BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the Matter of: Application No. 2013-01 TESORO SAVAGE, LLC VANCOUVER ENERGY DISTRIBUTION TERMINAL	CASE NO. 15-001 BNSF RAILWAY COMPANY'S AMICUS BRIEF IN SUPPORT OF VANCOUVER ENERGY'S MOTION TO DISMISS AND THE PORT OF VANCOUVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Pursuant to the accompanying motion for leave to file an amicus brief, *amicus curiae* BNSF Railway Company ("BNSF") makes this submission in support of applicant Tesoro-Savage Petroleum Terminal LLC, d/b/a Vancouver Energy's ("Vancouver Energy") motion to dismiss filed on March 29, 2016, and the Port of Vancouver's ("the Port") motion for partial summary judgment[1] filed on March 29, 2016 (collectively, the "Motions").

Vancouver Energy and the Port are correct that EFSEC cannot and should not consider "Rail Operations Issues" (as defined in Vancouver Energy's motion)[2] in this proceeding. These issues are fundamentally intertwined with interstate commerce and are capably and comprehensively regulated by the federal government. BNSF is a common carrier and has an obligation to serve all of its customers. BNSF works with the federal government on a regular basis to ensure the safe and efficient operation of its rail-related

[1] The Port raises four issues in its motion for partial summary judgment. BNSF supports the Port's motion with respect to railroad preemption issues raised by the Port. BNSF offers no opinion in this brief with respect to the vessel traffic issues raised by in the Port in its motion for partial summary judgment.
[2] These are issues 15, 20, 49, 50, 51, 52, 53, 66 and those portions of issues 7, 12, 14, 18, 19, 39, 45, 64, 67, 68, as set forth in Appendix A to Vancouver Energy's motion. *See* Vancouver Energy Motion at 4.

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facilities. No state, tribe, county, or municipality is permitted to interfere with the federal government's regulatory oversight role in this area.

Railroad preemption exists for very good reasons. BNSF's tracks pass through 28 states and thousands of counties, cities, and towns, not to mention the overlapping regulatory reach of many more state and regional agencies. The whole idea behind railroad preemption is to ensure the free flow of commerce among the states; commerce that would be impossible with a patchwork of regulations by each of these jurisdictions. Instead, a single sovereign—the United States—oversees railroad safety and operations, and does so in a comprehensive, uniform, and rigorous fashion that accounts for environmental impacts at every stage. This preemption regime applies to the State of Washington and EFSEC just as it applies to all of the thousands of other jurisdictions across the nation that might otherwise wish to regulate the railroads or interfere with commerce among the states.

As such, it would not only be illegal and improper for EFSEC to attempt to analyze and then regulate interstate rail facilities and operations, it would also place the results of these proceedings at great risk of being overturned, invalidated, or delayed. There is no reason to incur this risk, particularly in light of the substantial time, effort, and resources being dedicated to rail safety and the minimal impacts (if any) to BNSF's system, which in the case of the Vancouver Energy Terminal are pure speculation.

BNSF supports the Motions and urges EFSEC to grant them and focus the State of Washington's efforts on impacts associated with Vancouver Energy's proposal.

II. ARGUMENT

Vancouver Energy and the Port adequately present the substantive legal authority necessary for EFSEC to grant their Motions. However, there are several additional

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relevant topics that BNSF is uniquely positioned to address—namely, the role and importance of preemption to interstate rail transportation, the nature of the federal regulatory scheme under which BNSF operates, the anticipated effects of Vancouver Energy's proposal on BNSF's facilities and operations, and the effect to these proceedings of attempting to analyze, and then regulate, interstate commerce over BNSF's facilities under the guise of laws such as the State Environmental Policy Act.

A. The Critical Regulatory Role of Railroad Preemption.

Preemption serves a very specific and important purpose for interstate commerce by rail.

It is a truism that state and federal laws frequently overlap—especially those related to commerce, safety, and environmental protection. Under the Commerce Clause, Congress has plenary authority to "regulate commerce with foreign Nations, and among the several States." U.S. Const. art. I, sec. 8, cl. 3. Congress's Commerce Clause power generally operates side-by-side with the local, intrastate regulatory authority of state and municipal jurisdictions, with the line between state and federal power policed principally by political forces and the Supremacy Clause. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

But there are some areas of the law where, for good reason, Congress has decided that only the federal government may regulate. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (noting that states are precluded from regulating conduct in a field that Congress has determined must be governed exclusively by federal law). These are typically areas of the law that are so fundamentally connected to interstate activity that state-by-state, county-by-county, and city-by-city regulatory oversight is impossible or unworkable. Familiar examples include the patent laws, the immigration laws, and the

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Employee Retirement Income Security Act ("ERISA"). *See, e.g.*, *Arizona*, 132 S. Ct. at 2498 (immigration law); *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 46-47 (1987) (ERISA). These areas of the law are so inherently national in scope and character that it would make no sense to regulate them at the state and local level.

The same is true for interstate rail transportation. The defining characteristic of an interstate railroad is its nationwide reach. As such, interstate railroads necessarily span literally thousands of lawmaking jurisdictions. As a train travels along BNSF's tracks from, for example, Chicago to Seattle, it will pass through multiple states, hundreds of counties, thousands of cities and towns, and the overlapping regulatory ranges of many other assorted agencies. None of these regulating bodies are required to coordinate with one another in any way, none have any particular expertise on rail operations or safety, and most are overseen by local elected officials who may have purely parochial interests in mind rather than the interests of our Nation as a whole.

For these reasons, a patchwork system of railroad regulation would be unworkable. Railroads simply could not function if each of these thousands of jurisdictions could make independent rail safety and operations decisions (whether through direct regulation or permit conditions) on topics such as how loud a train horn can (or must) be, how fast or slow a train is permitted to travel, what times of day a train is permitted to travel through certain jurisdictions, what safety precautions must be undertaken when hauling hazardous cargo, and so on.[3] Not only would regulatory compliance in thousands of jurisdictions be unreasonably burdensome on rail companies and their customers, but it is a near certainty that various jurisdictions would eventually enact regulations that would conflict with one

[3] Congress has seen fit to delegate certain rail safety and operations issues to state agencies, but only in a limited manner and only as expressly allowed by federal law. *See* 49 U.S.C. § 20106(a)(2).

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another, making it impossible to comply with such a patchwork of laws and ordinances. It is also likely that railroads and their customers would become less safe and efficient and have greater impacts on the environment[4] without a uniform set of regulations along the length of the tracks.

Congress has addressed this reality through preemption. Congress's solution to patchwork railroad regulation has been to declare that all decisions related to interstate rail facilities, safety, and operations are exclusively the province of the federal government, and more specifically, the Surface Transportation Board and Federal Railroad Administration.[5] That means states cannot regulate railroads, counties cannot regulate railroads, tribes, towns and cities cannot regulate railroads, and agencies such as EFSEC cannot regulate railroads. This prohibition includes not only direct regulation, but, as explained in the Motions, any form of interference with federal oversight, such as placing conditions on permits, that has the effect of altering railroad operations or safety practices, or the design, construction and maintenance of railroad facilities. This prohibition applies to ***all*** non-federal regulating bodies, as it must, and does not exempt EFSEC.

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[4] Rail is the most sustainable method of moving our nation's freight over land. One train can carry as much freight as several hundred trucks. It would have taken approximately 5.6 million additional trucks to handle the 100.8 million tons of freight that originated in, terminated in, or moved through Washington by rail in 2012. Freight Railroads in Washington—Rail Fast Facts For 2012, Association of American Railroads, available at https://www.aar.org/Style%20Library/railroads_and_states/dist/data/pdf/Washington%202012.pdf. According to the Association of American Railroads (AAR) (https://www.aar.org/), trains move the same ton of freight more than three times as far as trucks per gallon of fuel. This efficiency produces more than 50 percent fewer CO_2 emissions per ton-mile than trucks. Emissions from locomotives have been extensively analyzed, and are federally regulated by the U.S. Environmental Protection Agency. *See* 42 U.S.C. § 7543(e).

[5] The doctrinal particulars of railroad preemption are thoroughly articulated in the Motions and are not repeated here.

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B. The Federal Regulatory Scheme Adequately Protects the Public and the Environment Such That Local Intervention is Not Called For.

Local interference with railroad operations is not only prohibited, it is unnecessary given the federal government's active and comprehensive role in railroad regulation.

For over a century, the federal government has exercised exclusive regulatory jurisdiction over the railroads. *See City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1029 (9th Cir. 1998). This authority was originally wielded by the Interstate Commerce Commission, which had "plenary authority over rail transactions." *See Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives Ass'n*, 491 U.S. 490, 510 (1989). In 1995, this plenary authority was transferred to the newly-created Surface Transportation Board. *See* Interstate Commerce Commission Termination Act ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803 (codified as amended at 49 U.S.C. §§ 10101, *et seq.*). When this transfer occurred, Congress explicitly preserved exclusive federal jurisdiction over "transportation by rail carriers" with the sweeping statement that ICCTA's "remedies . . . 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).

The federal government has taken an active role in overseeing rail safety and operations. Through copious federal regulations, the National Environmental Policy Act process, and permit conditions, the federal government addresses public safety and environmental concerns associated with interstate rail transportation in a thorough, open, and comprehensive manner.

For example, there are federal regulations governing the transportation of crude. The United States Department of Transportation ("USDOT") has promulgated specific and complete safety rules for transporting this commodity. *See* 49 C.F.R. Parts 171 - 174

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and 179. These rules represent a careful balancing of interests by an agency with regulatory expertise and a national perspective on the interstate rail system after consulting with multiple federal agencies, tribes, states, and the public. USDOT also requires railroads to use a Rail Corridor Risk Management System ("RCRMS") to determine the safest and most secure routes for crude trains of 20 or more loaded cars, considering 27 different factors. The Federal Railroad Administration ("FRA") frequently audits railroads' RCRMS analyses and the routes that railroads select. In addition, Congress established safety measures under the 2015 FAST Act.[6]

On top of this, separate federal regulations already address the rail-related concerns identified by opponents of Vancouver Energy's proposal. For example, locomotive emissions are federally regulated by the Environmental Protection Agency ("EPA").[7] In fact, the existing EPA emissions standards for locomotives, called Tier 4, were tightened in 2015. The EPA requires all newly manufactured and all remanufactured locomotives that were originally manufactured after 1972 to comply with increasingly stringent emission standards and to be equipped with idle reduction technology that automatically shuts down locomotives if they are left idling unnecessarily.[8] Similarly,

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[6] *See* Pub. L. No. 114-94, *available at* https://www.gpo.gov/fdsys/pkg/BILLS-114hr22enr/html/BILLS-114hr22enr.htm.

[7] *See* Locomotives: Exhaust Emission Standards, *available at* https://www.epa.gov/sites/production/files/2016-03/documents/420b16024.pdf. *See also* 40 C.F.R. §§ 1033.101, .120.

[8] The idling control program is expected to eventually reduce NOx, volatile organic compounds (VOCs), and PM emissions from locomotive idling by approximately 90 percent as well as significantly reduce locomotive smoke emissions and exhaust odors. These measures will reduce future locomotive emissions compared with both past and some present locomotive emissions.

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Congress established guidelines for safety at grade crossings in the Highway Safety Act, and the FRA publishes a Grade Crossing Safety Handbook.

Train noise is also regulated by the federal government on a uniform basis. The FRA has issued a "Train Horn Rule" that governs the types of horns that can be installed on trains and at grade crossings. *See* 49 C.F.R. Part 222 and § 229.129. The FRA has also established "Quiet Zones" through its Train Horn rule. *See* 49 C.F.R. §§ 222.35 - 222.59. For other safety standards, see 49 C.F.R. part 232 ("Brake system safety standards for freight trains and end-of-train devices"); 49 C.F.R. §§ 213.9, 213.307 ("Speed limits by classes of track").

The federal government's safety regulations work. The FRA named 2013 and 2014 as the safest in U.S. history for American freight railroads, including BNSF, and the rail industry has reduced hazardous material train accident rates by 91% since 1980. This stellar safety record continued in 2015. According to USDOT's Draft National Freight Strategic Plan[9]:

> Recent trends show impressive improvements in freight rail safety. There was a 27 percent increase in freight ton-miles for all surface modes between 1990 and 2011, but freight-related fatalities across all modes declined by 33% over that same period.

The USDOT also notes that total rail fatalities have decreased by over 37% from 1980 to 2013.

The federal government's regulatory scheme for railroad operations is both thorough and effective. This leaves little room to argue that more regulatory agencies,

[9] https://www.transportation.gov/sites/dot.gov/files/docs/DRAFT_NFSP_for_Public_Comment_508_10%2015%2015%20v1.pdf

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such as EFSEC, need to intervene and impose permit conditions or use the State Environmental Policy Act to delay or deny permits. Congress has decreed that local jurisdictions and agencies may not second-guess the federal government's decisions about how to regulate the railroads any more than they may enact their own patent laws or immigration laws. Such laws would be preempted just like local railroad regulation, and for the exact same reasons. It simply does not make sense to regulate a nationwide system at a local level.

C. There is Significant Risk to these Proceedings from Attempting to Analyze and Regulate Interstate Rail Transportation, and Little Reason to Do So.

There is little to be gained from considering Rail Operations Issues in this proceeding, and a great deal that can be lost by attempting to do so.

This is not a situation where mitigation is necessary or warranted even if EFSEC had jurisdiction to consider adding mitigation conditions (which it does not). There are several false assumptions underlying the supposition that Vancouver Energy's proposal will have any appreciable impact on BNSF's interstate rail system. These assumptions are described in BNSF's comments on the Draft Environmental Impact Statement, which were filed on January 21, 2016.

As described in those comments, Vancouver Energy's proposal will not affect BNSF's system. Vancouver Energy is projected to receive up to four unit trains per day should the terminal reach full capacity. It is not reasonably foreseeable that construction of this terminal will cause train traffic to increase on any particular rail line in Washington State. Any suggestion to the contrary is a gross oversimplification and clear error. Freight traffic ebbs and flows, and four freight trains per day are an insignificant addition to BNSF's overall traffic. Freight traffic is dynamic and is affected by many factors, such as:

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- A diverse set of customers, each with a different schedule
- Markets driven by global supply, commodity prices, and demand factors
- Competing modal choices, which themselves are influenced by factors such as highway congestion
- Population growth and the resultant demand for BNSF's transportation services
- Energy and environmental efficiencies of freight rail
- Scheduling factors for individual shipments, including seasonality and weather events.

These supply and demand scenarios play out across the entire rail system in the United States. Consequently, no credible evidence indicates that Vancouver Energy's terminal would cause an actual increase in train traffic anywhere in Washington State. Attempting to predict these impacts is not unlike trying to predict the impact of adding delivery trucks to the highway system to supply a store in Seattle and then attempting to measure that impact hundreds of miles away. Measuring such impacts is impossible to do and is certainly not a meaningful exercise.

In light of these considerations, there is little to be gained from attempting to analyze Railroad Operation Issues in this proceeding. On the other hand, there is much to be lost. At present, the parties to this proceeding (and EFSEC itself) are pouring significant time, effort, and resources into the EFSEC process. All of this could be squandered by addressing issues over which EFSEC has no jurisdiction.

III. CONCLUSION

BNSF supports Vancouver Energy and the Port's Motions with respect to railroad preemption and urges EFSEC to grant them. It is worth emphasizing again here that it is not as if any hypothetical rail-related impacts of the proposal would go unregulated or unmitigated unless EFSEC intervenes. That is simply not true. Regulation and mitigation of interstate rail impacts must come from the federal government which, after all, has its

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own environmental review process, its own rail regulations and permits, and its own authority to require mitigation. If the federal government deems mitigation or permit conditions unnecessary or inappropriate, EFSEC simply does not have the authority to override that decision.

Dated this 4th day of May, 2016.

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I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by authorized method of service pursuant to WAC 463-30-120(3).

EXECUTED at Seattle, Washington on this 4th day of May, 2016.

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