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7 **BEFORE THE STATE OF WASHINGTON**  
8 **ENERGY FACILITY SITE EVALUATION COUNCIL**

9 In the Matter of:  
10 Application No. 2013-01

11 TESORO SAVAGE, LLC  
12 VANCOUVER ENERGY DISTRIBUTION  
13 TERMINAL

CASE NO. 15-001

**POST-HEARING BRIEF OF  
THE DEPARTMENT OF  
NATURAL RESOURCES**

14 The Department of Natural Resources (DNR), by and through its attorneys,  
15 ROBERT W. FERGUSON, Attorney General, and TERENCE A. PRUIT, Assistant Attorney  
16 General, files its post-hearing brief to focus the attention of the Council on the significant  
17 additional risk of wildfire presented by Vancouver Energy's proposal to build a crude oil  
18 transloading terminal and explain why the Council is not prohibited from incorporating  
19 evaluation of that risk into its recommendation on the application to site the facility.

20 **I. DISCUSSION OF THE EVIDENCE PRESENTED**

21 Vancouver Energy asks EFSEC to recommend approval of its application to locate a  
22 crude oil transloading facility along the Columbia River at the Port of Vancouver (the  
23 Proposal). Once completed, the facility would receive on average 360,000 barrels of crude oil  
24 every day. Ex-0001-000216-PCE. To deliver that volume of crude oil would require an  
25 average of four trains per day, each carrying up to 120 fully loaded tank cars the length of  
26 Washington through cities and over lands from Spokane to Vancouver. Ex-0004-000094-PCE.

1 The crude oil unit trains necessary for the Proposal will travel through some of the most  
2 fire-prone areas of Washington where railroad operations regularly ignite wildfires. Heat and  
3 sparks from train traffic and railroad maintenance have been associated with a number of  
4 wildfires in the recent past. As Robert Johnson testified, railroad operations in Washington  
5 State have ignited 21 wildfires in Washington since 2011. Hearing Transcript, Volume 14  
6 (July 19, 2016), Testimony of Robert Johnson (R. Johnson Dir.) at 3396-97. Even in the  
7 absence of the Proposal, wildfires in recent years have strained the state's wildfire suppression  
8 resources. The 2014 and 2015 fire seasons were the worst in state history. Fires in 2015 burned  
9 over 1 million acres of land, destroyed hundreds of homes, and took the lives of three  
10 firefighters. Pre-filed Direct Testimony of Robert Johnson (May 12, 2016) (R. Johnson  
11 Pre. Dir.) 2:12-17. As response needs far outpaced resources, DNR sought assistance from as  
12 far away as New Zealand. R. Johnson Dir. 3395:1-13. Overall response costs to the fires in  
13 2015 alone approached \$340,000,000. *Id.* at 3395:14-22.

14 Given the availability of firefighting resources in recent fire seasons, even an  
15 incremental increase in wildfire ignitions caused by daily rail operations associated with the  
16 Proposal presents a significant risk. It is axiomatic that adequate fire response depends on the  
17 availability of response resources and that resources that are already committed will not be  
18 available to combat additional fires. Had the June 3, 2016, derailment fire in Mosier occurred a  
19 month later, for example, local fire response resources would not have been available because  
20 they were already engaged in fighting a 300-acre wildfire. Hearing Transcript, Volume 10  
21 (July 12, 2016), Testimony of Jim Appleton (Appleton Dir.) at 2316-17.

22 Apart from the risk presented by daily rail operations, regular derailments of trains  
23 associated with the Proposal will expose the state to an additional and significant wildfire risk.  
24 Of the 24 derailments that NTSB Investigator Robert Chipkevich identified between 2006 and  
25 2015, 20 led to a tank car fire. Pre-filed Direct Testimony of Robert Chipkevich (May 9, 2016)  
26 (Chipkevich Pre. Dir.) 18:11-18. A burning tank car presents an obvious wildfire ignition

1 source particularly in areas where just a spark from a passing train can ignite a fire. That risk is  
2 exacerbated by the protocol for fighting tank car fires. R. Johnson Dir. at 3402. Wildfires are  
3 typically fought aggressively to prevent the fire from spreading. *Id.* Tank car fires, on the other  
4 hand, are fought more passively. Appleton Dir. at 2320-21; Hearing Transcript, Volume 12  
5 (July 14, 2016), Testimony of Joseph Molina (Molina Dir.) at 2739-41. Tank car fires are often  
6 allowed to burn for hours while a safe perimeter is established and foam can be applied to  
7 extinguish the fire. *Id.* Following that protocol, the tank car fire from the Mosier derailment on  
8 June 3, 2016, burned for 14 hours before foam was applied. *Id.* Thus, even if resources are  
9 available for a timely response, a tank car fire presents a significant potential wildfire ignition  
10 source because it will be allowed to burn.

11 Wildfires associated with the Proposal present a particular concern in the Columbia  
12 River Gorge. As noted by Robert Johnson, wildfires in the Columbia River Gorge can spread  
13 quickly driven by the high winds common there. R. Johnson Dir. 3393:14-25. Wind can  
14 accelerate the speed at which a fire spreads along the ground and carry sparks that ignite  
15 additional fires, sometimes at great distances. *Id.* at 3390:1-11. Fire also travels faster up steep  
16 slopes, which are commonplace in the Gorge. *Id.* at 3390:15-25; Molina Dir. at 2742-43.  
17 A derailment near the town of Wishram in the Gorge in 2003, for example, sparked a fire that,  
18 blown by high winds, quickly grew to 800 acres within a matter of hours. R. Johnson Dir.  
19 at 3400. The absence of wind during the tank car fire in Mosier on June 3, 2016, was notable.  
20 As Mosier's Fire Chief Jim Appleton pointed out, given the location of the derailment near a  
21 school, a mobile home park, and the City's water treatment plant, had the wind been blowing  
22 as it typically does in the Gorge, the consequences of the fire would have been far worse.  
23 Appleton Dir. 2332-33.

24 The trains carrying the crude oil for the proposed facility will derail frequently. Even  
25 Vancouver Energy's own expert estimates that a fully loaded train associated with the Proposal  
26 will derail in Washington once every 2.4 years. Ex-0123000004-TSS. Because Vancouver

1 Energy's estimate fails to account for the return trips for trains following delivery and the  
2 unique features of crude oil unit trains and the terrain through which they would travel in  
3 Washington, even the significant number of derailments it projects falls short. Estimates of  
4 future derailment rates such as Vancouver Energy's that rely on national freight train  
5 derailment data, Ex-0123-000007-TSS, may underestimate the potential for derailment of  
6 crude oil unit trains generally. Unit trains are more challenging to control and stop than other  
7 types of trains. As noted by the U.S. Department of Transportation's Pipeline and Hazardous  
8 Materials Safety Administration (PHMSA),

9       The trains are longer, heavier in total, more challenging to control, and can  
10       produce considerably higher buff and draft forces, which affect train stability.  
11       In addition, these trains can be more challenging to slow down or stop, can be  
12       more prone to derailments when put in emergency braking, and the loaded tank  
13       cars are stiffer and do not react well to track warp which when combined with  
14       high buff/draft forces can increase the risk of derailments.

15 Ex 5547-000024-CRK (PHMSA 2014 Draft Regulatory Impact Analysis).

16       Vancouver Energy also fails to account for local conditions that may increase the  
17 likelihood of unit train derailments within Washington. As noted by Assistant State Geologist  
18 Timothy Walsh "[a] reliable derailment probability analysis is not possible without an adequate  
19 landslide hazard analysis." Pre-filed Direct Testimony of Timothy Walsh (May 13, 2016)  
20 (Walsh Pre. Dir.) 3:13-14. Landslides lead to derailments by hitting trains, forcing trains to  
21 stop suddenly, and by damaging tracks. *Id.* at 3:11-13. Thus, landslides may present a  
22 particular risk to unit trains because, as pointed out by PHMSA, the trains are more difficult to  
23 control and stop. The Columbia River Gorge, which contains a significant part of the rail line  
24 associated with the Proposal, has been among the most landslide-prone areas in the state in the  
25 recent past. Walsh Pre. Dir. 3:1-5. As pointed out by Mr. Walsh, a recent study by United  
26 States Geological Survey geologists in the Western Columbia River Gorge, "landslides are  
more numerous and complex than previously mapped." *Id.* at 5:16-17. Thus, Vancouver  
Energy's derailment probability analysis not only fails to account for the unique features of

1 | crude-oil unit trains, which make them more difficult to control and stop, it also fails to address  
2 | local conditions where the trains will travel that exacerbate those unique risks of derailment.

3 |         Frequent derailments will have adverse and potentially disastrous consequences for  
4 | Washington. Former NTSB Investigator Robert Chipkevich identified 24 derailments in the  
5 | nine-year period between 2006 and 2015 in which an ethanol or crude oil unit train derailment  
6 | resulted in a significant release. Chipkevich Pre. Dir. 12:4-22. The average release per incident  
7 | in those cases was 270,775 gallons, an amount equivalent to 30 gasoline tank trucks. *Id.* at  
8 | 13:12-15. The costs, including emergency response, property damage, cleanup, and  
9 | remediation, related to even average-sized spills associated with crude-by-rail derailments will  
10 | be significant. PHMSA puts the costs associated with spills from derailments at approximately  
11 | \$300 per gallon spilled. Thus, even a limited spill of 83,602 gallons would cost in the range of  
12 | \$25 million. Ex 5547-000034-CRK. PHMSA data indicates releases on that scale can be  
13 | expected to occur regularly.<sup>1</sup>

14 |         Of even greater concern is the potential for catastrophic loss associated with crude oil  
15 | unit train derailments. The derailment of a runaway crude oil unit train in Lac Mégantic,  
16 | Quebec, in July 2013 took the lives of 47 people and destroyed the city's downtown core.  
17 | Ex 5547-000037-CRK. Estimates of the costs to clean up, remediate, and rebuild the town ran  
18 | upwards of \$2.5 billion. *Id.* The potential for a tragedy of such magnitude to recur should not  
19 | be discounted. As PHMSA points out, the severity of harm caused by a derailment is linked to  
20 | the quantity of spilled crude and the geography, environmental sensitivity, and population  
21 | density in the vicinity of the derailment. *Id.* at 39. The 19-car derailment in Cherry Valley,  
22 | Illinois, in 2009 that killed one person and caused \$7.9 million in property damage, for  
23 | example, would have been far worse on both those fronts had it occurred in Chicago. *Id.* at 38.

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24 |         <sup>1</sup> PHMSA identified 40 derailments of crude or ethanol unit trains between 2006 and 2013 that resulted  
25 | in spills and, while acknowledging its data may underestimate spill volumes, PHMSA found the average spill to  
26 | be 83,602 gallons. Ex 5547-000025-CRK. Given Mr. Chipkevich's testimony and PHMSA data on spills related  
to derailments, Vancouver Energy's estimates of probable spill volumes appear questionable. *Cf.*  
Ex 123-0000004-TSS.

1 Similarly, as PHMSA points out, severe consequences such as those seen in Lac Mégantic  
2 could be experienced in areas where population densities are higher, even if a derailment  
3 occurs at lower speeds and involves fewer cars than in Lac Mégantic. *Id.* at 39-42.

4 PHMSA's analysis rings particularly true along the rail route in Washington which  
5 takes crude oil unit trains through several population centers, including Spokane, the  
6 Tri-Cities, and Vancouver and areas of high environmental value including the Columbia River  
7 Gorge. The maximum foreseeable loss associated with a derailment and associated crude oil  
8 fire within the City of Vancouver, for example, has been estimated to be in the range of  
9 \$5-6 billion. Pre-filed Direct Testimony of Robert Blackburn (May 10, 2016) (Blackburn  
10 Pre. Dir.) 7:12-20. The Columbia River would take nearly nine years to recover from a  
11 worst-case spill associated with a derailment, with damages reaching nearly \$85 million.  
12 Pre-filed Direct Testimony of James Holmes (May 12, 2016) (Holmes Pre. Dir.) 9:3-18. The  
13 potential for higher consequence events are of particular concern because of questions  
14 concerning the volatility of the Bakken crude which would be shipped to Vancouver Energy's  
15 facility. In general, "Bakken crude oil is much more volatile than other types of crude."  
16 Chipkevich Pre. Dir. at 18:14-16, quoting Congressional Research Service, *U.S. Rail*  
17 *Transportation of Crude Oil: Background and Issues for Congress* (December 4, 2014).

## 18 II. ARGUMENT

19 EFSEC has a duty to ensure that the proposed energy facility does not threaten the  
20 safety and welfare of Washington's citizens or cause more than minimal environmental harm.  
21 As fully explained below, based on the potential for catastrophic loss associated with siting the  
22 Proposal and the uncertainty surrounding how often catastrophe will occur, EFSEC cannot  
23 recommend certification of the Proposal and fulfil its duty to provide assurance that public  
24 welfare and safety and the environment are adequately protected. In the event that EFSEC  
25 chooses to recommend certification of the application, conditions in the site certification  
26

1 | agreement should be included to ensure Vancouver Energy provides adequate fire response  
2 | resources at every point along the rail route.

3 |       As further explained below, EFSEC's duty to provide assurance to the citizens of the  
4 | state that the Proposal would adequately protect their safety and welfare and the environment  
5 | does not depend on whether the Proposal's risks flow from federally regulated rail  
6 | transportation. Because Vancouver Energy is not a rail carrier and EFSEC's decision on its  
7 | Proposal would not implicitly manage or govern rail transportation, EFSEC is not preempted  
8 | from weighing all the impacts of the Proposal in its recommendation on the application.

9 | **A.     EFSEC Must Take the Significant Risks Associated With Transportation of**  
10 | **Crude By Rail to the Facility Into Account In Making Its Recommendation.**

11 |       When creating EFSEC, the State recognized that the selection of sites for energy  
12 | facilities "will have a significant impact on the welfare of the population." RCW 80.50.010.  
13 | As a result, RCW 80.50.010 directs EFSEC to assure the citizens of the state that operational  
14 | safeguards associated with an energy facility proposal are "technically sufficient for their  
15 | welfare and protection" and to ensure "that the location and operation of such facilities will  
16 | produce minimal adverse effects on the environment." RCW 80.50.010.

17 |       By rule, EFSEC has recognized that the policy directives in RCW 80.50.010 to protect  
18 | public health, safety and the environment are not merely aspirational but bind EFSEC's  
19 | decision making. WAC 463-14-020 ("In acting upon any application for certification, the  
20 | council action will be based on the policies and premises set forth in RCW 80.50.010 . . .").  
21 | Accordingly, EFSEC must recommend denial in cases where an application for certification  
22 | does not provide a sufficient level of certainty that public safety and welfare and the  
23 | environment will be protected. *See, e.g., N. Tier Pipeline Co.*, EFSEC Order 636 at 477-78,  
24 | 485 (January 27, 1982) ("On balance, it is not possible for the Council to determine that the  
25 | projected benefits of the proposed facility will outweigh the projected risks to the environment,  
26 | health, welfare, and safety of the people of this state."). This is just such a case.

1 If built, the proposed terminal would require daily transportation of up to  
2 360,000 barrels of crude oil through communities and over lands from Spokane to Vancouver  
3 and all points along the rail lines in-between.<sup>2</sup> Unless and until the significant concerns  
4 associated with the transportation of crude oil by rail are addressed, EFSEC will be unable to  
5 provide assurance to the public that the safeguards associated with the Proposal are sufficient  
6 for public welfare and protection or that the Proposal will have minimal adverse effects on the  
7 environment.

8 State firefighters are not prepared to address additional wildfires associated with  
9 transportation with crude oil by rail as part of the Proposal. Vancouver Energy's Proposal  
10 comes at a time when firefighting resources have just recently been demonstrated inadequate to  
11 address the existing wildfire threat. Accordingly, in the event EFSEC is inclined to recommend  
12 approval, any cite certification agreement should include conditions to ensure adequate training  
13 and resources for firefighting agencies all along the delivery route associated with the Proposal,  
14 given the current wildfire risk as demonstrated in recent years. In his pre-filed direct testimony,  
15 Robert Johnson identifies several such conditions. Mr. Johnson states specialized responders  
16 should be located at the proposed facility and along the rail delivery route to the degree  
17 necessary to implement an immediate and effective response to a fire associated with a  
18 derailment and associated crude oil fire. To that end, the project proponent should be required  
19 to ensure that qualified teams are available for an immediate response for an incident anywhere  
20 along the rail delivery route, including the facility itself. In addressing staff levels, EFSEC  
21 should take into consideration the availability of state wildfire response resources on a  
22 year-round basis and the potential impact to state firefighting resources should more  
23 rail-initiated fires start during fire season, when any response would take resources away from  
24 other fires.

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25 <sup>2</sup> At 42 gallons per barrel, 360,000 barrels would be 15,120,000 gallons per day, the equivalent of 1,680  
26 gasoline tanker trucks of crude per day. Chipkevich Pre Dir. 14:18 (a tanker truck holds 9,000 gallons).

1 EFSEC should also take into account the need to maintain adequate foam and water for  
2 fire response all along the rail line. Rapid response is critical to combating oil fires associated  
3 with derailments. DOT regulations require that tank cars be manufactured to withstand an oil  
4 pool fire for at least 100 minutes without failure. 49 C.F.R. § 179. As demonstrated in Mosier,  
5 the typical response to a tank car fire calls for significant quantities of water to be sprayed on  
6 tank cars involved in a fire until foam can be applied effectively. In Mosier, significant  
7 quantities of water were needed as foam was not applied until 14 hours after the fire began. The  
8 availability of sufficient water to combat a tank car fire is thus a particularly important factor.<sup>3</sup>  
9 Given the critical first 100-minute window for an adequate response to a derailment with a  
10 crude oil fire, if issuance of a site certification agreement is recommended, the draft agreement  
11 should ensure the necessary foam, water, and other resources are available to provide adequate  
12 response to a fire associated with a derailment at every point in the rail corridor.

13 Conditions in a draft site certification agreement, if issued, that relate to fire response  
14 resources should be based on adequate derailment probability analysis. As noted by Assistant  
15 State Geologist Timothy Walsh, an adequate assessment of the derailment probability is not  
16 possible without an adequate analysis of landslide risk, particularly in the Columbia River  
17 Gorge. Accordingly, in the event EFSEC recommends approval, EFSEC should require the  
18 Applicant to use available Lidar and aerial photography to adequately identify the landslide  
19 risk within the Columbia River Gorge and incorporate the risk into a derailment probability  
20 analysis that also accounts for the unique features of crude oil unit trains that make them more  
21 difficult to control and stop.

22 As noted in DNR's Pre-Hearing Brief, however, wildfire risk is just one of many  
23 significant concerns that have been raised about the transportation of the large volumes of  
24 crude oil by rail that the Proposal would require. As noted by PHMSA, even if derailments  
25 occur at lower speeds and involve fewer cars than in the Lac Mégantic disaster, the same

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26 <sup>3</sup> See Molina Dir. 2739-41.

1 catastrophic consequences are possible where population densities are higher than those in Lac  
2 Mégantic, as they are in many Washington cities along the rail route. The evidence establishes  
3 the maximum foreseeable loss associated with a derailment and associated crude oil fire within  
4 those communities is in the range of \$5-6 billion. Moreover, damages from a worst-case spill  
5 into the Columbia River would likely exceed \$84 million and ecosystems would take nearly a  
6 decade to fully recover.

7 Based on all the evidence presented, DNR's position following the month-long  
8 adjudication remains the same as it was at its outset. Because of the potential for tremendous  
9 catastrophic loss associated with shipment of crude by rail, and the difficulty in adequately  
10 assessing the frequency at which disasters will occur, EFSEC simply cannot provide adequate  
11 assurance in a draft site certification agreement that the safeguards associated with the  
12 Proposal are "technically sufficient for [public] welfare and protection" or ensure "that the  
13 location and operation of such facilities will produce minimal adverse effects on the  
14 environment" as required by RCW 80.50.010. Thus, the evidence as a whole compels the  
15 conclusion that the application for site certification should be denied.

16 **B. EFSEC Is Not Preempted From Recommending Denial or Conditional Approval**  
17 **of the Application Based on the Impacts Related to Siting the Proposed Facility in**  
18 **Vancouver Including Impacts Related to Transportation of Crude by Rail to the**  
19 **Facility.**

20 In its June 6, 2016, *Order Denying Tesoro Savage, LLC and Port of Vancouver*  
21 *Dispositive Motions*, EFSEC correctly rejected the arguments of Vancouver Energy and the  
22 Port of Vancouver that it was preempted from considering the impacts of rail transportation as  
23 part of the adjudication. The Order left the door open, however, for EFSEC to "determine the  
24 extent of its authority" following the presentation of evidence during the adjudication.  
25 Order at 5. As explained below, because Vancouver Energy is not a rail carrier and denial of  
26 the application or approval with conditions on Vancouver Energy would not implicitly govern  
or regulate rail transportation, neither the Interstate Commerce Commission Termination Act

1 (ICCTA), 49 U.S.C. §§ 10101 et seq., nor Federal Railroad Safety Act of 1970 (FRSA)  
2 49 U.S.C. §§ 20101 et. seq., preclude EFSEC from doing its duty to either ensure the Proposal  
3 is sufficiently safe or deny the application.

4 **1. The ICCTA Does Not Preempt EFSEC's Authority to Evaluate Impacts of**  
5 **the Proposal That Flow From Rail Transportation.**

6 When addressing a preemption argument, EFSEC should not lightly assume that  
7 Congress has preempted state law, but should address preemption claims with the presumption  
8 that Congress did not intend to supplant state law. *Medtronic, Inc. v. Lohr*. 518 U.S. 470, 485,  
9 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) ("we start with the assumption that the historic  
10 police powers of the States were not to be superseded by the Federal Act unless that was the  
11 clear and manifest purpose of Congress.") (citations omitted). Preemption can be either express  
12 or implied. *All-Pure Chemical Co.*, 127 Wn.2d 1, 6-7, 896 P.2d 697 (1995). However,  
13 preemption will not be implied when there is an express preemption provision unless the  
14 provision does not reliably indicate congressional intent. *Id.* at 7 (citing to *Cipollone v. Liggett*  
15 *Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407, 423 (1992)). Accordingly, as  
16 the ICCTA contains an express preemption, EFSEC should not presume that the ICCTA  
17 preemption is more expansive than provided for in the express provision. The ICCTA  
18 provides:

19 The jurisdiction of the [Surface Transportation] Board over:

20 (1) transportation by rail carriers, and the remedies provided in this part  
21 with respect to rates, classification, rules (including car service, interchange,  
22 and other operating rules), practices, routes, services and facilities of such  
23 carriers; and

23 (2) the construction, acquisition, operation, abandonment, or  
24 discontinuance of spur, industrial, team, switching, or sides tracks, or facilities,  
25 even if the tracks are located, or intended to be located, entirely in one state, is  
26 exclusive. Except as otherwise provided in this part, *the remedies provided*  
*under this part with respect to regulation of rail transportation are exclusive*  
*and preempt the remedies provided under Federal or State law.*

49 U.S.C. § 10501(b) (emphasis added).

1 As provided in the language of the statute, the express preemption of the ICCTA  
2 “applies only to state laws ‘with respect to *regulation* of rail transportation.’” *Florida East*  
3 *Coast Ry. Co. v. City of West Palm Beach*, 266 F. 3d 1324, 1331 (11th Cir. 2001) (emphasis in  
4 original). Use of the word “regulation” indicates that Congress intended something very  
5 different than preemption of all law that may encompass consideration of rail transportation.  
6 *Id.* The ICCTA preemption provision is “narrowly tailored” so that only state laws that may  
7 reasonably be construed to manage or govern rail transportation are displaced. *Id.*; *Ass’n of*  
8 *Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). “Generally  
9 speaking, ICCTA does not preempt state or local laws if they are laws of general applicability  
10 that do not unreasonably interfere with interstate commerce.” *Ass’n of Am. R.R.*, 622 F.3d  
11 at 1097.

12 In this case, EFSEC’s evaluation of health, safety, and environmental impacts along the  
13 rail route does not burden railroad activity. EFSEC’s governing statutes and regulations that  
14 require consideration impacts to the environment and public health, safety, and welfare are  
15 generally applicable. *See, e.g.*, RCW 80.50.010; 80.50.040(2); WAC 463-14-020 (EFSEC must  
16 ensure “the location and operation of such facilities will produce minimal adverse effects on  
17 the environment, ecology of the land and its wildlife, and the ecology of state waters and their  
18 aquatic life.”). Such laws and regulations do not target rail carriers or purport to authorize  
19 imposition of mitigation that would regulate railroads. Here, Vancouver Energy is not a rail  
20 carrier and its proposed transloading facility is not transportation by rail for purposes of the  
21 ICCTA. Where, as here, the law in question is generally applicable, and is applied not to  
22 transportation by rail or a rail carrier but to a decision on the site for a non-rail business, it is  
23 difficult to conceive how the law could be construed as regulation of transportation by rail.

24 Cases that have found state laws to be categorically preempted depend on direct  
25 regulation of transportation by rail, rail carriers, or matters directly regulated by the STB.  
26 *Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (Courts

1 and STB have recognized categorical preemption of regulations that “could be used to deny a  
2 railroad the ability to conduct some part of its operations or to proceed with activities that the  
3 [STB] has authorized and . . . regulation of matters directly regulated by the [STB].”) (citations omitted). In *City of Auburn*, for example, the Ninth Circuit found that the Surface  
4 Transportation Board properly preempted the application of local environmental permitting  
5 laws to the federal decision to re-open a railroad line in Western Washington. *City of Auburn*  
6 *v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998). Here, Vancouver Energy is not seeking  
7 to re-open a rail line, an operation the ICCTA makes expressly subject to the exclusive  
8 jurisdiction of the federal STB. Instead, Vancouver Energy seeks EFSEC’s recommendation  
9 for certification of its plans for a crude oil transloading facility, which is neither owned nor  
10 operated by a rail carrier. Under such circumstances, EFSEC’s evaluation of health, safety,  
11 and environmental impacts associated with such plans cannot reasonably be construed to  
12 manage or govern rail transportation such that it would be categorically preempted.<sup>4</sup>

14 Generally applicable state laws may also be preempted as applied if they impose an  
15 unreasonable burden on railroading or discriminate against railroads. *Adrian & Blissfield R.R.*  
16 *Co.*, 550 F.3d at 541. State laws thus may not burden railroading by preventing railroads from  
17 “carrying out railroad business in sensible fashion” or be so indefinite that they could cause  
18 “open ended delays” in rail transportation. *Id.* To avoid discrimination against railroads, state  
19 laws “must address state concerns generally, without targeting the railroad industry.” *Id.* Here,  
20 the requirement under RCW 80.50.010 that EFSEC assure the citizens of the state that the  
21 safeguards associated with an application to site an energy facility are sufficient for their  
22 welfare and protection does not target railroads—it applies to any energy facility siting

23 <sup>4</sup> *Green Mountain Railroad v. Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005), is also illustrative. There,  
24 application of state law to facilities owned by a railroad over which the STB had jurisdiction was preempted. The  
25 court found that the facilities were “integral to the railroad’s operation and are easily encompassed within the  
26 Transportation Board’s exclusive jurisdiction over ‘rail transportation.’” *Id.* at 644. As in *Green Mountain Railroad* and *City of Auburn*, *Norfolk Southern Railway v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), and *CSX Transportation, Inc.*, 2005 WL 1024490, involved direct regulation of a facility owned by a railroad company and operated under its auspices.

1 application—and does not prevent railroads from carrying out their business. If it were true  
2 that impermissible impacts on doing business as a railroad could arise from local siting  
3 decisions about the construction of a new non-railroad facility by a non-railroad business at a  
4 particular location, virtually any local authority over siting facilities might be preempted—a  
5 new facility could be sited anywhere, even in the heart of a residential neighborhood, without  
6 consideration of the local impacts of bringing trains to the site. But, fortunately, that is not the  
7 case. *See City of West Palm Beach*, 266 F. 3d at 1332 (“in no way does federal preemption  
8 under the ICCTA mandate that municipalities allow any private entity to operate in a  
9 residentially zoned area simply because the entity is under a lease from the railroad”).<sup>5</sup>

10 While denial of an application to site a new non-railroad business at a particular  
11 location may have prospective economic consequences for a railroad, “state actions are not  
12 preempted merely because they reduce the profits of a railroad.” *Adrian & Blissfield R.R. Co.*,  
13 550 F.3d at 541. Because EFSEC’s siting recommendation applies only to Vancouver Energy’s  
14 application, it could not bind a railroad or affect the manner in which it conducts railroad  
15 business. That local siting decisions for new non-railroad businesses which may be future  
16 customers of the railroad may have incidental impacts on prospective railroad profit is not a  
17 basis for preemption under the ICCTA. *Cf. Adrian & Blissfield R.R. Co.*, 550 F.3d at 541 (costs  
18 “are ‘incidental’ when they are subordinate outlays that all firms build into the cost of doing  
19 business.”) (citations omitted).

20 Because EFSEC’s authority to evaluate health, safety, and environmental impacts is  
21 generally applicable and does not target railroads or transportation by rail, it cannot be  
22

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23 <sup>5</sup> Such local siting decisions for new facilities are a far cry from the cease and desist order issued by the  
24 Town of Winchester aimed at curtailing rail traffic over an existing line to an existing facility at issue in *Boston &*  
25 *Maine Corp. & Springfield Terminal R.R. Company - Petition for Declaratory Order*, STB Finance Docket No.  
26 35749 (July 19, 2013); *Sea-3, Inc. - Petition for Declaratory Order*, FD No. 34192 (STB served March 17, 2015),  
2015 WL1215490 at 5 (“Thus, it appears that the only regulatory action at issue in this case is a local  
government’s participation in zoning litigation over the expansion of a non-carrier facility. Without more, this  
situation does not reflect undue interference with “transportation by rail carriers.”) (discussing *Boston & Maine*  
*Corp.*).

1 reasonably construed to have the effect of managing or controlling rail transportation. Thus,  
2 there is no categorical preemption under the ICCTA of EFSEC's authority to consider all the  
3 impacts of the Proposal when conditioning or denying Vancouver Energy's application in this  
4 case. Moreover, because EFSEC's recommendation on whether to site the facility will apply  
5 only to Vancouver Energy, EFSEC's consideration of environmental, health, and safety  
6 impacts along the rail route does not constitute an undue burden on railroading. Accordingly,  
7 EFSEC is not prohibited from incorporating consideration of impacts of transporting crude oil  
8 to the facility into its recommendation based on federal preemption under the ICCTA.

9           **2. EFSEC's Authority to Evaluate the Proposal's Safety Impacts Along the**  
10           **Rail Route Are Not Preempted Under the FRSA.**

11           For the same reasons discussed above with respect to the preemption under the ICCTA,  
12 it does not follow that EFSEC's consideration of public safety issues associated with  
13 Vancouver Energy's application would result in regulation of rail safety in a draft site  
14 certification agreement. A decision to deny or conditionally approve the application would  
15 apply to Vancouver Energy and would not be binding on a railroad. But even if EFSEC were to  
16 include conditions aimed at regulating rail safety, the conditions would not be preempted if  
17 they concern a safety issue that is not covered by existing federal rail safety regulations or  
18 address an essentially local safety hazard.

19           Section 20106 of the FRSA sets forth the goal of achieving uniform national rail safety  
20 standards to the extent practicable. The statute provides:

- 21           (1) Laws, regulations, and orders related to railroad safety shall be nationally  
22 uniform to the extent practicable.  
23           (2) A State may adopt or continue in force a law regulation, or order related to  
24 railroad safety until the Secretary of Transportation prescribes a regulation . . .  
25 *covering the subject matter of the State requirement.* A State may adopt or  
26 continue in force an additional or more stringent law, rule, regulation, order, or  
standard . . . when the law, regulation or order—  
(A) *is necessary to reduce an essentially local safety hazard;*  
(B) is not incompatible with a law regulation or order of the United States  
Government; and  
(C) does not unreasonably burden interstate commerce.

1 49 U.S.C. § 20106(a) (emphasis added). Accordingly, the FSRA allows state regulation of  
2 railroad safety if the Federal Railroad Administration has not adopted a rule covering the same  
3 subject matter or if state regulation is necessary to address an essentially local safety concern,  
4 is not incompatible with federal regulation, and does not create an undue burden on interstate  
5 commerce. *Union Pacific R.R. Co. v. Pub. Util. Comm'n of Oregon*, 723 F. Supp. 526, 529  
6 (D. Or. 1989).

7       Whether a state regulation is “cover[ed]” within the meaning of Section 20106(a) must  
8 be determined with “considerable solicitude for state law.” *CSX Transp., Inc. v. Easterwood*,  
9 507 U.S. 658, 665, 113 S. Ct. 1732, 1738, 123 L. Ed. 2d 387 (1993). “Preemption will lie only  
10 if the federal regulations substantially subsume the subject matter of the relevant state law.”  
11 *Id.* at 664. The Ninth Circuit, for example, found that a state law that prohibited use of train  
12 whistles at night was not preempted by the FRSA because, at the time of the decision, FSRA  
13 regulation pertained to the characteristics of train whistles but not the use of train whistles.  
14 *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993). Since the  
15 Ninth Circuit’s decision, the FRA has adopted rules that allow local jurisdictions to establish  
16 quiet zones where no train horns sound. *See* 49 C.F.R. pt. 222, Appendix C, *Guide To*  
17 *Establishing Quiet Zones*. Thus not only may FRA rules not cover particular mitigation  
18 measures, it is also possible that the rules may expressly allow local mitigation measures  
19 related to rail safety under some circumstances.

20       EFSEC’s consideration of safety issues created by the Proposal does not require  
21 EFSEC to impose any safety conditions on railroads. EFSEC’s recommendation to deny or  
22 conditionally approve the application would not bind a railroad. Moreover, even if EFSEC  
23 chose to include safety conditions in a draft site certification agreement that purported to apply  
24 to railroads, such conditions, depending on the facts presented, could be tailored to fall within  
25 either of the significant savings clauses in 49 U.S.C. § 20106(a) which allow for state rail  
26 safety regulation.

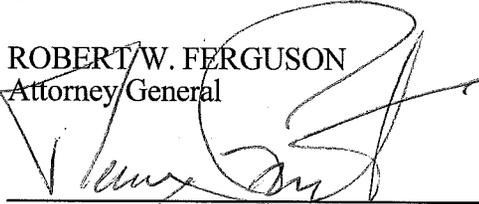
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**III. CONCLUSION**

For the reasons set forth above, DNR respectfully submits that in the event EFSEC recommends approval of the Proposal, the draft site certification agreement should contain the conditions discussed in the pre-filed direct testimony of its expert witnesses, Timothy Walsh and Robert Johnson. Based on the evidence as a whole, however, DNR asserts that EFSEC cannot meet its obligations to assure the public that the Proposal contains adequate safeguards for public welfare and protection and to ensure the Proposal will have minimal adverse environmental consequences. Accordingly, EFSEC should deny the application to certify the Proposal.

DATED this 2nd day of September, 2016.

ROBERT W. FERGUSON  
Attorney General



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**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 6, 2016, as follows:

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20 I certify under penalty of perjury, under the laws of the state of Washington, that the  
21 foregoing is true and correct.

22 DATED this 6th day of September, 2016, at Olympia, Washington.

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Natural Resources Division