

HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as
Governor of the State of Washington; MAIA
BELLON, in her official capacity as Director
of the Washington Department of Ecology;
and HILARY S. FRANZ, in her official
capacity as Commissioner of Public Lands,

Defendants.

No. 3:18-cv-05005-RJB

STATES OF CALIFORNIA, MARYLAND,
NEW JERSEY, NEW YORK, and OREGON,
and the COMMONWEALTH OF
MASSACHUSETTS'S MOTION FOR
LEAVE TO FILE *AMICUS CURIAE*
BRIEF(S)

Note for Motion Calendar:
Friday, August 31, 2018

The States of California, Maryland, New Jersey, New York, and Oregon, and the Commonwealth of Massachusetts (together, Amici States) respectfully move the Court for leave to participate in this action as *amici curiae* on the dispositive motions now and soon to be before the Court. Amici States are familiar with and agree to abide by the directives set forth in the Court's Blanket Order on Amicus Curiae Briefs (Dkt. 103). At the Court's direction, the parties will address the issues raised in Plaintiffs' complaints in separate, sequential briefs. Attached as Exhibit A is the first of Amici States' proposed briefs in support of Defendants' motion for summary judgment on preemption issues. The Amici States' proposed brief

1 addresses Plaintiffs’ claims under the Interstate Commerce Commission Termination Act
2 (ICCTA) and Ports and Waterways Safety Act (PWSA).

3 Amici States have notified all parties, including intervenors, of their intention to seek
4 leave to participate as *amici curiae* in this matter going forward, including to file the attached
5 brief; each of them stated that they do not oppose this motion.

6 Broadly speaking, this action is about the scope of a state’s authority to exercise its
7 traditional police powers—which derive from the state’s status as a sovereign entity—to
8 safeguard public health, safety, and the environment. Plaintiff and Plaintiff-Intervenor’s claims
9 directly threaten these traditional and vital state functions. Indeed, Plaintiff and Plaintiff-
10 Intervenor’s claims, if accepted, would work a radical reformulation of longstanding-federalism
11 principles and cripple Amici States’ ability to perform discretionary land use functions and
12 thereby fulfill their “important responsibilities” to “protect[] the health, safety, and welfare of
13 [their] citizens.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S.
14 330, 342-43 (2007). As is their sovereign prerogative and responsibility, Amici States exercise
15 a broad range of regulatory powers within their jurisdictions to ensure the well-being of their
16 citizens, natural resources, infrastructure, institutions, and economies, among other things. *E.g.*,
17 *State of Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (States have significant
18 interests “independent of and behind the titles of [their] citizens, in all the earth and air within
19 [their] domain.”). While State authority is not unlimited, it is far broader than Plaintiff and
20 Plaintiff-Intervenor’s extreme legal theories suggest.

21 District courts have broad discretion to allow the participation of *amici curiae*.
22 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). As this Court has recognized, an *amicus*
23 is appropriate where the legal issues at bar “have potential ramifications beyond the parties
24 directly involved” or where “the amicus has ‘unique information or perspective that can help
25 the court beyond the help that the lawyers for the parties are able to provide.’” *Skokomish*
26 *Indian Tribe v. Goldmark*, 2013 WL 5720053, at *1 (W.D. Wash. 2013) (quoting *NGV Gaming,*
27 *Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). Both

1 conditions are met here. First, the core legal issues in this case have potentially broad
2 ramifications for state authority to regulate land-use and protect the environment: Plaintiffs ask
3 this Court to nullify the exercise of a sovereign entity's traditional police powers. The
4 resolution of the preemption questions at issue in this could serve as precedent in cases beyond
5 Washington State's borders and in other contexts and thereby potentially impact Amici States'
6 ability to protect consumers, their economies, and the public health and welfare in their states.

7 Second, coextensive with Amici States' significant interest in defending their traditional
8 police powers is their expertise with questions of federal preemption like those at issue in this
9 case. For example, with increased production from the Bakken shale formation and Canadian
10 tar sands, California has experienced an influx of proposals to develop terminals and facilities
11 capable of transloading and refining crude oil delivered by unit trains, raising issues under
12 ICCTA and the dormant commerce clause (the latter issue is reserved for later briefing). And,
13 like Longview, Washington in this case, localities in Oregon and California have been
14 identified as possible coal export-terminal sites, and development proposals have raised many
15 of the same arguments at issue here. Similar issues are also arising on the east coast. *Portland*
16 *Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321 (D. Me. 2017) (considering whether
17 federal law preempts or otherwise bars local ordinance regarding crude oil transloading
18 facility). Amici States similarly deal with issues arising under the PWSA and the protection of
19 coastal resources. *E.g.*, *United States v. Coalition for Buzzards Bay*, 644 F.3d 26 (1st Cir. 2011)
20 (invalidating federal PWSA regulation intended to preempt state law); *United States v. Mass.*,
21 493 F.3d 1, 8 (1st Cir. 2007) (remanding case to district court for consideration of whether
22 PWSA preempted state vessel-related laws).

23 In light of the foregoing, Amici States respectfully request that the Court grant them
24 leave to participate as *amicus curiae* in this matter and to file the accompanying brief in support
25 of Defendants' motion for summary judgment on preemption issues.

DATED: August 20, 2018

BRESKIN JOHNSON TOWNSEND, PLLC

By: s/ Roger Townsend
Roger Townsend, WSBA #25525
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Tel: (206)652-8660
rtownsend@bjtlegal.com

OF COUNSEL:

XAVIER BECERRA
ATTORNEY GENERAL OF CALIFORNIA

CHRISTIE VOSBURG
Supervising Deputy Attorney General
SCOTT J. LICHTIG*
Deputy Attorney General
ELIZABETH B. RUMSEY*
Deputy Attorney General
California Department of Justice
1300 I Street
Sacramento, California 94612
Tel: (916) 210-7815
scott.lichtig@doj.ca.gov
*Pro Hac Vice Pending

Attorneys for the State of California

(Add'l amici parties on following page)

1
2
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FOR THE STATE OF MARYLAND:

BRIAN E. FROSH
Attorney General
JOHN B. HOWARD, JR.
Special Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE STATE OF NEW JERSEY:

GURBIR S. GREWAL
Attorney General
LISA J. MORELLI
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625

FOR THE STATE OF OREGON:

ELLEN F. ROSENBLUM
Attorney General
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
General Counsel Division
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE COMMONWEALTH OF MASSACHUSETTS:

MAURA HEALEY
Attorney General
SETH SCHOFIELD
Senior Appellate Counsel
Assistant Attorney General
Energy and Environment Bureau
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2436

FOR THE STATE OF NEW YORK:

BARBARA D. UNDERWOOD
Attorney General
STEVEN C. WU
Deputy Solicitor General
JUDITH VALE
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this date I filed the foregoing document with the Clerk of the Court using the court’s ECF filing system which will automatically serve this filing on registered ECF users.

DATED August 20, 2018, at Seattle, Washington.

s/Leslie Boston
Leslie Boston

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EXHIBIT A

HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
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LIGHTHOUSE RESOURCES, INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
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STATES OF CALIFORNIA, MARYLAND,
NEW JERSEY, NEW YORK and OREGON,
and the COMMONWEALTH OF
MASSACHUSETTS'S AMICUS BRIEF IN
SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT ON
PREEMPTION ISSUES

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1 Amici, the States of California, Maryland, New Jersey, New York, and Oregon, and the
2 Commonwealth of Massachusetts (Amici States) respectfully submit the following amicus
3 curiae brief in support of Defendants Jay Inslee, in his official capacity as Governor of the State
4 of Washington; Maia Bellon, in her official capacity as Director of the Washington Department
5 of Ecology; and Hilary S. Franz, in her official capacity as Commissioner of Public Lands
6 (collectively, Washington).

7 I. AMICI STATES' INTEREST

8 Amici States, together with their political subdivisions, exercise a broad range of
9 regulatory police powers within their respective jurisdictions to protect the public health and
10 safety of their citizens and their natural environments. Amici States are charged with balancing
11 demands for economic growth and development, health and safety concerns, and the need to
12 preserve finite natural resources located within their borders. To this end, “[t]he States
13 traditionally have had great latitude under their police powers to legislate as to the protection of
14 the lives, limbs, health, comfort, and quiet of all persons.” *Met. Life Ins. Co. v. Mass.*, 471 U.S.
15 724, 756 (1985) (internal quotation marks omitted). Amici States’ regulatory responsibilities
16 are diverse, varying from ensuring water quality to preventing of the sale of contaminated foods
17 or drugs. They are charged with the stewardship of a broad range of environments, from
18 wilderness areas to urban centers, coastal wetlands to rural farmlands.

19 In the land use context, proposed development projects that Amici States and their local
20 governments review include residential subdivisions, commercial centers, recreational
21 developments and—as here—large-scale industrial facilities. The power of state, regional, and
22 local governments to regulate development to minimize projects’ adverse impacts on the
23 environment or the public health of their citizens has been recognized for generations. *See, e.g.,*
24 *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mugler v. Kansas*, 123 U.S. 623 (1887).
25 That power is as important as ever given burgeoning populations and the increasing complexity
26 of society and technology, in addition to our enhanced understanding of how humans impact the
27 environment and the consequences of those impacts on our own well-being.

1 The issues presented by this case are of fundamental importance to each of the states
 2 joining in this brief. A decision holding that federal law preempts or otherwise precludes
 3 Washington from considering environmental impacts of rail and vessel shipments that result
 4 directly from a project subject to state environmental and public health-protection regulations
 5 would impair the ability of states to carry out their police-power responsibilities. Plaintiffs’
 6 radical reformulation of historic police-power authority would cripple Amici States’ ability to
 7 perform discretionary land use functions and thus to fulfill their “important responsibilities” to
 8 “protect[] the health, safety, and welfare of [their] citizens.” *United Haulers Ass’n v. Oneida-
 9 Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007).

10 II. INTRODUCTION

11 To guide local land-use and other permitting decisions, many states have enacted laws
 12 that require public agencies to consider the environmental impacts of their actions—including
 13 discretionary permitting decisions like the ones at issue in this case¹—before they take those
 14 actions. Broadly speaking, the purpose of these and other laws of general applicability (e.g.,
 15 zoning ordinances) is to protect public health and safety and the states’ environment and natural
 16 resources for the benefit of present and future generations. It is Washington’s sovereign
 17 prerogative to take these measures pursuant to its well-established police powers. *See, e.g.*,
 18 *Euclid*, 272 U.S. at 386; *Mugler*, 8 S. Ct. 273, 282 (“The states have as complete power now, as
 19 ever, to so regulate the use of property within their limits that it shall not be made an instrument
 20 of injury to the public, but rather to promote the general welfare.”); *see also Huron Portland*

21
 22 ¹ As specifically relevant here, Washington’s State Environmental Policy Act (SEPA, Wash. Rev. Code § 43.21C)
 23 requires a study of a project’s anticipated environmental impacts to inform the decision-makers and the public of
 24 both the short-term and long-term effects of authorizing it. Several states require similar analyses of a project’s
 25 environmental impacts before taking discretionary actions, including California, under the California
 26 Environmental Quality Act (CEQA, Pub. Res. Code §§ 21000, *et seq.*); Massachusetts, under the Massachusetts
 27 Environmental Policy Act (MEPA, Mass. Gen. Laws ch. 30, §§ 61-62H); and New York, under the State
 Environmental Quality Review Act (SEQRA, Environmental Conservation Law Art. 8 and 6 NYCRR Part 617).
 The goal of laws like these is to “to alert the public and its responsible officials to environmental changes before
 they have reached ecological points of no return.” *Cleveland Nat’l Forest Found. v. San Diego Assn. of Govts.*, 3
 Cal. 5th 497, 503 (2017) (internal quotations and citations omitted). Even absent such laws, however, state and
 local authorities retain the authority to review a project’s impacts and exercise their discretionary land use authority
 to approve or deny a project.

1 *Cement*, 362 U.S. 440, 442 (1960), (“Legislation designed to free from pollution the very air
 2 that people breathe clearly falls within the exercise of even the most traditional concept of what
 3 is compendiously known as the police power.”) While the states have ceded certain of their
 4 sovereign powers to the federal government—including, to some extent, their ability to regulate
 5 rail and ship operations within their jurisdictions—the discretionary state and local land use
 6 authority at issue here is not among the ceded or preempted powers.

7 This amicus brief addresses two claims alleged by Plaintiff Lighthouse Resources, Inc.
 8 and its subsidiaries (collectively, Lighthouse), namely that Defendants’ “actions and inactions”
 9 are preempted by (1) the Interstate Commerce Commission Termination Act (ICCTA) and/or
 10 (2) the Ports and Waterways Safety Act (PWSA). See Dkt. 1-1, Lighthouse Compl. (hereinafter
 11 LH) ¶¶ 249-264. (Intervenor-Plaintiff Burlington Northern Santa Fe Railroad (BNSF) also
 12 alleges preemption under ICCTA, but not PWSA. Dkt. 22-1, BNSF Compl. (hereinafter BNSF)
 13 ¶¶ 90-98.) Neither claim has merit. ICCTA’s preemption provision does not apply to
 14 Lighthouse’s proposed Terminal, because ICCTA itself does not apply: Lighthouse is not a
 15 “rail carrier” under ICCTA.² *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir.
 16 2004). Similarly, PWSA also does not apply to preempt Washington’s actions, because
 17 Washington’s actions do not regulate PWSA-covered subjects, such as vessel design, operation,
 18 or safety equipment. *Ray v. Atlantic Richfield, Co.*, 435 U.S. 151, 168-69 (1978). Lighthouse
 19 and BNSF attempt to avoid these straightforward conclusions by asserting, among other things,
 20 that even if federal law does not preempt a state or local agency’s exercise of discretionary
 21 authority over a project or activity, federal law may nonetheless preempt such action if the state
 22 or local agency considers impacts arising from activities allegedly outside of its regulatory
 23 jurisdiction in the decision-making process. For reasons described below, Plaintiffs’ sweeping
 24 view of federal preemption over traditional state authority is inconsistent with federalism’s

25
 26
 27 ² The fact that BNSF, a rail carrier, is a plaintiff in this lawsuit, does not change the analysis. The only “rail carrier”
 status germane to the preemption inquiry is the project proponent’s, that is, Lighthouse’s.

1 respect for states' historic police powers exercised entirely within their sovereign domain and
2 must be rejected.

3 III. BACKGROUND

4 Lighthouse is a Utah-based coal corporation that operates a coal energy supply chain
5 company that in turn owns coal mines, extracts coal, sells coal, and transports coal directly to
6 customers. LH ¶¶ 16-20, 36. For the transport aspect of its operation, Lighthouse contracts
7 with various rail carriers, including BNSF.³ *Id.* ¶ 16. Unlike BNSF, Lighthouse itself is not a
8 rail carrier subject to applicable federal laws governing rail transportation, nor does it claim to
9 be. *Id.* ¶¶ 16-20.

10 Lighthouse proposes to construct a coal export facility known as Millennium Bulk
11 Terminal ("Terminal") on the edge of the Columbia River in Longview, Washington. *Id.* ¶ 8.
12 To build the Terminal, Lighthouse was required to obtain a number of land use and
13 environmental quality permits from local and state agencies, including a conditional use permit
14 from Cowlitz County (LH ¶ 179) and a water quality certificate from the Washington State
15 Department of Ecology. *Id.* ¶ 161. Lighthouse was required by federal, state, and local laws to
16 obtain such permits from these state and local entities, which had the discretion to deny them.

17 Before deciding whether to issue the required permits, Washington analyzed the
18 Terminal's anticipated impacts on public health and the environment. *Id.* ¶120. The resulting
19 Environmental Impact Statement (EIS) determined that the Terminal would create nine
20 different categories of unavoidable and significant adverse environment impacts that could not
21 be mitigated, including impacts related to onsite Terminal construction and operation as well as
22 impacts occurring offsite due to the substantial increase in vessel and train traffic. *See* Dkt.
23 130-1, Final EIS, § S.7. All nine of the significant and adverse environmental impacts
24 identified in the EIS directly affect Washington's environment and the public health and safety
25 of its citizens. Such effects include increased cancer risks from the Terminal's air quality

26
27 ³ It bears emphasis that BNSF is not the project proponent and was not the applicant for any of the permits at issue here. As BNSF itself states, "[N]o permits are required of BNSF for this Project." BNSF at ¶ 45.

1 impacts and a disproportionate environmental burden on the surrounding low-income, minority
2 communities. *Id.*

3 Based in part on the adverse impacts to Washington’s environment identified in the EIS,
4 state and local officials exercised their discretionary land use authority and denied the permits
5 for the Terminal. *See, e.g.*, LH ¶ 164 (water quality certification); ¶ 181 (conditional use
6 permit). In other state administrative and judicial proceedings, Lighthouse appealed the
7 agencies’ denial of those permits and other authorizations, but in this action Lighthouse and
8 BNSF allege more generally that Washington’s actions and inactions with respect to the permits
9 are preempted. *See, e.g.*, LH ¶¶ 251, 264; BNSF ¶ 92. State Amici here respond to those
10 assertions.

11 IV. ARGUMENT

12 Plaintiffs ask this Court to hold that ICCTA and PWSA preempt Washington from
13 denying Lighthouse’s permits on the basis of public health and environmental impacts
14 attributable to the considerable increase in rail and ships accessing the Terminal. But, as
15 explained below, neither ICCTA nor PWSA applies to Washington’s actions here, nor can they
16 be construed to do so, despite Plaintiffs’ best efforts. The states’ historic police powers, like the
17 ones at issue in this case, are “not to be superseded by [a federal law] . . . unless that [is] the
18 clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)
19 (quotations omitted). Here, there are no indicia that Congress “clearly” intended either ICCTA
20 or PWSA to preclude a state, in exercising its discretionary authority to permit a project within
21 its regulatory jurisdiction, from considering all of the project’s public health and environmental
22 impacts.

23 A. ICCTA Does Not Preempt the Agency Actions at Issue Here

24 1. ICCTA Applies To Preempt Local Regulation Only Where the Subject 25 Activity Is Undertaken by a Rail Carrier

26 As Washington and Intervenor-Defendant Washington Environmental Council, *et al.*
27 (WEC) have stated in their briefs to this Court, ICCTA does not apply to Lighthouse’s permit

1 applications because Lighthouse is not a rail carrier regulated exclusively by the Surface
 2 Transportation Board (STB). *See Valero Ref. Co.*, STB FD 36036, 2016 WL 5904757, at *4
 3 (Sept. 20, 2016) (no preemption where regulated entity is not a rail carrier, even where agency
 4 analyzed and considered rail-related impacts in its decision to deny project); *Tri-State Brick &*
 5 *Stone, Inc. and Tri-State Transp., Inc.*, STB FD 34824, 2006 WL 2329702, at *2 (Aug. 11,
 6 2006) (“The broad Federal preemption of 49 U.S.C. § 10501(b) does not apply to activities over
 7 which the Board does not have jurisdiction.”); *Hi Tech Trans, LLC*, STB FD 34192, 2003 WL
 8 21952136, at *4 (Aug. 14, 2003). In this case, that is the end of the analysis. Where ICCTA
 9 does not preempt a state or local agency’s permitting authority over a project, the agency has
 10 authority to consider all of the project’s impacts when exercising its police powers over land
 11 use decisions, including the indirect impacts associated with federally-regulated activities such
 12 as rail transportation. *Valero*, 2016 WL 5904757, at *4.

13 2. The Agencies’ Actions Are Not Otherwise Preempted

14 Notwithstanding that Lighthouse’s operation of the Terminal is not subject to STB
 15 jurisdiction, Lighthouse and BNSF assert alternative theories to support their argument that
 16 ICCTA preemption applies here. Specifically, they allege that Washington’s actions infringe on
 17 their supposed “right” to receive and/or provide common carrier service. Both parties also
 18 allege that Washington’s consideration of rail-related environmental impacts in exercising its
 19 discretionary permitting authority over Lighthouse’s Terminal has “the effect of managing or
 20 governing rail transportation.” LH at ¶ 253; BNSF at ¶ 95. For reasons discussed by
 21 Washington and WEC in their respective motions, and for the additional reasons set forth
 22 below, these arguments are unavailing.

23 a) *ICCTA Does Not Protect a Customer’s “Right” To Construct a Facility* 24 *That Would Enable It To Demand and Receive Rail Service*

25 Plaintiffs allege that ICCTA provides rail customers with a “right” to demand common
 26 carrier rail service, and that Washington’s actions interfere with that right. LH ¶¶ 250-51;
 27 BNSF ¶¶ 91-93. Plaintiffs further allege that Washington’s actions impair BNSF’s ability to

1 “provide common carrier service to Lighthouse” (LH ¶ 251; BNSF ¶ 92), implying that ICCTA
2 provides BNSF with a “right” to the increased market demand for its services that would be
3 created by Lighthouse’s construction of the Terminal. It does not, and these assertions
4 misconstrue the “rights” at issue in ICCTA.

5 ICCTA’s primary concern is a railroad’s ability to conduct STB-authorized operations,
6 including to meet shippers’ *existing* demand for rail services, as well as its obligation to provide
7 those services upon reasonable request. 49 U.S.C. § 11101(a). But *creating* demand for such
8 rail carrier services is not a concern of the statute, and ICCTA certainly does not give rise to or
9 protect a rail carrier’s “right” to profit from such expanded customer demand, as Plaintiffs
10 suggest. And to the extent ICCTA is concerned with a non-carrier shipper’s ability to demand
11 and receive rail services from those rail carriers, it in no way extends to a “right” for any rail
12 customer to construct infrastructure to receive additional rail service. Indeed, there is a well-
13 established distinction between: (1) ICCTA’s preemption of state and local regulation of STB-
14 authorized rail transportation, provided by rail carriers; and (2) the not-preempted police power-
15 authority state and local jurisdictions retain over the thousands of rail customers simply
16 receiving goods delivered by rail. *See, e.g., Fla. E. Coast Ry. Co. v. City of West Palm Beach*,
17 266 F.3d 1324, 1331 (11th Cir. 2001) (“[E]xpress pre-emption applies only to state laws ‘with
18 respect to *regulation* of rail transportation.’ 49 U.S.C. § 10501(b). ... This necessarily means
19 something qualitatively different from laws ‘with respect to rail transportation.’”) (citing
20 *Bennett v. Spear*, 520 U.S. 154, 173 (1997)). Under Plaintiffs’ logic, ICCTA would preempt
21 state and local discretionary permitting authority over *any* project undertaken by an entity that
22 intended to have goods delivered by rail. It does not. *See, e.g., Valero*, 2016 WL 5904757, at
23 *3 (facility proposed by non-rail carrier was not subject to STB jurisdiction, so ICCTA
24 preemption did not apply, despite the fact that the facility would rely on rail).

1 ***b) Defendants' Actions Are a Permissible Exercise of Defendants' Police Power***

2 Lighthouse and BNSF alternatively assert that Defendants' actions and inactions with
3 respect to the Terminal are preempted because they "have the effect of managing or governing
4 rail transportation." LH ¶ 252; BNSF ¶ 93. But Washington's decision not to authorize
5 Lighthouse's Terminal is well within the scope of its police powers and has no impermissible
6 impact on rail operations.

7 ICCTA preemption applies only to "state laws that may reasonably be said to have the
8 effect of managing or governing rail transportation, ... while permitting continued application
9 of laws having a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry. Co.*,
10 266 F.3d at 1331 (internal citations omitted). BNSF's efforts to establish that Washington's
11 decision not to authorize Lighthouse's Terminal has the effect of managing or governing its rail
12 operations fall flat. It alleges, for example, that "[c]ustomers would use BNSF's existing
13 railroad system to deliver up to eight unit trains (i.e., rail cars that carry the same commodity)
14 per day from their operations in Montana and Wyoming to the Terminal for export to Asia."
15 BNSF ¶ 43. All that such allegations might establish is that Washington's actions will have an
16 adverse impact on some prospective economic advantage that might result from increased
17 demand for BNSF's rail carrier services, but that does not transmute Washington's actions to
18 "regulation" or "management" of rail operations. *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1331
19 (no "regulation" where statute "alters the incentives, but does not dictate the choices" of the
20 federally regulated entity) (citing *Cal. Div. of Labor Standards Enforcement v. Dillingham*
21 *Constr. N.A.*, 519 U.S. 316, 334 (1997)). Such an impact is, at most, "a more remote or
22 incidental effect" that does not trigger preemption. *Id.* at 1331; *see also Town of Milford, Ma.*,
23 STB FD 34444, 2004 WL 1802301, at *3 (Aug. 11, 2004) (where rail carrier's involvement
24 ended when it delivered loaded rail cars to the offloading facility, the facility's "planned
25 activities would not be considered integrally related to ... rail carrier service.") Lighthouse and
26 BNSF's allegations are thus insufficient to establish that Washington's decision to deny the
27 authorization of a coal company's offloading facility, over which BNSF will have no

1 operational or ownership control, has the effect of “managing or governing” BNSF’s STB-
2 authorized rail operations.

3 This is true regardless of the basis for Washington’s decision to deny Lighthouse’s
4 permits, and the entire premise of Plaintiffs’ argument—namely that ICCTA preempts
5 Washington from denying the Terminal for one reason but not another—is illogical. The proper
6 focus of the preemption analysis in these circumstances is the *actual impact* of Washington’s
7 action on rail transportation, and the nature of such impact, not the agency’s intent in taking that
8 action. Plaintiffs acknowledge that ICCTA does not preempt Washington’s discretionary
9 permitting authority over the Terminal altogether, and once it has been established—as it has
10 here—that Washington is not preempted from deciding to deny permits necessary for the
11 Terminal’s construction, there is no basis for arguing that denying the permits for one reason
12 has any greater impact on rail carriers than denying it for another. *Fla. E. Coast Ry. Co.*, 266
13 F.3d at 1331 (no preemption where a local ordinance of general applicability was “not
14 sufficiently linked to rules governing the operation of the railroad”).

15 **B. Washington’s Actions Are Not Preempted by PWSA**

16 Equally unavailing is the claim made by Lighthouse that PWSA preempts Washington’s
17 denial of the Terminal permits. In particular, Lighthouse alleges that PWSA preempts
18 Washington from analyzing significant environmental impacts to state waters from vessels
19 related to the Terminal and considering those impacts when exercising its discretionary land use
20 authority. Nothing in PWSA supports such a sweeping view of federal preemption of the
21 historic local power over the siting of ports and related facilities. Quite the opposite; Congress
22 made clear in the PWSA that state and local authorities maintained an important role in
23 regulating certain aspects of ports and waterways. *Ray v. Atlantic Richfield, Co.*, 435 U.S. 151,
24 168–69 (1978). In fact, with regard to onshore “structures” like Lighthouse’s Terminal, the
25 PWSA explicitly allows state and local authorities to prescribe higher safety requirements and
26 standards than those at the federal level. 33 U.S.C. § 1225(b).

1 **1. The PWSA Does Not Establish a “Right” for Lighthouse To Receive Vessel Service**

2 Like its ICCTA argument, Lighthouse’s PWSA preemption claim is predicated on the
3 misguided assumption that the PWSA provides a coal company with a “right” to receive vessel
4 service at the newly-constructed Terminal. LH ¶ 258. The PWSA provides no such right.
5 Rather, its focus is establishing traffic safety regulations and uniform federal design and
6 equipment standards for subject vessels. *United States v. Locke*, 529 U.S. 89, 101 (2000). It is
7 agnostic as to the number of terminal facilities in operation, and nothing in the statute or its
8 legislative history indicates that its goal is to maintain or increase the market for vessel services.
9 *See Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 437-438 (D. Me.
10 2017) (The PWSA does not preempt local authority to ban terminals from loading crude oil
11 onto tanker vessels in city harbor to protect the public health and environment.) Instead, the
12 PWSA authorizes (and in some cases directs) the U.S. Coast Guard to ensure that certain
13 vessels that engage in maritime commerce do so safely. *See generally* 33 U.S.C. § 1221
14 (setting forth the PWSA’s “Statement of Policy”).

15 **2. Washington’s Denial of Lighthouse’s Permits Did Not Regulate Vessels**

16 Washington has not engaged in any regulatory action that implicates the PWSA. Here,
17 as explained above, Washington analyzed the potential direct and indirect environmental
18 consequences of approving the Terminal’s construction (as state law required it to do) and
19 found that the Terminal would attract vessels that would have a significant and unavoidable
20 environmental impact on the state’s water quality. The PWSA does not preempt this analysis
21 nor Washington’s subsequent decision to deny Lighthouse’s permit application, because
22 Washington’s actions simply do not regulate vessel traffic and safety issues in any way. *See*
23 *Beveridge v. Lewis*, 939 F.2d 859, 865 (9th Cir. 1991) (holding that the PWSA did not preempt
24 local ordinance that restricted vessel mooring and anchorage in specified area, because, among
25 other reasons, the ordinance did not concern safety standards for vessels).

1 Washington’s denial of the Terminal permit is not prohibited under either the PWSA’s
2 Title I or Title II preemption standards.⁴ Lighthouse conflates Washington’s consideration of
3 the environmental impacts due to increased vessels traversing state waters with the
4 establishment of actual standards for the operation of those vessels, which is the focus of PWSA
5 preemption. *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 500 (9th Cir. 1984)
6 (reviewing PWSA legislative history and finding that while uniform design and construction
7 standards are matters for national attention, “environmental regulation, on the other hand, has
8 long been regarded by the Court as particularly suited to local regulation.”) Unlike the
9 establishment of vessel operation standards, Washington’s analysis neither contains technical
10 specifications nor mandates additional safety equipment. After Washington decided not to
11 authorize the Terminal’s construction, the same ships continued to use the Columbia River
12 exactly as they did before.

13 **V. CONCLUSION**

14 For the foregoing reasons, Washington’s decision not to authorize Lighthouse’s
15 Terminal was a valid exercise of its police power and neither ICCTA nor the PWSA interfere
16 with that authority here. Nor do those statutes circumscribe the scope of impacts Washington
17 can consider in exercising its authority.

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26 ⁴ The U.S. Supreme Court has established separate preemption analysis for Title I and Title II of the Act: “conflict
27 preemption applies to state regulations within the scope of Title I,” which concerns local vessel traffic, and “[f]ield
preemption applies to state law on subjects within the province of Title II,” which concerns, inter alia, vessel design
and equipment standards. *See United States v. Mass.*, 493 F.3d 1, 8 (1st Cir. 2007).

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3 BRESKIN JOHNSON TOWNSEND, PLLC

4 By: s/ Roger Townsend
5 Roger Townsend, WSBA #25525
6 1000 Second Avenue, Suite 3670
7 Seattle, WA 98104
8 Tel: (206)652-8660
9 rtownsend@bjtlegal.com

10 OF COUNSEL:

11 XAVIER BECERRA
12 ATTORNEY GENERAL OF CALIFORNIA

13 CHRISTIE VOSBURG
14 Supervising Deputy Attorney General
15 SCOTT J. LICHTIG*
16 Deputy Attorney General
17 ELIZABETH B. RUMSEY*
18 Deputy Attorney General
19 California Department of Justice
20 1300 I Street
21 Sacramento, California 94612
22 Tel: (916) 210-7815
23 scott.lichtig@doj.ca.gov
24 *Pro Hac Vice Pending

25 *Attorneys for the State of California*

26
27 (Add'l amici parties on following page)

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27

FOR THE STATE OF MARYLAND:

BRIAN E. FROSH
Attorney General
JOHN B. HOWARD, JR.
Special Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
(410) 576-6427

FOR THE STATE OF NEW JERSEY:

GURBIR S. GREWAL
Attorney General
LISA J. MORELLI
Deputy Attorney General
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625

FOR THE STATE OF OREGON:

ELLEN F. ROSENBLUM
Attorney General
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
STEVE NOVICK
Special Assistant Attorney General
Natural Resources Section
General Counsel Division
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE COMMONWEALTH OF MASSACHUSETTS:

MAURA HEALEY
Attorney General
SETH SCHOFIELD
Senior Appellate Counsel
Assistant Attorney General
Energy and Environment Bureau
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2436

FOR THE STATE OF NEW YORK:

BARBARA D. UNDERWOOD
Attorney General
STEVEN C. WU
Deputy Solicitor General
JUDITH VALE
Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

CERTIFICATE OF SERVICE

I hereby certify that on this date I filed the foregoing document with the Clerk of the Court using the court's ECF filing system which will automatically serve the filing on registered ECF users.

DATED August 20, 2018, at Seattle, Washington.

s/Lealie Boston
Leslie Boston

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