The Honorable Robert J. Bryan

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

WASHINGTON ENVIRONMENTAL COUNCIL *ET AL.* JOINDER IN STATE DEFENDANTS' AMENDED MOTION FOR PARTIAL DISMISSAL AND ABSTENTION

Note on Motion Calendar: May 15, 2018

ORAL ARGUMENT REQUESTED

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 1

ARGUMENT 2

I. THE ICCTA DOES NOT PREEMPT STATE AND LOCAL PERMITTING REQUIREMENTS FOR THE MILLENNIUM COAL TERMINAL. 3

A. Millennium Is Not a Rail Carrier, and Its Project Does Not Fall under the Surface Transportation Board's Jurisdiction. 3

B. There Is No Direct or Indirect Regulation of a Rail Carrier. 7

CONCLUSION 9

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Canadian National Ry. Co. v. Rockwood,
2005 WL 1349077 (E.D. Mich. 2005) 5

City of Auburn v. United States,
154 F.3d 1025 (9th Cir. 1998) 5

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

Franks Inv. Co. LLC v. Union Pac. R.R.,
593 F.3d 404 (5th Cir. 2010) 7

Green Mountain R.R. Corp. v. Vermont,
404 F.3d 638 (2d Cir. 2005) 5

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 RR v. Oregon Dep't of State Lands,
841 F.3d 1069 (9th Cir. 2016) 3

U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,
971 F.2d 244 (9th Cir. 1992) 6

Surface Transportation Board Orders

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

City of Alexandria, Va.—Petition for Declaratory Order,
S.T.B. 35157, 2009 WL 381800 (Feb. 17, 2009) 4

Hi Tech Trans, LLC—Petition for Declaratory Order,
S.T.B. 34192, 2003 WL 21952136 (Aug. 14, 2003) 3, 4

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

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

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

Town of Milford, Mass.—Petition for Declaratory Order,
S.T.B. 34444, 2004 WL 1802301 (Aug. 11, 2004) 3, 4

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

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

Shorelines Hearings Board Order

Millennium Bulk Terminals v. Cowlitz County Hearing Examiner,
Order on Motions, SHB No. 17-017c (April 20, 2018)..........8

Statutes

49 U.S.C. § 10101..........2

49 U.S.C. § 10501(b) 3, 7

RCW 43.21C.031(2)(f) 1

RCW 79.105 2

Regulation

WAC 197-11-060(4)(b) 2

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

Lighthouse Resources *et al.* (hereinafter "Millennium") have invoked this Court's federal jurisdiction to challenge several land-use and state lease-based decisions for its single project, despite the fact that Millennium is concurrently challenging those same denials before appropriate state courts and adjudicative boards. Plaintiff-intervenor BNSF, admittedly not part of the proposed coal export terminal, has joined the fray. Between Millennium and BNSF, they bring five claims, two alleging that separate federal statutes preempt all state and local permitting decisions for the port project and three alleging constitutional infirmities with the state and local permit and authorization denials. All these claims are baseless. Defendant-intervenors Washington Environmental Council *et al.* ("WEC") join with state defendants in their amended motion to dismiss the statutory preemption claims and abstain on the constitutional ones.[1]

BACKGROUND

Millennium Bulk Terminals-Longview sought permits from state and local jurisdictions to build a single coal export terminal on the banks of the Columbia River in Longview, Washington. As required under the State Environmental Policy Act ("SEPA"), Cowlitz County and the Washington Department of Ecology jointly conducted a full environmental and public health review that culminated in a Final Environmental Impact Statement ("FEIS") released in April 2017. SEPA mandates informational review of environmental and public health risks and harms of projects needing state or local permits. It requires review of all impacts caused by a particular project, even if they occur outside the state or otherwise outside the jurisdiction of the permitting agency. RCW 43.21C.031(2)(f) (SEPA guidelines for state agencies provides that all branches of state government shall "recognize the worldwide and long-range character of environmental

---

[1] WEC incorporates by reference the state defendants' brief and addresses the ICCTA statutory preemption claim in more detail below.

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

problems…"); WAC 197-11-060(4)(b) ("Content of environmental review. In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries."). The FEIS found nine areas of significant, adverse, and unavoidable harm from the proposed coal terminal; Millennium did not challenge or appeal the FEIS.

The Washington Department of Ecology, the Washington Department of Natural Resources ("DNR"), and the Cowlitz County Hearing Examiner have all denied permits or authorizations necessary under Washington state law to construct and operate the coal export terminal. Those denials are based on separate laws (Washington Shorelines Management Act,[2] Clean Water Act § 401, DNR authorizing statutes, *i.e.* RCW 79.105) as well as Washington's substantive SEPA authority.

ARGUMENT

The Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, does not preempt the state and local permits and associated environmental review for the Millennium terminal. Millennium is not a rail carrier and plainly not covered by the Act. That fact alone is dispositive of its preemption claims. As to BNSF, while it is a rail carrier, it is not part of this proposed terminal and does not need (and did not seek) any state or local permits that it could theoretically challenge. It does not own the land; it will not operate the project; it is not an agent for Millennium (nor is Millennium an agent of BNSF); and it has no control over the project. Although Millennium and BNSF blur the lines to create the impression that this case involves a rail transportation project, it does not. Indeed, the theory that non-rail carrier projects like Millennium that are served by rail effectively cannot be denied on state land-use and other

[2] Whatever else Cowlitz County intends to convey in its amicus brief, the County acknowledges that the County has "statutory authority over land use development approvals" under the Shorelines Management Act and that the County's duly delegated Hearing Examiner denied the requested shoreline permits. Cowlitz County Amicus Br. at 3-4.

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

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

regulatory grounds has been rejected by the Surface Transportation Board and the courts. This Court should dismiss the ICCTA preemption claims.

I. THE ICCTA DOES NOT PREEMPT STATE AND LOCAL PERMITTING REQUIREMENTS FOR THE MILLENNIUM COAL TERMINAL.

The various state and local regulatory decisions challenged by Millennium and BNSF do not violate the ICCTA, which gives the federal Surface Transportation Board exclusive jurisdiction over "transportation by rail carriers." *See Or. Coast Scenic RR v. Oregon Dep't of State Lands,* 841 F.3d 1069, 1072 (9th Cir. 2016) (ICCTA preemption applies only if regulated activity falls within Surface Transportation Board jurisdiction).

A. Millennium Is Not a Rail Carrier, and Its Project Does Not Fall under the Surface Transportation Board's Jurisdiction.

The ICCTA provides that the Surface Transportation Board has exclusive jurisdiction over "transportation by rail carriers…" 49 U.S.C. § 10501(b). The Board itself has reiterated that in order to fall under the ICCTA's preemption provision, the activity in question 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); *SEA-3, Inc.—Petition for Declaratory Order,* S.T.B. 35853, 2015 WL 1215490, at *3 (Mar. 16, 2015).

"Rail carrier" is a specific statutory term in the ICCTA; not every facility related to trains qualifies as a rail carrier. The Surface Transportation Board has held that "many shippers that own and operate locomotives and transloading facilities are not considered to be rail carriers under the [ICCTA]." *Town of Milford, Mass.—Petition for Declaratory Order,* S.T.B. 34444, 2004 WL 1802301 at *2 (Aug. 11, 2004). Whether activities at a transloading facility, like Millennium, are performed by a rail carrier depends upon many factors, including (1) the degree of the railroad's involvement in operations of the facility; (2) whether the railroad claims any agency or employment relationship with the facility; and (3) the degree of control retained by the

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

railroad over operations at the facility. *See City of Alexandria, Va.—Petition for Declaratory Order,* S.T.B. 35157, 2009 WL 381800 at *2 (Feb. 17, 2009); *Hi Tech Trans, LLC — Petition for Declaratory Order,* S.T.B. 34192, 2003 WL 21952136 at *3-4 (Aug. 14, 2003).

In *Hi Tech Trans, LLC,* the Surface Transportation Board examined a transloading facility operated by a third party on a railroad's property. *Hi Tech Trans, LLC — Petition for Declaratory Order,* S.T.B. 34192, 2003 WL 21952136 at *1 (Aug. 14, 2003). The Surface Transportation Board concluded that the railroad's involvement in the transloading facility was "minimal and insufficient to make [the operator's transloading] activities an integral part of [the railroad's] provision of transportation by rail carrier." *Id.* at *4. Rather, the operator was merely using the railroad's property to transload cargo—the railroad did not have any involvement otherwise in the project. Accordingly, state and local permits were not preempted. *Id.* at *5; *see also Town of Milford, Mass.—Petition for Declaratory Order,* S.T.B. 34444, 2004 WL 1802301 at *2-3 (Aug. 11, 2004). (Local permits not preempted where "[t]here was nothing on the record that establishes that [the terminal company] would be acting on behalf of [the railroad] or that [the railroad] would be offering its own services to customers directly.").

Similarly, in *SEA-3, Petition for Declaratory Order,* S.T.B. 35853, 2015 WL 1215490 at *3-4 (March 16, 2015), for example, the Surface Transportation Board denied a petition for a declaratory order that ICCTA preempted local permits for proposed construction at a liquefied petroleum gas transloading facility served by rail. While SEA-3 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 the fuel terminal company was not a rail carrier, nor acting under the auspices of a rail carrier. In short, the STB agreed that the local permitting statutes, and accompanying environmental review, applied to the project—even though it would be served by rail.

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

Accordingly, the Surface Transportation Board has found no federal preemption of state or local regulation of transloading facilities where the railroad had "no involvement in the operations of the facility," although the railroad owned the property but contracted with a third party to build and operate the transloading facility. *See Town of Babylon & Pinelawn Cemetery—Petition for Declaratory Order,* S.T.B. 35057, 2008 WL 275697, at *4 (Feb. 1, 2008). By contrast, a federal district court found that a transloading facility constructed by a railroad and operated by the railroad's contractor fell within the scope of the ICCTA, primarily because the railroad was holding itself out as providing the transloading services and the operator was providing services to the railroad so that the railroad could complete its transportation obligations. *Canadian Nat'l Ry. Co. v. Rockwood,* 2005 WL 1349077, at *6 (E.D. Mich. 2005).

Federal decisions that find preemption make it clear that such preemption applies to rail carriers only. In *City of Auburn v. United States,* 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit upheld the Surface Transportation Board's determination that County and City environmental permitting requirements <u>for a rail project directly regulated by the Board</u> were preempted. *Id.* at 1030-31. Similarly, in *Green Mountain R.R. Corp. v. Vermont,* 404 F.3d 638 (2d Cir. 2005), the appellate court found a substantive environmental land use permit process to be preempted when considering the proposed activities <u>of a rail carrier</u>. *Id.* at 642-43.

These cases reveal that state and local regulation is not preempted here because Millennium is not a rail carrier, nor is a rail carrier involved in the operations of the proposed coal terminal. There facts are indisputable. Millennium Complaint ¶¶ 16-20 (describing parties); BNSF Complaint ¶ 45 ("the BNSF rail system is not part of the Project…"); *see also* Opening Remarks of Dava Kaitala, BNSF, Exh. A-57 at 2 (Cowlitz County Shoreline Permit Proceedings, Nov. 2, 2017) ("[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.

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

1 Our rail system is not part of this project, and no permits are needed for BNSF.").[3]

2 Millennium and BNSF essentially assert that the state and local permits for this project are

3 preempted by ICCTA because there may be some incidental impact on rail transportation. But

4 that is not the standard. To the contrary, this argument has been rejected repeatedly. For

5 example, in a factual situation remarkably similar to the instant case, the Surface Transportation

6 Board rejected this argument in *Valero Refining Company—Petition for Declaratory Order,*

7 S.T.B. 36036, 2016 WL 5904757 (Sept. 20, 2016), finding "no preemption because the Planning

8 Commission's [denial] decision does not attempt to regulate transportation by a 'rail carrier.'"

9 The Board rejected Valero's argument that the City's denial of a land-use permit for a refinery to

10 build a facility to receive crude oil by train impermissibly interfered with the railroad:

11
12
13
14
> The 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.

15 *Id.* While the City's denial of Valero's Use Permit might have diminished an unspecified

16 prospective economic advantage to the railroad that would have served the facility, such a remote

17 or incidental effect on rail transportation did not qualify as rail regulation because Valero was not

18 a rail carrier. *See also Washington & Idaho Railway—Petition for Declaratory Order,* S.T.B.

19 36017, 2017 WL 1037370, *5 (Mar. 15, 2017) ("Federal preemption does not apply to a transload

20 facility, however, where the activities are not being performed by or on behalf of a rail carrier,

21 even if those activities fall 'within the broad definition of transportation.'").

22
23
24
25
26
[3] Available at http://www.co.cowlitz.wa.us/DocumentCenter/View/13481. All exhibits admitted before the Cowlitz County Hearing Examiner during the Shorelines permit proceedings are available online, and the Court may take judicial notice of them as they are directly related to this case. *See U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

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

B. There Is No Direct or Indirect Regulation of a Rail Carrier.

Even if the Millennium project did involve transportation by a rail carrier (which it does not), the state and local decision-makers' review of the rail-related effects of this project was not preempted by federal law, categorically or otherwise. As noted, the ICCTA expressly preempts state law related to the regulation of rail transportation. 49 U.S.C. § 10501(b). But that preemption, while broad, does not cover every action possibly connected to rail. "[B]oth courts and the [Surface Transportation Board] have limited the preemptive scope" of ICCTA. *Humboldt Baykeeper v. Union Pac. R.R. Co.,* 2010 WL 2179900, at *2 (N.D. Cal. 2010). Citing decisions from federal appellate courts, the *Humboldt Baykeeper* court reiterated that ICCTA preemption "applies only to state laws 'with respect to regulation of rail transportation.'" *Id.* ("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 is not preempted by the ICCTA). "The text of [the ICCTA], with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted." *Franks Inv. Co. LLC v. Union Pac. R.R.,* 593 F.3d 404, 410 (5th Cir. 2010) (emphasis added).

BNSF's attempt to cast any consideration of rail issues as "regulation" of a rail carrier fails to save its preemption claim. BNSF Complaint ¶¶ 92-95. The various state and local permitting decisions clearly 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.

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

As for "indirect" regulation, cases which found indirect regulation to be an issue involved vastly different facts not present here. In *Boston & Marine Corp. and Springfield Terminal Railroad Co.,* 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 indirectly and 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). Both these cases are inapplicable, as the permitting decisions at issue neither ban any rail traffic nor involved a rail carrier as part of the proposed project.

While the FEIS 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 SEPA review, as well as the project's failure to comply with the Shoreline Management Act and the Cowlitz County Shoreline Master Plan.[4] 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 FEIS. DNR's obligations as the steward r of Washington's state-owned aquatic lands required it to examine Millennium's request to

[4] On April 20, 2018, the Washington Shorelines Hearings Board affirmed the Cowlitz County Hearing Examiner's denial of Millennium's shorelines development permits. *Millennium Bulk Terminals v. Cowlitz County Hearing Examiner,* Order on Motions, SHB No. 17-017c (April 20, 2018), *available at* http://www.eluho.wa.gov/Global/RenderPDF?source=casedocument&id=2359.

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

1 sublease under the terms of the existing sublease, and, after doing so, DNR denied the request
2 because Millennium and Northwest Alloys (the lessee) had failed to provide requested financial
3 information and other information bearing on the suitability of Millennium as a subtenant.
4 * * *
5 The state and local permitting decisions challenged in this case do not apply to a rail
6 carrier, or even to a non-rail project that is controlled by a rail carrier. They do not directly or
7 indirectly seek to regulate or otherwise govern the use of rails. Instead, they are garden-variety
8 local land use permitting decisions that found that a large industrial project on the banks of the
9 Columbia River presented multiple threats to the health, safety, and welfare of the community and
10 the state as a whole. The ICCTA preemption claim should be dismissed.
11
12 CONCLUSION
13 For the reasons stated above and in state defendants' opening brief, WEC joins the state
14 defendants' motion to dismiss all statutory preemption claims under Fed. R. Civ. P. 12(b)(6) and
15 abstain on the remaining constitutional claims.
16
17 //
18
19 //
20
21
22 //
23
24 //
25
26

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

Respectfully submitted this 24th day of April, 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Bradley Bishop Jones	bjones@gth-law.com, dwilliams@gth-law.com, sstevens@gth-law.com
Edward David Callow	tedc@atg.wa.gov, RESOlyEF@atg.wa.gov
Harold Lee Overton	ecyolyef@atg.wa.gov, LeeO1@atg.wa.gov, TeresaT@atg.wa.gov
Jay C Johnson	jcjohnson@venable.com, dpace@venable.com
Kathryn Kusske Floyd	kkfloyd@venable.com, alcrawford@venable.com, dclitigationdocketing@venable.com, dpace@venable.com, krobisch@venable.com, mkfawal@venable.com
Laura J Watson	lauraw2@atg.wa.gov, daniellef@atg.wa.gov
Robert M McKenna	rmckenna@orrick.com, hbond@orrick.com, lpeterson@orrick.com
Thomas J Young	TomY@atg.wa.gov, ecyolyef@atg.wa.gov
Adam Nolan Tabor	atabor@orrick.com
James M. Lynch	Jim.lynch@klgates.com
Barry M. Hartman	Barry.hartman@klgates.com

Dated this 24th of April, 2018.

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

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