The statutory language defines rail carrier as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Nowhere in its opposition brief does Millennium contend that it is, in fact, a rail carrier. Nor does Millennium move, pursuant to Fed. R. Civ. P. 56(d), for the opportunity to pursue specific discovery to prove it is a rail carrier.[3] Nor could it, as clearly the question of whether or not Millennium is a rail carrier does not hinge on discovery from state agencies and environmental groups.

Instead, Millennium skips this vital first step and goes directly to argument that the ICCTA preempts indirect attempts to control the activities of rail carriers. Millennium Opp. at 5. Millennium does this, of course, to avoid addressing the fact that it is not a rail carrier. Wide-ranging discussion and discovery about whether denial of particular state permits have an indirect effect on rail is misplaced because Millennium is not a rail carrier.

Millennium's interpretation (at 5-6) of *Oregon Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069 (9th Cir. 2016) is simply wrong. As the very first sentence of the case explains, *Oregon Coast* "presents the question whether the federal Surface Transportation Board ("the Board") has 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." *Id.* at 1070-71 (emphasis added). It is immediately clear that *Oregon Coast* involved actual railroad repair controlled by a rail carrier, both elements that are missing here. In that case, there was no question that Oregon Coast Scenic Railway was operating as an agent of a federally recognized railroad (the

[3] Millennium does not attempt to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition…." Fed. R. Civ. P. 56(d). The Declaration of Jay C. Johnson sets forth the history of discovery so far, and vaguely avers that Millennium will pursue discovery to show "how the State Defendants' actions 'burden' rail transportation." Johnson Decl. ¶ 27. Mr. Johnson does not identify any need to obtain information about Millennium's lack of status as a rail carrier or BNSF's operational involvement with the project. *See also* Millennium Opp. at 14 (positing discovery questions unrelated to threshold issues).

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

Port). Addressing the issue of jurisdiction as a matter of law, *id.* at 1072, the Ninth Circuit found that "[Surface Transportation] Board jurisdiction under §10501(a) is a threshold question requiring that the disputed activity meet three statutory prongs: it must be (1) "transportation" (2) "by rail carrier" (3) "as part of the interstate rail network." *Id.* at 1073. Here, because Millennium is not a rail carrier, the threshold question of Surface Transportation Board jurisdiction (and therefore preemption) must be answered in the negative.[4]

The Surface Transportation Board has repeatedly rejected the argument that an incidental impact on rail transportation bestows jurisdiction. For example, as discussed in WEC's opening brief, where the city of Benicia, California denied a permit to build an oil transloading facility not operated or controlled by a railroad that would be served by rail, the Surface Transportation Board found "no preemption because the Planning Commission's [denial] decision does not attempt to regulate transportation by a 'rail carrier.'" *Valero Refining Company—Petition for Declaratory Order*, S.T.B. 36036, 2016 WL 5904757, *3 (Sept. 20, 2016). S*ee also Washington & Idaho Ry.—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* WEC Motion for Partial Summary Judgment on Preemption Claims at 3-6.

B. BNSF Is Not An Operational Part of the Millennium Project.

Because Millennium itself is not a rail carrier, it relies on the intervening presence of BNSF to jump to an argument that ICCTA preemption extends to activities beyond those conducted by, or under the auspices of, a rail carrier. Millennium Opp. at 6. Millennium's argument here is exactly backward. If Millennium's coal terminal itself was operated by BNSF in significant part (making it

[4] Millennium points to the "factual scenario" language in *Oregon Coast* as supporting its need for discovery, Millennium Opp. at 5, n.26, but that language does not and cannot change the threshold requirements. Every case presents factual scenarios, and the uncontested, operative fact here is that Millennium is not a rail carrier.

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

in essence a BNSF project), then ICCTA preemption might be an issue and permitting jurisdiction (and environmental reviews) could lie with the Surface Transportation Board rather than state and local authorities. But here BNSF has itself confirmed that it is not part of this project, and neither Millennium nor BNSF have rebuffed that assertion in their opposition briefs. *See* Partial Summary Judgment Exhibit A, Opening Remarks of Dava Kaitala, BNSF, Cowlitz County Shoreline Permit Proceedings (Nov. 2, 2017) at 2 ("[I]t is important to remember that BNSF is not an applicant for this project. We would serve Millennium, just as we would any other customer's terminal or rail-served business.").

Cases where Surface Transportation Board jurisdiction attaches to non-rail carriers all involve situations where the acknowledged rail carrier is truly an operational part of the project, not merely a service provider. *See Valero Refining*, 2016 WL 5904757 at *3 ("[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 agent, or the rail carrier exerts control over the third party's operations." *Id.* (emphasis added; parentheses in original). This was the situation in *Oregon Coast,* where the Port was a federally recognized railroad that hired a contractor to perform the rail repair work. 841 F.3d at 1073. Surface Transportation Board decisions consistently conduct this analysis, considering whether the non-carrier's activities are "an integral part of [the rail carrier's] provision of transportation by rail carrier." *Hi Tech Trans, LLC*, 2003 WL 21952136 at *4 (rejecting the argument that "there is no legal distinction between a transloading facility operated by a noncarrier licensee and one operated by a rail carrier").

Millennium's argument to the contrary is more than a "slight twist," Millennium Opp. at 8, for Millennium actually turns the standard on its head. Instead of asking whether a non-rail carrier is essentially acting as an agent of a rail carrier, Millennium wants this Court to extend Surface Transportation Board jurisdiction over admitted non-rail carriers if a rail carrier provides them

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

service. Not only is this switch unsupported by the statutory language, but it would expand Surface Transportation Board jurisdiction far beyond rail projects. Under Millennium's theory, literally any one of countless projects—a coal shipping terminal, a food warehouse, a new car dealership—would become a rail project under Surface Transportation Board jurisdiction simply if it was served by a railroad, preempting local land use permits, building and grading permits, water quality certifications, unique lease requirements, and a host of other state and local regulations. Such an expanded reading of Surface Transportation Board jurisdiction would also allow BNSF to challenge any and every project near or served by a railroad. That is not the ICTTA's statutory command, nor the holding of any Board or court decisions. Congress intended the ICCTA to prevent piecemeal regulation of interstate railroads, not to usurp traditional state police powers or create piecemeal state land-use regulation. *See Norfolk Southern Railway Corp. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010) ("Our Court has heretofore recognized that Congress has narrowly tailored the ICCTA preemption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'managing' or 'governing' rail transportation. … By contrast, the ICCTA does not preempt those state or local laws that have a more remote or incidental impacts on rail transportation. Moreover, state and local governments may act, pursuant to their general police powers, to regulate certain areas affecting railroad activity; for example, local electric, building, fire, and plumbing codes are generally not preempted.") (citations and internal quotations omitted).

As the *Oregon Coast* court summarized, "[t]he Board's decisions show that work done by a non-carrier can be considered activity "by a rail carrier" if there is a sufficient degree of integration between the work done by the non-carrier and the authorized rail carrier's own operations." 841 F.3d at 1074 (citing Board decisions). It makes perfect sense that railroad repair done by a non-carrier at the direction of a rail carrier would fall under Surface Transportation Board jurisdiction; "[a]llowing a rail carrier to avoid federal jurisdiction by hiring a contractor would defeat Congress's

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

purpose in creating such a far-reaching regulatory scheme." *Id.* But it does not follow that a non-rail carrier project with no operational control from a rail carrier falls under Surface Transportation Board jurisdiction simply because a railroad serves the project. As BNSF's operations are not part of the Millennium project, there is no STB jurisdiction and no preemption here.

The "case-by-case, fact-specific determination" discussed in *City of Alexandria, Va.—Petition for Declaratory Order*, S.T.B. 35157, 2009 WL 381800, *2 (Feb. 17, 2009), and other decisions involves facts surrounding the "whether the rail carrier owns the transloading facility; whether the third party is compensated by the carrier or the shipper; the degree of control retained by the carrier over the third party; and the other terms of the contract between the carrier and the third party." *Id.*[5] Nothing in Millennium's or BNSF's discovery is aimed at these questions, and BNSF presents no information to show a degree of integration with Millennium sufficient to invoke Surface Transportation Board jurisdiction.[6] To the contrary, BNSF has publicly disavowed having any part of the project.

BNSF confuses the preemption threshold argument by claiming that the state decisions are preempted not because they regulate rail, but because they were based in part on rail impacts

[5] The dispute between Norfolk Southern and the City of Alexandria eventually reached the Fourth Circuit. The appellate court confirmed that because the railroad owned and operated the ethanol transloading facility, an ordinance regulating truck traffic at the railroad facility regulated a rail carrier for the purposes of Surface Transportation Board jurisdiction and federal preemption. 608 F.3d at 158-59. None of the court's factual inquiries involved whether Norfolk Southern controlled and operated the project, as that fact was undisputed. *See id.* at 159 (distinguishing Eleventh Circuit decision where regulation of railroad property was not preempted because there was no impact to railroad operations). The case turned on the fact that while non-rail carrier trucks served the ethanol transloading facility, it was Norfolk Southern's ethanol transloading facility. By regulating trucks serving the facility, the challenged ordinance regulated a rail carrier. *Id.*

[6] Millennium consistently misstates this point, contending that language about factual inquiries shows that summary judgment is inappropriate. Millennium Opp. at 7, n.35. But the factual inquiries in *Norfolk Southern* and other cases focused on facts concerning the degree of involvement and control on a non-rail project by a rail carrier, not concerns over indirect impacts to rail. Neither Millennium nor BNSF offer any rebuttal to the salient threshold facts here.

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

identified through the unchallenged State Environmental Policy Act ("SEPA") process. BNSF Opp. at 7. This interpretation turns ICCTA preemption review on its head; it would require a court to review the substance of challenged actions before deciding whether it had jurisdiction. Under BNSF's argument, a water quality certification denial based solely on failure to meet water quality standards would not be preempted, but the same denial (with the same impacts) based on failure to meet water quality standards and harmful rail impacts would. The reasons for the decisions cannot logically control the preemption analysis.

Finally, BNSF dramatically misrepresents *Valero Refining*. BNSF Opp. at 10. *Valero* has remarkably similar facts to the present situation, including the parallel situation that the Benicia Planning Commission denied Valero's land use permit to build a facility that would bring oil to the refinery by rail based in part on a state environmental review, and that some reasons for denial "were based on the potential effects of increased rail traffic outside of the off-loading facility location and others that addressed potential effects of the construction and operation of the off-loading facility itself." 2016 WL 5904757 at *2. Valero, like BNSF, 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.* The Surface Transportation Board rejected the refinery's position, because Valero was not a rail carrier, nor was it acting on behalf of a rail carrier. *Id.* at *3.

As in *Valero*, the state defendants here 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 denials were based, in part, on environmental and public health risks and harms found in the final environmental impact statement, including some impacts related to rail traffic, just as in *Valero*. Like *Valero*, BNSF argues 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.

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

The Surface Transportation Board noted that the City might be preempted from requiring mitigation for the rail impacts that formed part of the basis for permit denial, but the City instead simply denied. *Id.* at *4. So too here, as the state defendants prescribed no mitigation of any sort for the rail-related impacts. And, like Millennium, BNSF points to the factual determination language in the *Valero* decision, BNSF Opp. at 12, to show an alleged need for ongoing factual investigation. Yet the factual determinations alluded to by the Surface Transportation Board were those seeking to judge the extent of rail carrier involvement in the project, not questions about indirect impacts on rail from a non-rail project denial. The Surface Transportation Board dismissed Valero's petition because those factors of rail carrier involvement were absent. 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" over Millennium's operations.[7] There is no need to further develop the record through discovery.

Indeed, in order to bypass *Valero*, BNSF claims that the "State Defendants have done more than tell Lighthouse 'no' to certain permits," without explaining what that "more" is. BNSF Opp. at 12. Moreover, the assertion is simply wrong. The state defendants have not tried to condition approvals in ways that impact rail, just as the City of Benicia did not try to condition its approvals. Not only should the Court not grant a Rule 56(d) deferral, but Court should grant defendants' motions for summary judgment on rail preemption.

[7] 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 Surface Transportation Board. *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

II. THERE IS NO PORTS AND WATERWAYS SAFETY ACT PREEMPTION.

Enacted in 1972, the Ports and Waterways Safety Act aims to protect navigation and vessel safety, the marine environment, and the security of United States ports and waterways. 33 U.S.C. § 1221. Congress specifically noted the need to cope with the increasing safety hazards of maritime transportation and with pollution resulting from operation and casualties of vessels carrying oil or other hazardous substances in bulk. S. Rep. No. 92-724 (1972). Similarly, Congress found that the Act was needed to protect coastal waters and resources including fish, shellfish, wildlife, marine and coastal ecosystems, and recreational and scenic values. *Id.* Title I of the PWSA authorizes the U.S. Coast Guard to control and supervise vessel traffic within marine ports of the United States, establish safety requirements for vessels, and investigate or detain particular vessels in violation of the Act or its regulations. 33 U.S.C. § 1221 *et seq.*[8]

Under Title I, the Coast Guard may, but is not required to, establish traffic services, including reporting and operating requirements, surveillance and communications systems, routing systems, and navigation equipment. 33 U.S.C. § 1223. In carrying out these duties, the Coast Guard must consider protection of the marine environment, the safety and security of the United States ports and waterways, as well as local practices and customs. 33 U.S.C. § 1224. At the national level, the Coast Guard has established regulations governing general safety of ports and waterways, vessel traffic movement reporting systems and traffic services, and navigation safety regulations, to name a few. *See* 33 C.F.R. §§ 160-68. For the Columbia River, the Coast Guard has promulgated one regulation setting a restricted area downstream of the Grand Coulee Dam. 33 C.F.R. § 162.230.

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." PWSA preemption

[8] PWSA Title II applies to marine tanker vessels, not coal ships; as Millennium admits at 12, n.63, Title II is not at issue in this case.

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

applies only if a state or local government action directly conflicts with Title I of the Act. *See United States v. Locke*, 529 U.S. 89, 109-11 (2000) (discussing PWSA conflict and field preemption); *United States v. Massachusetts*, 493 F.3d 1, 8-10 (1st Cir. 2007) (summarizing U.S. Supreme Court direction as conflict preemption for Title I).

The state actions here do not and cannot directly conflict with traffic control on the Columbia River. Ecology denied a water quality certificate 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 FEIS. DNR denied a request to assign a sub-lease for state-owned aquatic lands, citing multiple financial and business concerns. These decisions simply do not directly involve vessel traffic control; they are specific permit denials. As the district court found for the city ordinance banning crude oil export from South Portland, Maine, such an outright project denial:

> does not provide any duties or restrictions related to vessel navigation or traffic in ports. Although it prohibits the loading of crude oil, the Ordinance creates no affirmative duties at all. Nor does the Ordinance impinge on conduct that federal law mandates. Tankers currently can and do navigate into the harbor following federal traffic controls and navigation requirements in compliance with both the PWSA and Ordinance.

Portland Pipe Line Co. v. City of South Portland, 288 F. Supp. 3d 321, 437 (D. Me. 2017) (citation omitted). Similarly, denial of permits for Millennium "does not provide any duties or restrictions on vessels navigation or traffic" in the Columbia River or at the Port of Longview; the denials create "no affirmative duties at all"; and vessels "can and do navigate" along the river "in compliance with both the PWSA" and permit denials. There is no authority to support an argument that either denying or granting permits for any proposed facilities, which could incidentally impact vessel traffic, constitutes vessel traffic control. Nor can Millennium hijack Title I's "peculiarities of local waters" language—a phrase meant to allow state vessel traffic regulation—as a shield against partial

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

summary judgment where there is no conflicting vessel traffic regulation. As the state denials do not conflict with any federal marine traffic regulation, the Court should grant summary judgment on PWSA preemption claim as well.

CONCLUSION

For the reasons stated above and in its opening brief, WEC respectfully asks the Court to grant its motion for partial summary judgment and dismiss the statutory preemption claims (Millennium Count III, IV; BNSF Count I) from this case.

Respectfully submitted this 7th day of September, 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 September 7, 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 7th of September, 2018.

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

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