

1 HONORABLE ROBERT J. BRYAN  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

9 LIGHHOUSE RESOURCES, INC.;  
10 LIGHHOUSE PRODUCTS, LLC; LHR  
11 INFRASTRUCTURE, LLC; LHR COAL,  
12 LLC; and MILLENNIUM BULK  
13 TERMINALS-LONGVIEW, LLC,

14 Plaintiffs,  
15 v.  
16

17 JAY INSLEE, in his official capacity as  
18 Governor of the State of Washington; MAIA  
19 BELLON, in her official capacity as Director  
20 of the Washington Department of Ecology;  
21 and HILARY S. FRANZ, in her official  
22 capacity as Commissioner of Public Lands,  
23

24 Defendants.

25 No. 3:18-cv-05005-RJB

26 STATES OF CALIFORNIA, MARYLAND,  
27 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

19 The States of California, Maryland, New Jersey, New York, and Oregon, and the  
20 Commonwealth of Massachusetts (together, Amici States) respectfully move the Court for leave  
21 to participate in this action as *amicus curiae* on the dispositive motions now and soon to be  
22 before the Court. Amici States are familiar with and agree to abide by the directives set forth in  
23 the Court's Blanket Order on Amicus Curiae Briefs (Dkt. 103). At the Court's direction, the  
24 parties will address the issues raised in Plaintiffs' complaints in separate, sequential briefs.  
25 Attached as Exhibit A is the first of Amici States' proposed briefs in support of Defendants'  
26 motion for summary judgment on preemption issues. The Amici States' proposed brief  
27

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.

1 DATED: August 20, 2018  
2

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## **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

# EXHIBIT A

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18 Defendants.  
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No. 3:18-cv-05005-RJB

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).

## 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 case<sup>1</sup>—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       

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<sup>1</sup> As specifically relevant here, Washington's State Environmental Policy Act (SEPA, Wash. Rev. Code § 43.21C) requires a study of a project's anticipated environmental impacts to inform the decision-makers and the public of both the short-term and long-term effects of authorizing it. Several states require similar analyses of a project's environmental impacts before taking discretionary actions, including California, under the California Environmental Quality Act (CEQA, Pub. Res. Code §§ 21000, *et seq.*); Massachusetts, under the Massachusetts 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.<sup>2</sup> *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

26  
 27 <sup>2</sup> 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.<sup>3</sup> *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 <sup>3</sup> 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.

## 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.

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

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

As Washington and Intervenor-Defendant Washington Environmental Council, *et al.* (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).

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

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

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

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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.<sup>4</sup> 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 <sup>4</sup> 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).

DATED: August 20, 2018

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## **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/*Leslie Boston*  
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