

BEFORE THE
SURFACE TRANSPORTATION BOARD

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**ENVIRONMENTAL ORGANIZATIONS' RESPONSE TO ASSOCIATION OF
AMERICAN RAILROADS' PETITION FOR DECLARATORY ORDER**

Via E-Filing

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The undersigned submit the following comments on behalf of the Sierra Club, Natural Resources Defense Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Spokane Riverkeeper, RESources for Sustainable Communities, and Puget Soundkeeper (collectively, the “Commenters”). These environmental organizations represent hundreds of thousands of people nationwide who use and enjoy waters of the United States that could be adversely affected by pollution from rail cars in transit. Such pollution goes to the core of these organizations’ mission of environmental protection and stewardship. As such, Commenters have a direct interest in the Board’s consideration of the Association of American Railroads’ Petition for Declaratory Order. For the reasons set forth below, Commenters respectfully request that the Board deny the Petition.

INTRODUCTION

On November 27, 2019, the Association of American Railroads (“AAR”) submitted a Petition for Declaratory Order (“AAR Petition” or “the Petition”) to the Surface Transportation Board (“STB” or “Board”) asking the Board to declare that the Interstate Commerce Commission Termination Act (“ICCTA”), particularly 49 U.S.C. § 10501(b), “preempts” application of the Clean Water Act’s (“CWA”) discharge prohibition to rail cars in transit.¹ AAR Petition at 2. The CWA prohibits the discharge of pollutants from point sources into waters of the United States unless that discharge is

¹ Whether one federal statute prevents application of another federal statute is a question of preclusion, not preemption. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111, 134 S. Ct. 2228, 2236 (2014). In keeping with the convention used by AAR in its Petition, Commenters will use the term “preemption,” although it is not legally correct.

authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit.² This discharge prohibition is the “cornerstone” of the Nation’s goal to eliminate water pollution and “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ The prohibition applies to “point source” discharges, which Congress defined expansively and which explicitly include “rolling stock,” or rail cars in transit.⁴

AAR’s petition effectively asks the Board to step into the role of Congress and re-write the CWA to exclude “rolling stock” from the definition of “point source.” Specifically, AAR claims that application of the CWA’s discharge prohibition to rail cars in transit would result in a “patchwork of local regulation” “in direct conflict with the regulation of rail transportation by the STB.” AAR Petition at 12. Thus, AAR submits that ICCTA must “preempt” application of the CWA’s discharge prohibition to *all* rail cars in transit – a conclusion that would create a massive exemption from federal environmental law.

But AAR offers no facts to show that such a “patchwork” exists or is likely to soon exist. AAR fails to identify a single rail carrier who has been asked to comply with an NPDES permit for discharges from rail cars in transit, or any other CWA permits that would subject rail carriers to “fluctuating rules as they cross[] state lines.” AAR Petition at 13 (quoting *Fayus Enterprises v. BNSF et al.*, 602 F.3d 444 (D.C. Cir. 2010)). Without

² 33 U.S.C. § 1311(a).

³ *Id.* § 1251 *et seq.*; *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 644–45 (9th Cir. 2007), *rev’d on other grounds sub nom. Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009).

⁴ 33 U.S.C. § 1362(14).

concrete, particularized facts by which the Board could judge the impact of the NPDES program on rail cars in transit, the Board is left to speculate as to the degree to which compliance with the statute that Congress passed to protect the Nation's waters for the benefit of all would interfere with rail carrier operations. AAR's Petition is thus premature and the Board should deny it as such.

The Board should likewise reject AAR's broader request for a declaration that *any* application of the NPDES program to rail cars in transit, regardless of whether it results in a patchwork of varying state or localized requirements, is preempted by ICCTA. *See* AAR Petition at 16–18. In order for the Board to make such a declaration, it would need to find that it is *impossible* to harmonize the requirements of the CWA with ICCTA under any circumstances, a determination that would directly conflict with a long line of Board and judicial opinions. AAR has failed to carry its heavy burden showing that Congress intended to repeal the lynchpin of the CWA as applied to rail cars in transit when it passed ICCTA. The Petition's request for such sweeping relief must be denied.

ARGUMENT

I. Reconciliation of Distinct Statutory Regimes is a Matter for Federal Courts, Not Administrative Agencies

AAR's Petition asks the Board to find that ICCTA's preemption provision completely precludes application of the CWA to rail cars in transit. The Supreme Court's recent decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018), however, makes clear that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies[,]” because “[a]n agency eager to advance its statutory mission, but

without any particular interest in or expertise with a second statute, might...seek to diminish the second statute's scope in favor of a more expansive interpretation of its own – effectively bootstrapping itself into an area in which it has no jurisdiction.”⁵

At issue in *Epic Sys. Corp.* was whether a provision of the Federal Arbitration Act conflicted with the National Labor Relations Act. Under the Federal Arbitration Act, arbitration agreements shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁶ The National Labor Relations Act, on the other hand, guarantees that employees “shall have the right to self-organization...and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁷ The question before the Supreme Court was whether the National Labor Relations Act's guarantee provides employees a substantive right to bring class action lawsuits against employers, when such employees are also subject to arbitration agreements that expressly waive the right to bring class action lawsuits.

The Court found the Federal Arbitration Act controlled. It reasoned Congress “instructed federal courts to enforce arbitration agreements according to their terms - including terms providing for individualized proceedings.”⁸ Because the National Labor Relations Act was silent as to how “judges and arbitrators must try legal disputes that

⁵ *Id.* at 1629 (internal quotations and citations omitted).

⁶ *See id.* at 1621–22; 9 U.S.C. § 2.

⁷ *Id.* at 1624.

⁸ *Id.* at 1619.

leave the workplace” and enter arbitration, the Court determined there was no conflict between the two statutes, and allowed arbitration of the claims in question.⁹

Relevant here, the respondent-employees argued that the Court owed *Chevron* deference to the National Labor Relations Board, which had previously concluded in a formal proceeding that the National Labor Relations Act “effectively nullifies the Arbitration Act[.]”¹⁰ In rejecting this argument, the Court pointed out that *Chevron* deference is only afforded to an agency’s interpretation of a statute that Congress tasked the agency with administering. No deference is given to an agency’s attempt at harmonizing two distinct federal statutes, one that the agency administers and another it does not.¹¹ To the contrary, the Court held that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies.”¹² This conclusion “preserve[s] the balance Congress struck in its statutes,” allowing federal courts to “exercise independent interpretive judgment,” because “[a]n agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might...seek to diminish the second statute’s scope in favor of a more expansive interpretation of its own - effectively bootstrapping itself into an area in which it has no jurisdiction.”¹³

⁹ *Id.* at 1624–26.

¹⁰ *Id.* at 1620.

¹¹ *Id.* at 1629.

¹² *Id.* (internal quotations and citations omitted).

¹³ *Id.*; see also *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (“If an apparent conflict exists between ICCTA and a federal law, courts must strive to harmonize the two laws, giving effect to both laws if possible.”) (emphasis removed and added).

Here, AAR's Petition invites the Board to engage in the exact type of statutory analysis that the Supreme Court held is a matter for the courts, not administrative agencies. While the Board enjoys broad latitude and deference in interpreting ICCTA, the CWA is not a statute this agency administers or enforces. The Board should heed the Supreme Court's admonishment and refrain from issuing any type of declaratory order that could be construed as "bootstrapping itself into an area in which it has no jurisdiction."¹⁴

II. AAR's Petition Should Be Denied Because It Is Speculative and Premature

AAR argues that rail cars in transit should be exempt from complying with the CWA's prohibition on the discharge of pollutants to waters of the United States, except when in compliance with a permit, such as an NPDES permit. AAR's primary argument is that application of the CWA's fundamental tool of pollution abatement, the NPDES system, would create a patchwork of varying state law permits, each with their own distinct pollution control requirements, and that this patchwork could place an unreasonable burden on rail carriers' operations. *See* AAR Petition at 16–18.

But AAR offers no facts demonstrating that such a patchwork is likely to occur in the absence of an STB declaration that the NPDES program is preempted by ICCTA. AAR claims that it is "reasonable to assume that permit requirements would vary from state to state and on tribal lands," AAR Petition at 12, but offers no support for this assumption, because none exists. *See also id.* at 19 ("The requirement that permit

¹⁴ 138 S. Ct. at 1629.

conditions protect applicable water quality standards creates the *potential* for rail cars to be subject to a variety of compliance obligations that *could* vary depending on where the rail car is located.”) (emphases added). No State or Federal authority has required any rail car operator or transporter to obtain an NPDES permit for in-transit discharges. Indeed, when reciting its parade of supposed horrors that may result from the hypothetical application of the NPDES permitting regime, AAR uses the words “might” or “could” prior to every specific instance of supposed conflict. *See, e.g.*, AAR Petition at 17.

The absence of any actual permits or permit conditions, much less multiple conflicting provisions, prevents the Board from granting the relief sought. The Board has explained that determining “whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a *fact-bound question*. Accordingly, *individual situations need to be reviewed individually* to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner....”¹⁵ The Board has made clear that “[n]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as ... the

¹⁵ *Joint Petition for Declaratory Order - Bos. & Maine Corp. & Town of Ayer, Ma*, 5 S.T.B. 500, 2001 WL 458685, at *6 (2001) (emphasis added) (hereinafter “*Town of Ayer*”); *see also PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009) (“As courts have recognized, the determination of whether the action constitutes an ‘unreasonable interference’ requires a factual assessment of the effect of providing the claimed remedy.”); *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357, 1364 (S.D. Ga. 2013).

Clean Water Act ... unless the regulation *is being applied* in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.”¹⁶ In attempting to resolve such a question, “[w]hat matters is the degree to which the challenged regulation burdens rail transportation.”¹⁷

For example, in rejecting a railroad’s argument that ICCTA categorically preempts all state law negligence claims relating to the railroad’s operations, the Court of Appeals for the Fifth Circuit stated the inquiry is “fact-based.”¹⁸ The court explained that the railroad was required to “come forward with evidence of the specific burdens imposed...[g]eneral evidence that the [obligations for which preemption is sought] affect rail transportation is insufficient.”¹⁹

Here, there is no challenged regulation at all, only the generalized claim that a state may decide in the future to consider requiring NPDES permits for rail cars. There are no concrete facts to question, no “individual situations” to review, and no “specific

¹⁶ *Friends of the Aquifer, City of Hauser, Id, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Env'tl. All., R.R. & Clearcuts Campaign*, 5 S.T.B. 880, 2001 WL 928949, at *4 (2001) (emphasis added) (hereinafter “*Friends of the Aquifer*”).

¹⁷ *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007).

¹⁸ *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 813 (5th Cir. 2011).

¹⁹ *Id.* at 813–14 (explaining that, even if a rail carrier’s affidavit demonstrated that the plaintiffs’ state law negligence claim would have some impact on its operations, more concrete facts were needed to establish that such interference would be unreasonable); see also *Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380, 1999 WL 715272, at *7 (1999) (“The Borough has also raised complaints about NYSW’s facilities that concern surfacing, fence height, site distance for ingress and egress, roads, train utility stations, the truck weigh station, and the truck depot. We do not have enough information to determine whether the non-discriminatory application of state or local regulation regarding those matters would unduly restrict NYSW’s ability to provide transportation-related facilities and service.”).

burdens” to weigh. Contrary to AAR’s claims, the degree to which any future NPDES permitting requirements may restrict any railroad from conducting its operations or burden interstate commerce simply cannot be known at this time.

Furthermore, in order to determine whether a particular law or regulation “unreasonably interfere[s] with rail transportation,”²⁰ the Board must look not only at the impact on rail operations in isolation, but must also weigh that impact against the public benefits such regulations provide. As the Court of Appeals for the Fourth Circuit explained, “whether a particular regulation imposes an ‘unreasonable burden’ on interstate commerce depends on whether the burden on interstate commerce imposed by the regulation outweighs the local benefits it provides.”²¹ Absent concrete instances of regulation of discharges from rail cars in transit, the Board cannot determine what benefits would accrue to the public from keeping those pollutants out of the waters of the United States.²²

²⁰ *PCS Phosphate Co.*, 559 F.3d at 220–21 (quoting *CSX Transp., Inc.—Petition for Declaratory Order*, 2005 WL 1024490, at *3 (S.T.B. May 3, 2005)) (emphasis added).

²¹ *See id.* at 221 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

²² Though the case has not resulted in any rail carrier applying for, or complying with, an NPDES permit, the record in *Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016) nonetheless indicates that regulation of discharges of coal and petroleum coke may provide substantial benefits to the public by reducing the alarming volume of such materials currently entering the nation’s waters from rail cars. *See Sierra Club*, at *10 (citing, for example, studies in the record “estimating a loss from the top of coal cars to be ‘50-500 lbs/car/100 miles’ and a loss from the bottom of coal cars to be ‘10 lbs/100 miles,’” “many expert reports, witness observations of coal found in the environment and being released from BNSF trains ... [and] analysis of coal collections at various waterways”).

The case that appears to have motivated AAR’s Petition, *Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016), does not supply the missing factual parameters necessary for the Board to apply the proper preemption standards. The court in that case held that, under the plain language of the CWA, rail cars are point sources and can be liable for direct discharges of coal and petcoke to waters of the United States.²³ The court did not, however, actually hold BNSF liable for any such unpermitted discharges.²⁴ Nor did it order BNSF to obtain an NPDES permit. Instead, BNSF voluntarily settled the case during trial but prior to final judgment. See AAR Petition at 1.

AAR cannot now rely on the specter of obligations that its member BNSF *voluntarily* undertook as part of a settlement agreement in order to claim broad preemption of the NPDES program. As the Board has explained, “preemption provisions should not be used to shield the carrier from its own commitments, and ‘voluntary agreements must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce.’”²⁵

²³ *Sierra Club*, 2016 WL 6217108 at *7–8.

²⁴ *Sierra Club*, 2016 WL 6217108 at *9–10 (“Defendant is only potentially liable for point source discharges of coal that went directly into the water and point source discharges of coal dust that came from trains passing directly above or adjacent to the waters.”).

²⁵ *Town of Ayer, Ma*, 2001 WL 458685, at *18 (quoting *Township of Woodbridge, NJ et al. v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053 (STB served Dec. 1, 2000), at 5); see also *Friends of the Aquifer*, 2001 WL 928949 at *4; *PCS Phosphate Co.*, 559 F.3d at 219 (observing that voluntary agreements “do not fall into the core of economic regulation that the ICCTA was intended to preempt”); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1158 (9th Cir. 2020) (explaining that “both courts and the STB have held in the state-law context ... that voluntary agreements between private parties ‘are not presumptively regulatory acts’ subject to the ICCTA’s preemption provision” and thus declining to hold that a request for injunctive relief to enforce such

Regardless, even if consideration of obligations imposed by the settlement agreement were appropriate, AAR has failed to describe any specific obligations that it believes unreasonably interfere with railroad operations.

In the absence of any concrete facts that would allow the Board to weigh the burden on rail carriers and interstate commerce against the public benefits Congress intended to provide when it wrote the CWA without any exception for rail cars in transit, the Board should decline AAR's request for what would essentially be an advisory opinion. Simply put, AAR has failed to demonstrate that application of CWA Section 301, and specifically the prohibition on discharges of pollutants from rail cars except in accordance with an NPDES permit, would create "a patchwork of local of local regulation" at all, much less that such a patchwork "*unreasonably* interfer[es] with interstate commerce."²⁶ Accordingly, any declaratory order from the Board would be premature.²⁷

an agreement constitutes an "unreasonable interference with rail transportation") (quoting *PCS Phosphate Co.*, 559 F.3d at 218); *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 228 F. Supp. 3d 1171, 1178 (W.D. Wash. 2017) ("When determining whether a contract impermissibly regulates rail transportation or merely concerns a peripheral railroad activity, the existence of a voluntary agreement gives rise to an assumption that the railroad has already evaluated the effect of the promise and determined that it can perform under the contract without adversely impacting its common carrier obligations.").

²⁶ See *United States Env'tl. Prot. Agency Petition for Declaratory Order*, No. FD 35803, 2014 WL 7392860, at *5 (Dec. 29, 2014) (emphasis added).

²⁷ *Id.* (explaining that a declaratory order finding that certain regulations adopted by a state pursuant to the Clean Air Act are preempted by ICCTA would be premature where the regulations had yet to be adopted into a State Implementation Plan and approved by EPA, and outstanding questions existed as to the extent to which EPA would ultimately approve the regulations).

III. ICCTA Does Not Preempt the Clean Water Act, Including the Prohibition on Discharges of Pollutants Except As Authorized By An NPDES Permit

As the above discussion makes clear, AAR’s petition does not request relief from any particular permit decision or localized regulation, much less a “patchwork” of such decisions or regulations that interfere with rail carrier operations. Rather, what it requests is a wholesale rewriting of the CWA as applied to rail carriers. In the absence of any demonstration that application of NPDES requirements is or will imminently and unduly restrict rail carrier operations or that it will unreasonably burden interstate commerce, granting AAR’s Petition requires a finding that it is *impossible* to harmonize ICCTA with the CWA’s discharge prohibition as applied to rail carriers. The Board should decline this sweeping invitation to step into the Congressional arena and amend federal law in a manner that is inconsistent with its own precedent and that of the federal courts.²⁸

Despite AAR’s attempt to cast regulation under the NPDES program as an exclusively state law affair, *see* AAR Petition at 14–15, the Petition’s true target is the

²⁸ Were the Board to find that ICCTA is fundamentally incompatible with a requirement that railroads obtain separate NPDES permits from each jurisdiction in which they operate, the broad relief from CWA Section 301 requested by AAR’s Petition would *still* be inappropriate. That is, even if the Board agreed that hypothetical state-level NPDES permitting created a patchwork of regulation that unduly restricted rail operations, that conclusion does not preclude *any* regulation of discharges of pollutants from transiting rail cars. Rather, in such a situation, EPA would issue a nationally-uniform general permit as it did for discharges of pollutants from floating vessels. *See* AAR Petition at 7–9, 18–19. AAR argues that such a uniform national permit was only possible in that context because regulation of such discharges had historically been excluded from state NPDES programs. *Id.* at 7–9. But, in the event that the Board finds that state-by-state NPDES permitting of rail cars in transit is preempted by ICCTA, such permitting would *also* be excluded from state regulatory programs and thus appropriately be covered by a nationwide permit issued by EPA.

federal statute’s discharge prohibition under CWA Section 301. As the District Court for the Southern District of West Virginia explained when rejecting West Virginia’s request for sovereign immunity against a Section 301 CWA claim, “it does not matter in this instance whether the issuance of the permit is governed by state law or federal law. The discharge of pollutants without a permit is the act the claim seeks to remedy, and it is governed by federal law. The fact the remedy—the permit—is to be issued by the state is of little moment.”²⁹

When determining whether ICCTA “preempts” another *federal* law,³⁰ the Board “must strive to harmonize the two laws, giving effect to both laws if possible.”³¹ The Board is “not at liberty to pick and choose among congressional enactments.”³² Rather, “[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”³³

²⁹ *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512, 528–29 (S.D.W. Va. 2009); *see also id.* at 527 (explaining that “upon EPA acceptance of a state’s plan for administration of the NPDES permit program, neither federal nor state law completely ‘drop out,’” as they do under the Surface Mining Control and Reclamation Act, where state law completely displaces federal law upon approval of a state’s regulatory program).

³⁰ These comments follow the convention of AAR’s Petition and speak in terms of “preemption,” but when dealing with the interaction of two federal statutes, as opposed to federal and state or local laws, the proper framing is whether the latter statute constitutes an implied repeal of the earlier statute, the CWA. *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1157 (holding that ICCTA did not impliedly preempt the Indian Right of Way Act of 1948, 25 U.S.C. §§ 323–328, despite the broad language of 49 U.S.C. § 10501(b)).

³¹ *Ass’n of Am. R.R.*, 622 F.3d at 1097.

³² *See St. Mary’s Ry. W., LLC*, 989 F. Supp. 2d at 1361 (quoting *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives’ Ass’n*, 491 U.S. 490, 510, 109 S. Ct. 2584 (1989)).

³³ *Id.* at 1362 (quoting *Pittsburgh & Lake Erie R.R. Co.*, 491 U.S. at 510); *see also Ass’n of Am. R.R.*, 622 F.3d at 1097.

When evaluating Congressional intent to preempt the requirements of an earlier enacted statute, the Board must keep in mind that such implied repeals are disfavored.³⁴

Congressional intent to preempt an earlier law must be “clear and manifest,” and the two statutes must be harmonized unless completely irreconcilable.³⁵

In accordance with this strict standard, the Board and courts have uniformly held that ICCTA does not preempt federal environmental laws. The Board has been consistent in its proclamation that “nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the [Safe Drinking Water Act].”³⁶ The Board has spoken

³⁴ *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1157; *see also Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (“As statutory ‘repeals by implication are disfavored’ and there is no positive repugnancy between FRSA and the ICCTA’s jurisdictional provisions, this statutory construction properly reflects Congress’s purpose.”) (quoting *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133–34, 95 S. Ct. 335 (1974)).

³⁵ *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1156 (citing *Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474 (1974)); *see also Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429 (2003) (“An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.”) (citations and internal quotation marks omitted); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381, 116 S. Ct. 873 (1996) (“The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.”) (citations and internal quotation marks omitted).

³⁶ *Town of Ayer*, 2001 WL 458685, at *5 (assuring a town whose local drinking water protections the Board found to be preempted that “the lack of a specific environmental remedy at the Board or under state and local laws ... does not mean that there are no environmental remedies under other Federal laws”); *see also CSX Transportation, Inc.--Petition for Declaratory Order*, Fed. Carr. Cas. (CCH) ¶ 37186 (STB Mar. 14, 2005) (“[A]lthough a literal reading of section 10501(b) might suggest that it supersedes other federal law, the Board and the courts have rejected such an interpretation as overbroad

directly on the present issue, explaining that despite ICCTA’s preemption of local environmental, building, and land use permitting, railroads are nonetheless required to “comply with the safety and environmental requirements imposed by other federal statutes, such as the Clean Water Act’s National Pollution Discharge System program involving water quality issues relating to spills into lakes or streams.”³⁷

The courts have similarly been unequivocal in their refusal to find that ICCTA preempts the CWA and other federal environmental laws. For example, in *Association of American Railroads v. South Coast Air Quality Management District*, the Court of Appeals for the Ninth Circuit explained that “to the extent that state and local agencies

and unworkable. Instead, the Board and the courts have harmonized section 10501(b) with federal statutes[.]” (citing *Tyrrell v. Norfolk S. Ry*, 248 F.3d 517, 523 (6th Cir. 2001)); *Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 1999 WL 715272, at *5 (Board observing that “Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.”); *Desertxpress Enterprises, LLC--Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, *3 (STB June 25, 2007) (“ . . . Federal environmental statutes, such as NEPA, the Clean Air Act, and the Clean Water Act, and the regulation of railroad safety under the Federal Railroad Safety Act, will apply to this proposal.”); *United States Env’tl. Prot. Agency Petition for Declaratory Order*, No. FD 35803, 2014 WL 7392860, at *7 (“The Board has stated that federal environmental statutes such as the CAA, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads.”); *Friends of the Aquifer*, 2001 WL 928949 at *4.

³⁷ *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330, 1997 WL 362017, at *2 n.7 (1997); see also *id.* at *6 (“[E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. . . . The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce.”).

promulgate EPA-approved statewide plans under federal environmental laws (such as ‘statewide implementation plans’ under the Clean Air Act), ICCTA generally does not preempt those regulations because it is possible to harmonize ICCTA with those federally recognized regulations.”³⁸ Other courts have noted that, despite ICCTA’s broad preemption language, states may nonetheless require “compliance with applicable federal laws, such as the Clean Air Act and the Clean Water Act.”³⁹

Indeed, courts routinely reject ICCTA preemption arguments against the CWA. For example, in *United States v. St. Mary's Ry. W., LLC*, the District Court for the Southern District of Georgia found the state could proceed with a CWA enforcement action against the defendant railroads, explaining that:

The CWA’s scheme for environmental protection is in no way a direct regulation on Defendants’ activities.... The CWA’s prohibition against pollutant discharges does not discriminate against those operating in the rail transportation industry, but instead applies generally to “any person.” 33 U.S.C. § 1311(a). It is meant merely to “protect[] the quality of our Nation’s waters for esthetic, health, recreational, and environmental uses.” *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531

³⁸ 622 F.3d at 1096–98 (citing *Bos. & Me. Corp.*, 2001 WL 458685, at *5); *see also Swinomish Indian Tribal Cmty.*, 951 F.3d at 1157 (explaining that “[d]espite the broad ‘preemption’ language of § 10501(b) of the ICCTA, and consistent with the jurisprudence on ‘implicit repeals,’ courts and the STB have routinely held that the ICCTA does not repeal particular federal statutes and the remedies provided thereunder. They have harmonized the ICCTA with these other federal statutes, giving effect to both.”).

³⁹ *See Green Mountain R.R. Corp. v. State of Vermont*, No. 1:01-CV-00181JGM, 2003 WL 24051562, at *8 (D. Vt. Dec. 15, 2003), *aff’d sub nom. Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005); *Flynn v. Burlington N. Santa Fe Corp. (BNSF)*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (explaining that a “local government entity may play a role in implementing federal statutes such as the Clean Air Act and Clean Water Act.”); *St. Mary's Ry. W., LLC*, 989 F. Supp. 2d at 1364 (“[W]hen a state or local regulation is preempted, decisions note that federal environmental laws are still available to fill any void.”).

U.S. 159, 175, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). The Court does not construe this as entailing any conflict with the ICCTA's separate purpose in simplifying the regulatory regime over the railroad industry.⁴⁰

The court evaluated specific regulations under ICCTA that the railroads claimed were incompatible with the CWA's discharge prohibition and determined that "the regulations, like the Statute, can be consistently read with the requirements imposed by the CWA: the regulations ensure that railways are in a safe, usable condition, while the CWA protects United States waters from pollutants."⁴¹

The text, context, and legislative history of ICCTA and the CWA support these decisions and further demonstrate that the Petition must be denied. The section of the CWA that AAR asks the Board to find has been partially repealed by ICCTA is not an ancillary provision that Congress would have given little thought to undercutting. Rather, Section 301 is the lynchpin of the entire federal scheme for regulating pollution to waters of the United States. The Court of Appeals for the First Circuit has observed that "[t]he most important component of the Act is the requirement that an NPDES permit be obtained[.]"⁴² That requirement "is unconditional and absolute."⁴³

⁴⁰ 989 F. Supp. 2d at 1362.

⁴¹ See *id.* at 1363; see also *id.* at 1366 ("Although Defendants seek to provide immunity to the rail industry from environmental actions by the EPA that, to the Court's knowledge, is unavailable to any other economic sector, the Court cannot find any basis to put Defendants' activities on such a pedestal. Therefore, Defendants' preemption argument is without merit, and the Government may bring the present action under the CWA."); *Humboldt Baykeeper v. Union Pac. R.R. Co.*, No. C 06-02560 JSW, 2010 WL 2179900, at *2–3 (N.D. Cal. May 27, 2010) (rejecting defendant railroad's claim that ICCTA preempts the CWA in the context of a CWA citizen suit).

⁴² *Dubois v U.S. Dept. of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996).

⁴³ *Hudson River Fishermen's Ass'n v. Arcuri*, 862 F. Supp. 73, 76 (S.D.N.Y. 1994) (internal quotation marks and citation omitted).

It is indisputable that Congress intended to regulate the discharge of pollution from rail carriers and, specifically, from rail cars in transit when it enacted the CWA. As explained above, CWA Section 301 establishes that except in compliance with certain requirements—including NPDES and other permitting requirements—the “discharge of any pollutant by any person shall be unlawful.”⁴⁴ The CWA defines “discharge of a pollutant” to mean “any addition of *any* pollutant to navigable waters from *any* point source.”⁴⁵ Critically, Congress defined point source as “any discernible, confined and discrete conveyance, including but not limited to . . . rolling stock,” *i.e.*, rail cars.⁴⁶ And Congress did not create any *de minimis* or other unstated exception to its prohibition.⁴⁷ In passing the CWA, Congress “stressed that the [Act] was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.”⁴⁸

If Congress intended to upend such a fundamental, unequivocal aspect of one of the nation’s bedrock environmental laws, it would have used much more direct language than 49 U.S.C. § 10501(b)’s generalized assertion of preemption. “Where there is no

⁴⁴ 33 U.S.C. 1311(a).

⁴⁵ *Id.* § 1362(12) (emphasis added).

⁴⁶ *Id.* § 1362(14).

⁴⁷ *See, e.g., Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1376, 1380–82 (D.C. Cir. 1977) (explaining that “all the Supreme Court decisions referring to § 402 view the permit as the only means by which a point source polluter can avoid the ban on discharges found in § 301” and countering arguments that such an inflexible prohibition would create “administrative infeasibility” by pointing to regulatory agencies’ significant flexibility in crafting effluent limitations and to the availability of general permits to cover large classes of pollution sources); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 165 (4th Cir. 2010) (“[T]he CWA bans ‘any addition of any pollutant to navigable waters from any point source.’ . . . ‘Any’ is a powerful statutory term. The Clean Water Act uses it frequently.”).

⁴⁸ *Costle*, 568 F.2d at 1375.

clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”⁴⁹ Instead, the text and legislative history of ICCTA reveal that Congress was primarily concerned with preemption of *economic* regulation of railroads, as opposed to broadly applicable environmental regulations.⁵⁰ The House Report discusses the regulation that 10501(b) is intended to preempt exclusively in terms of “economic regulation,” prefacing “regulation” with “economic” all seven times that it uses the term.⁵¹ Likewise, the Conference Report made clear that Congress was concerned with preemption of laws that “collide with the scheme of economic regulation (and deregulation) of rail transportation.”⁵² As the Court of Appeals for the D.C. Circuit explained, “the core of ICCTA preemption is ‘economic regulation,’ which we take to refer to regulation of the relationship before us here, that of shippers and carriers....Railroad-shipper transactions indeed pose a problem quite different from environmental regulation.”⁵³

⁴⁹ *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1160 (quoting *Mancari*, 417 U.S. at 550–51).

⁵⁰ See *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001) (“The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct economic regulation* by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning.”) (emphasis added); *Elam*, 635 F.3d at 805 (“Congress was particularly concerned about state *economic* regulation of railroads when it enacted the ICCTA....The preemptive effect of § 10501(b) may not be limited to state economic regulation, but economic regulation is at the core of ICCTA preemption.”) (emphasis in original).

⁵¹ H.R. REP. 104-311, 95–96, 1995 U.S.C.C.A.N. 793, 807–08.

⁵² H.R. CONF. REP. 104-422, 167, 1995 U.S.C.C.A.N. 850, 852.

⁵³ *Fayus Enterprises*, 602 F.3d at 451.

Congress's alleged intention to repeal the CWA's unpermitted discharge prohibition as to rail cars in transit is likewise not apparent in the Board's regulations implementing ICCTA. Those regulations contemplate that railroads will be required to comply not only with dredge and fill permits issued pursuant to CWA Section 404,⁵⁴ but also with NPDES permits issued pursuant to Section 402.⁵⁵ Pursuant to 49 C.F.R. § 1105.7(a), applicants for certain authorizations must submit an Environmental Report on the proposed action. These reports are required not just for construction activities, but also for certain operational activities.⁵⁶ In the section mandating inclusion of information regarding water quality in those reports, the regulation requires applicants to:

(ii) Based on consultation with the U.S. Army Corps of Engineers, state whether permits under section 404 of the Clean Water Act (33 U.S.C. 1344) are required for the proposed action and whether any designated wetlands or 100-year flood plains will be affected. Describe the effects.

(iii) State whether permits under section 402 of the Clean Water Act (33 U.S.C. 1342) are required for the proposed action. (Applicants should contact the U.S. Environmental Protection Agency or the state environmental protection or equivalent agency if they are unsure whether such permits are required.)⁵⁷

The regulation does not make any distinction between NPDES permits required for “stationary facilities” and those which would be applicable to the operation of rail cars in transit. See AAR Petition at 19. All available evidence thus points to the conclusion that

⁵⁴ 33 U.S.C. § 1344.

⁵⁵ *Id.* § 1342.

⁵⁶ *Id.*; 49 C.F.R. § 1105.6(b).

⁵⁷ 49 C.F.R. § 1105.7(e)(9)(i), (ii).

Congress did not intend to preempt application of the CWA's general prohibition on unpermitted discharges when it passed ICCTA.

CONCLUSION

For the foregoing reasons, Commenters respectfully request that the Board reject AAR's request for sweeping relief from the CWA's fundamental prohibition against unpermitted discharges of pollutants and deny the Petition for Declaratory Order.

Respectfully Submitted this 24th Day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that I have this 24th day of April, 2020, served copies of the foregoing document upon all parties of record in this proceeding by electronic mail to the addresses listed in the Board's Service List for this docket.

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