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,

and

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

SUPPLEMENTAL REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PREEMPTION ISSUES



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## I. INTRODUCTION

Plaintiffs' preemption claims fail for two reasons: (1) the federal laws Plaintiffs rely on to support their preemption claims do not apply to the proposed coal export terminal that is the subject of this case, and (2) Plaintiffs lack Article III standing to bring their claims because they fail the redressability prong. *See* Dkts. 129, 136, 150. In their supplemental responses (Dkts. 187, 190), Plaintiffs and Plaintiff-Intervenors (collectively, "Plaintiffs") submit nothing new in response to these points. Instead, Plaintiffs submit expert reports that simply make irrelevant assertions about the "burden" that Ecology's section 401 denial allegedly has caused. This "burden" is nothing more than the fact that vessel and rail traffic to and from the proposed facility will not occur because Ecology (and others) have denied permits for it.[1] Because this "burden" is not relevant to the issue of preemption, Plaintiffs' arguments should be rejected.

## II. SUPPLEMENTAL ARGUMENT

### A. The ICCTA and PWSA Do Not Preempt Ecology's Section 401 Decision Because They Do Not Apply

Under the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. §§ 10101–16106, preemption applies only if the "activity in question" is performed either (1) by a "rail carrier" or (2) under the auspices of a rail carrier. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1073 (9th Cir. 2016); *Valero Ref. Co.*, S.T.B. No. FD 36036 (Sept. 20, 2016), 2016 WL 5904757, at *3. The proposed Millennium coal export terminal is neither and therefore ICCTA preemption does not apply.

Similarly, under Title I of the Ports and Waterways Safety Act of 1972 (PWSA), 33 U.S.C. § 1223, the test is whether the Coast Guard has adopted regulations for the relevant area and whether the state action conflicts with those regulations. *See United States v. Locke*, 529 U.S. 89, 109–10 (2000) ("[t[here is no preemption by operation of Title I itself if the state

[1] Besides Ecology, other entities that have denied permits for the facility are the Department of Natural Resources, Cowlitz County, the Shorelines Hearings Board, and the Pollution Control Hearings Board. The Boards affirmed denials by the County and Ecology, respectively. *See* Dkts. 1-2, 1-3, 64-13, 130-6.



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regulation is so directed [to a particular port or waterway] and if the Coast Gurard has not adopted regulations on the subject or determined that regulation is unnecessary or inappropriate"); *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 437–38 (D. Me. 2017) (ordinance not preempted where it did not "impinge on conduct that federal law mandates" or "stand as an obstacle to the goals of the PWSA"). Here, there are no Coast Guard regulations nor any such conflict. Therefore, there is no preemption.

In their supplemental submissions, Plaintiffs try to get around these legal barriers by arguing that Ecology's section 401 decision has the "effect" of regulating rail and vessel transport. For example, BNSF argues that, because Ecology relied in part on rail impacts in making its decision, Ecology "effectively demand[ed] a permit or form of preclearance from BNSF before it may expand and operate its coal shipping services to the Terminal." Dkt. 190, at 5. This claim, however, is simply false—Ecology demanded nothing from BNSF because BNSF was not the project applicant. As BNSF itself has stated, it needed no permits for the terminal project to proceed. Dkt. 130-3, at 3. Ecology merely determined that Millennium—a non-rail carrier—did not meet state and federal standards for obtaining a section 401 certificate.

Similarly, Lighthouse attempts to distinguish *Valero* on the ground that Valero did not show any impact on rail transportation. Dkt. 187, at 3. But the Surface Transportation Board's decision in *Valero* turned on the fact that the project applicant—Valero—was not a rail carrier, not on whether there was or was not an effect on rail transportation. *Valero Ref. Co.*, 2016 WL 5904757, at *3. Clearly, denial of the permit in *Valero* affected rail traffic to and from that facility in exactly the same way that the denial of permits to Millennium affects traffic to and from it. The case is thus not distinguishable from this one.

Plaintiffs' primary argument is that Ecology's section 401 denial is preempted because it allegedly has an effect on or "burdens" vessel and rail traffic. Dkt. 187, at 2. According to BNSF, it allegedly affects BNSF's "economies of scale, scope, and density." Dkt. 190, at 5.



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This argument has no support in the case law or the relevant statutes, and is without merit. The question of whether the state's action burdens rail or vessel transport does not arise unless the threshold conditions for preemption exist—namely, that the statutes cited actually apply to the facility and/or the state decision at issue. Because Plaintiffs fail these threshold tests, their claims of preemption based on an alleged "burden" must be rejected.

Even if the question of burden were relevant, Plaintiffs fail to identify any actual burden. The "burden" Plaintiffs assert is nothing more than a lost business opportunity that allegedly results from the permit denials. *See, e.g.*, Dkt. 188-1, at 18 ¶ 50 ("The Terminal would provide an important opportunity to BNSF . . . ."). This burden would occur regardless of the reasons for the denial. Under Plaintiffs' theory, the ICCTA and PWSA would preempt Ecology from denying the section 401 certificate for *any* reason, not just allegedly preempted reasons, simply because the denial has an economic impact on them. This is plainly an overbroad contention. In section 401, Congress gave states explicit authority to deny such certificates. 33 U.S.C. § 1341(a)(1); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval"). There is no basis to argue that the State's section 401 authority is preempted simply because the project involves vessel or rail traffic.

Lighthouse also engages in a lengthy and irrelevant discussion to the effect that the vessel accidents predicted by the Environmental Impact Statement (EIS) on the Columbia River are really nothing to be concerned about, according to their expert. Dkt. 187, at 5–7. This discussion is irrelevant because it presumes that the State's action in denying section 401 certification to Millennium was an attempt to regulate vessel traffic, which it was not. Ecology denied 401 certification to a proposed export terminal located on land, which is not the same as regulating vessels on the Columbia River. *See Portland Pipe Line*, 288 F. Supp. 3d at 439 ("On-shore state and local siting restrictions and even prohibitions on industrial activities, large



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structures, and pollution are quintessential examples of the use of historic police powers"). Nothing in Lighthouse's supplemental briefing addresses the question of conflict preemption central to the analysis under Title I of the PWSA. Lighthouse's argument in this section of its brief is a red herring that should be disregarded.

**B. Plaintiffs Fail the Redressability Prong for Article III Standing**

In their supplemental responses, Plaintiffs submit no new argument regarding standing. Plaintiffs fail to demonstrate redressability because Ecology's section 401 denial is supported by numerous reasons that have nothing to do with vessel or rail traffic. These include, among other things, Plaintiffs failure to demonstrate reasonable assurance of compliance with state water quality standards. Dkt. 1-1, at 14–19. Because these grounds are not preempted under any conceivable interpretation of the ICCTA or PWSA, and are explicitly authorized by section 401 itself, the Court could not "vacate" Ecology's section 401 denial even if it concluded that some of the other grounds in the decision are preempted. Thus, Plaintiffs cannot demonstrate standing.

## III. CONCLUSION

For the reasons stated above, Plaintiffs' supplemental arguments and evidence are neither relevant nor persuasive. Plaintiffs fail to demonstrate that Lighthouse is a rail carrier, fail to show any conflict between Ecology's section 401 decision and Coast Guard regulations, and fail to show that they have standing. Since there is no factual dispute on these key points, the Court should enter summary judgment dismissing Plaintiffs' preemption claims.

DATED this 30th day of November 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 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 such filing to all counsel of record.

DATED this 30th day of November 2018.

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