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4 **BEFORE THE STATE OF WASHINGTON**
5 **ENERGY FACILITY SITE EVALUATION COUNCIL**

6 In the Matter of:
7 Application No. 2013-01

8 TESORO SAVAGE, LLC

9 VANCOUVER ENERGY
10 DISTRIBUTION TERMINAL

CASE NO. 15-001

PORT OF VANCOUVER USA'S MOTION
FOR PARTIAL SUMMARY JUDGMENT
RE: PREEMPTION

11 **I. RELIEF REQUESTED**

12 Pursuant to the Council's February 3, 2016, *Order Clarifying EFSEC's Process,*
13 *Modifying Dispositive Motion Deadline, Summarizing Preliminary Issues, and Setting*
14 *Hearing Dates*, the Port of Vancouver USA ("Port" or "POV") moves for partial summary
15 judgment on the following jurisdictional issues:

- 16 **A. Does EFSEC have jurisdiction to address issues concerning rail**
17 **transportation or to impose mitigation for impacts associated with**
18 **rail transportation?**
- 19 **B. Does federal law preempt EFSEC from regulating any aspect of**
20 **the Vancouver Energy Distribution Terminal (the "VEDT") with**
21 **regard to rail transportation?**
- 22 **C. Does EFSEC have jurisdiction to address issues concerning**
23 **marine vessel transportation or to impose mitigation for impacts**
24 **associated with marine vessel transportation?**
- 25 **D. Does federal law preempt EFSEC from regulating any aspect of**
26 **the VEDT with regard to marine vessel transportation?**¹

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¹ February 3, 2016, *Order Clarifying EFSEC's Process, Modifying Dispositive Motion Deadline, Summarizing Preliminary Issues, and Setting Hearing Dates*, at 2.

PORT OF VANCOUVER USA'S MOTION FOR
PARTIAL SUMMARY JUDGMENT RE:
PREEMPTION - 1

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1 The Port's motion is based on the Council's Order and Civil Rules 56(d) and 16(b), to
2 address issues in the case that should be deemed established in advance of the Adjudication.

3 **II. STATEMENT OF FACTS**

4 The Port of Vancouver USA ("POV" or "Port") is a 104-year-old independent public
5 agency with a mission of providing economic benefit to our community through leadership,
6 stewardship and partnership in marine, industrial and waterfront development. Declaration
7 of Todd M. Coleman in Support of The Port of Vancouver USA's Motion for Partial
8 Summary Judgment ("Coleman Decl."), ¶ 4. The Port was formed more than a century ago
9 to ensure that prime industrial and marine property on the waterfront was retained for public
10 economic benefit. True to its mission, today the Port serves as landlord for more than 1,500
11 acres with the primary purpose of marine and industrial development, and Port tenants and
12 customers move more than 6 million metric tons of goods each year. Coleman Decl., ¶ 5.

13 From a global perspective, POV is a link in one of the most efficient shipping
14 connections between the Midcontinent and the Pacific Rim. This deep-water inland port
15 features four miles of waterfront, is served by two rail carriers and two interstates, and offers
16 two of North America's largest mobile harbor cranes. Coleman Decl., ¶ 6

17 POV is not a container port, which is a port equipped to handle containerized cargo.
18 Rather, POV specializes in transport of bulk commodities and transport of large high-value
19 items like wind turbines and motor vehicles. Coleman Decl., ¶ 7. For example, 10 percent
20 of the nation's wheat harvest moves through the Port. The Port also handles large volumes
21 of steel and scrap metal, corn, soybeans, copper, fertilizers, and petroleum products such as
22 diesel and jet fuel. *Id.*

23 One of the Port's major areas of focus is improving the flow of freight through the
24 Port. Coleman Decl., ¶ 8. Railroad traffic comes to the Port from sources across North
25 America, served by BNSF Railway, Union Pacific Railroad, Canadian National Railroad
26 and Canadian Pacific Railroad. *Id.* Vessels that call at the Port primarily carry cargo up and

1 down the west coast and to Asian ports. *Id.* The West Vancouver Freight Access (“WVFA”)
2 rail project, a 10-year, \$275 million investment that increases the Port’s internal track miles
3 from about 16 to more than 50, is expected to reduce congestion on the Interstate 5 and Great
4 Northern Corridor routes by as much as 40 percent, and will allow full unit trains carrying a
5 single product to be handled within the Port. Coleman Decl., ¶ 9. The VEDT, a project the
6 Port expects will generate a \$22 million, one-time payment in state and local taxes during
7 construction, and \$7.8 million in tax revenue annually, once fully operational, is just one of
8 the Port’s tenants that will take advantage of the WVFA improvements and the Port’s deep-
9 water marine terminal. Coleman Decl., ¶ 10.

10 Current and future Port tenants and customers using rail and vessel transportation will
11 benefit from the Port’s improved rail-to-vessel facilities, regardless of commodity. Coleman
12 Decl., ¶ 11. The Port and its tenants would be at a competitive disadvantage if conditions
13 were imposed on railroad operations or Columbia River vessel traffic under the Energy
14 Facility Site Locations Act that are inconsistent with the uniform and comprehensive federal
15 regulation of rail and vessel traffic. Coleman Decl., ¶ 12. For that reason, the Port seeks a
16 determination, as a matter of law, that federal law expressly preempts the Council’s
17 imposition of conditions in a site certification agreement that impact railroad or Columbia
18 River vessel traffic.

19 **III. LAW AND LEGAL ARGUMENT**

20 **A. Preemption Is an Issue of Law Subject to Summary Judgment**

21 Summary judgment is appropriate “if the pleadings, depositions, answers to
22 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
23 no genuine issue as to any material fact and that the moving party is entitled to a judgment as
24 a matter of law.” *Atherton Condominium Apartment-Owners Ass’n Bd. of Dirs. v. Blume*
25 *Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990), quoting CR 56(c).
26

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1 The summary judgment procedure is designed to eliminate trial if only questions of
2 law remain for resolution, so it is appropriate when the only controversy to be adjudicated
3 involves the meaning of statutes, and neither party contests the facts relevant to a legal
4 determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d
5 443 (1990), *rev. den.*, 117 Wn.2d 1004 (1991). Whether the application of a state law is
6 preempted is a question of law properly decided on summary judgment. *Berger v. Personal*
7 *Products, Inc.*, 115 Wn.2d 267, 275, 797 P.2d 1148 (1990); *see, also, Veit*, 171 Wn.2d at 99;
8 *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 233 P.3d 861 (2010).

10 **B. The Interplay Between the Energy Facility Site Locations Act**
11 **and Federal Law**

12 The Energy Facility Site Locations Act (“EFSLA” or “Act”) governs the location,
13 construction, and operational conditions of energy facilities in Washington. *Residents*
14 *Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wn.2d
15 275, 284-285, 197 P.3d 1153 (2008). The Act is intended “to ensure through available and
16 reasonable methods, that the location and operation of such facilities will produce minimal
17 adverse effects on the environment, ecology of the land and its wildlife, and the ecology of
18 state waters and their aquatic life.” RCW 80.50.010.

19 If the Energy Facility Site Evaluation Council (“EFSEC”) recommends that the
20 governor approve an application to construct a facility, it must provide a draft site
21 certification agreement to the governor. RCW 80.50.100(2). “The council shall include
22 conditions in the draft certification agreement to implement the provisions of this chapter,
23 including, but not limited to, conditions to protect state or local governmental or community
24 interests affected by the construction or operation of the energy facility. . . .” *Id.* The
25 council’s authority to impose conditions is not unlimited, however; it is subject to the
26 specific delegation of authority from the Washington legislature, RCW 80.50.040(2);

1 Washington is itself limited in what power it has to delegate.

2 “Under the preemption doctrine, states are deemed powerless to apply their own law
3 due to restraints deliberately imposed by federal legislation.” *Alverado v. Wash. Pub. Power*
4 *Supply Sys.*, 111 Wn.2d 424, 430-31, 759 P.2d 427 (1988); U.S. Const. art. VI (federal law is
5 the “supreme law of the land”). Congress may preempt local law by explicitly defining the
6 extent to which its enactments preempt laws (express preemption), where the federal
7 government intends to exclusively occupy a field (field preemption), and where it is
8 impossible to comply with both state and federal law (conflict preemption). *Veit v.*
9 *Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99-100, 249 P.3d 607 (2011); *Campbell v.*
10 *Dep’t of Soc. & Health Servs.*, 150 Wn.2d 881, 897, 83 P.3d 999 (2004).

11 Conflict preemption operates where (1) “compliance with both federal and state
12 regulations is a physical impossibility,” or (2) where state law “stands as an obstacle to the
13 accomplishment and execution of the full purposes and objectives of Congress.” *Gade v.*
14 *National Solid Wastes Management Ass’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d
15 73 (1992) (internal citations omitted). Conflict preemption analysis involves an initial
16 inquiry into whether federal authority has been exercised through a regulation intended to
17 displace state law, or by a federal decision that there should be no regulation of the subject in
18 question. *United States v. Massachusetts*, 493 F.3d 1, 8 (2007) (citing *United States v.*
19 *Locke*, 529 U.S. 89, 109-110, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)).

20 Whenever there is a conflict between state law and federal laws and regulations, the
21 state law must fail. *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937). Congress has
22 expressly preempted state law as it pertains to the regulation of transportation by rail carriers,
23 *City of Auburn v. Surface Transportation Board*, 154 F.3d 1025, 1029 (9th Cir. 1998), and
24 maritime vessels. *Locke*, 529 U.S. 89; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978);
25 *Kelly v. Washington ex rel Foss Co.*, 302 U.S. 1 (1937); *Moran v. New Orleans*, 112 U.S. 69
26 (1884); *Sinnot v. Daveport*, 63 U.S. (22 How.) 227 (1859); *Gibbons v. Ogden*, 22 U.S. (9

1 Wheat.) 1 (1824).

2 Those express preemptions preclude the Council's including conditions in a site
3 certification agreement that would impact railroad operational requirements, or impose
4 conditions on Columbia River vessel traffic.

5 **1. Federal Law Governs Railroad Operations Nationwide**

6 Congress and the federal courts long have recognized a need to regulate railroad
7 operations at the federal level. *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir.
8 1998). Congress's authority under the Commerce Clause to regulate the railroads is well
9 established, *see, e.g., Houston, E. & W. Tex. Ry. v. United States*, 234 U.S. 342, 350-52, 58
10 L. Ed. 1341, 34 S. Ct. 833 (1914); *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives'*
11 *Ass'n*, 491 U.S. 490, 510, 105 L. Ed. 2d 415, 109 S. Ct. 2584 (1989), and the Supreme Court
12 repeatedly has recognized the preclusive effect of federal legislation in this area. *See, e.g.,*
13 *Colorado v. United States*, 271 U.S. 153, 165-66, 70 L. Ed. 878, 46 S. Ct. 452 (1926) (ICC
14 abandonment authority is plenary and exclusive); *Transit Comm'n v. United States*, 289 U.S.
15 121, 127-28, 77 L. Ed. 1075, 53 S. Ct. 536 (1933) (ICC authority over interstate rail
16 construction is exclusive); *City of Chicago v. Atchison, T. & S. F. Ry.*, 357 U.S. 77, 88-89,
17 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958) (local authorities have no power to regulate interstate
18 rail passengers).

19 The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), which, as amended, still
20 governs federal regulation of railroads, has been recognized as "among the most pervasive
21 and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo*
22 *Brick & Tile Co.*, 450 U.S. 311, 318, 67 L. Ed. 2d 258, 101 S. Ct. 1124 (1981).

23 Section 10501 of the Interstate Commerce Commission Termination Act ("ICCTA"),
24 which governs the Surface Transportation Board's ("STB") jurisdiction, states the STB will
25 have exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or
26 discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the

1 tracks are located, or intended to be located, entirely in one State.” 49 U.S.C. §10501(b).

2 The same section states that “the remedies provided under this part with respect to regulation
3 of rail transportation are exclusive and preempt the remedies provided under Federal or State
4 law.” *Id.*

5 The *City of Auburn* case, which involved BNSF Railroad’s plans to re-open
6 Stampede Pass to rail traffic, demonstrates how ICCTA preempts Washington state and local
7 laws. Auburn was among several municipalities challenging the STB’s conclusion that state
8 and local environmental review laws were preempted by the ICCTA and, therefore,
9 prohibited the City’s environmental review of the proposed project. The City contended that
10 the ICCTA was intended to preempt only state and local economic regulation of railroads,
11 and that the traditional police powers of state and local governments, including
12 environmental regulation, are not preempted. The 9th Circuit rejected Auburn’s argument,
13 finding that there was no evidence that Congress intended any role under the ICCTA for
14 local regulation of railroads, in any fashion:

15 [G]iven the broad language of § 10501(b) (2), (granting the
16 STB exclusive jurisdiction over construction, acquisition,
17 operation, abandonment, or discontinuance of rail lines) the
18 distinction between ‘economic’ and ‘environmental’
19 regulation begins to blur. For if local authorities have the
20 ability to impose ‘environmental’ permitting regulations on
21 the railroad, such power will in fact amount to ‘economic
22 regulation’ if the carrier is prevented from constructing,
23 acquiring, operating, abandoning, or discontinuing a line.

24 *City of Auburn*, 154 F.3d at 1031.

25 The ICCTA preempts remedies under state and federal law that seek directly to
26 regulate rail operations. *See, e.g., Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622
F.3d 1094, 1098 (9th Cir. 2010) (local government rules regulating locomotive idling
preempted). Section 10501(b) also preempts state and federal laws of general application,
like environmental laws, that have the effect of regulating rail transportation. *City of
Auburn*, 154 F.3d at 1031 (STB’s exclusive jurisdiction over railroad operations precludes

1 Ecology’s use of SEPA process to modify railroad infrastructure or operations); *see, also,*
2 *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005) (enforcement of
3 Vermont’s environmental land use statute preempted in connection with a railroad’s
4 construction of a transloading facility); *Guild v. Kan. City S. Ry. Co.*, 541 F. App’x. 362,
5 2013 U.S. App. LEXIS 18730 (5th Cir. 2013) (attempt to compel railroad to add a switch
6 seeks to regulate rail conduct and is preempted).

7 The ICCTA vests in STB “exclusive jurisdiction” over transportation by rail carriers
8 and the construction and operation of rail facilities. 49 U.S.C. § 10501(b). This express
9 preemption prevents state or local agencies from imposing conditions to mitigate impacts
10 arising from the rail system.

11 The issues that are raised in this adjudication related to conditions which may be
12 imposed on railroad operations in a site certification agreement were clearly “placed by
13 Congress within the jurisdiction of an administrative body having regulatory authority,”
14 *Syntek*, 307 F.3d at 781—*i.e.*, the STB. For that reason, the Council has no authority to
15 impose conditions in a site certification agreement that has the effect of regulating railroad
16 operations. Issues A and B in the Council’s February 3, 2016, Order must be answered in the
17 negative.

18 **2. Federal Law Governs Vessel Traffic on the Columbia River**

19 The “authority of Congress to regulate interstate navigation, without embarrassment
20 from intervention of the separate States and resulting difficulties with foreign nations, was
21 cited in the Federalist Papers as one of the reasons for adopting the Constitution.” *Locke*,
22 529 U.S. at 99.

23 As with railroad regulations, federal courts consistently have upheld and reinforced
24 the preemptive effect of federal regulations for maritime vessels. *Locke*, 529 U.S. 89
25 (striking down Washington laws regulating oil tanker design, equipment, reporting, and
26 operating requirements); *Ray*, 435 U.S. 151 (striking down portions of a Washington law

1 regulating the design, size, and movement of oil tankers on Puget Sound); *Kelly v.*
2 *Washington ex rel Foss Co.*, 302 U.S. 1 (1937); *Moran v. New Orleans*, 112 U.S. 69 (1884);
3 *Sinnot v. Daveport*, 63 U.S. (22 How.) 227 (1859); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1
4 (1824). “The federal acts and regulations with respect to vessels on the navigable waters of
5 the United States are elaborate.” *Kelly*, 302 U.S. at 4.

6 Congress has bestowed broad authority, including the authority to preempt state law,
7 upon the Coast Guard. The “power delegated to the [Coast Guard] plainly comprises
8 authority to regulate” vessels navigating in United States waterways. *Capital Cities Cable,*
9 *Inc. v. Crisp*, 467 U.S. 691, 699, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984).

10 Congress has also granted to the Coast Guard broad authority to promulgate
11 regulations to control vessel traffic, to enhance vessel safety and to decrease environmental
12 hazards. *United States v. Massachusetts*, 724 F. Supp. 2d 170, 181 (D. Mass. 2008). When
13 the Coast Guard makes a determination not to impose a regulation, this may amount to a
14 decision that no regulation at either the state or federal level is appropriate. *See Ark. Elec.*
15 *Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384, 103 S. Ct. 1905, 76 L. Ed. 2d 1
16 (1983); *Ray*, 435 U.S. at 171-72.

17 Federal regulations have no less preemptive effect than federal statutes, and agency
18 regulations may preempt state regulation expressly or by implication. *Massachusetts*, 724 F.
19 Supp.2d at 180 (Coast Guard regulations regarding oil or other hazardous material preempt
20 state’s enhanced tug escort and vessel manning provisions); *see also Hillsborough County v.*
21 *Automated Med. Labs, Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)
22 (“We have held repeatedly that state laws can be pre-empted by federal regulations as well as
23 by federal statutes.”); *Capital Cities Cable*, 467 U.S. at 699.

24 The issues that are raised in this adjudication related to conditions which may be
25 imposed in a site certification agreement on Columbia River vessel traffic “to control vessel
26 traffic, to enhance vessel safety and to decrease environmental hazards” are preempted by

1 federal law. *See Massachusetts*, 724 F. Supp. 2d at 181. Issues C and D in the Council's
2 February 3, 2016, Order must be answered in the negative.

3 **IV. CONCLUSION**

4 The United States Supreme Court has twice struck down, as preempted, Washington
5 laws which sought to regulate (among other things) equipment and operating requirements of
6 vessels engaged in interstate commerce through Washington waters. The 9th Circuit Court of
7 appeals similarly has rejected the City of Auburn, Washington's efforts to enforce its police
8 powers (*e.g.*, environmental regulation) over railroad operations. Federal law preempts the
9 Council's imposition of conditions in a site certification agreement that that have the effect
10 of regulating railroad or Columbia River vessel traffic. The Port's Motion for Partial
11 Summary Judgment Re: Preemption should be granted.

12 Dated this 29th day of March, 2016.

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 29th day of March, 2016, I served the following PORT
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4 PREEMPTION on:

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