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ASSOCIATION OF AMERICAN RAILROADS –
PETITION FOR DECLARATORY ORDER

OPENING COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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INTRODUCTION

The petition before the Board concerns one narrow and important issue: whether the ICC Termination Act of 1995 (ICCTA) preempts application of the Clean Water Act's (CWA) Section 301 discharge prohibition and the Section 402 (also known as the National Pollutant Discharge Elimination System or NPDES) permitting regime to discharges from rail cars in transit. That narrow question arises, however, in a broader context of settled law.

The Board has already concluded that federal environmental law, including environmental law that is implemented in part by states, cannot be harmonized with ICCTA, and is therefore preempted by ICCTA, when it is “being used to regulate rail operations directly or being applied in a discriminatory manner against railroads.” *United States Environmental Protection Agency – Petition for Declaratory Order*, FD 35803 (hereinafter, *EPA*), 2014 WL 7392860, at *7 (STB served Dec. 29, 2014). The Board and the courts have also repeatedly concluded that government permitting that acts as preclearance requirements imposed on railroads constitute impermissible efforts to regulate rail operations directly. *E.g.*, *Delaware v. STB*, 859 F.3d 16 (D.C. Cir. 2017); *CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662 (STB served Mar. 14, 2005), *pet. for recon. denied* (STB served May 3, 2005). Moreover, the Board and the courts have repeatedly held that “state or local permitting or preclearance requirements, including . . . environmental and land use permitting requirements, *are categorically preempted.*” *Soo Line R.R. Company Petition for Declaratory Order*, FD 35850, slip op. at 4 (STB served Dec. 22, 2014) (emphasis added).

It is also settled that, in enacting the preemption provision of ICCTA, Congress intended that interstate rail transportation not be subjected to a patchwork of state regulation. *See EPA*, 2014 WL 7392860, at *8. The patchwork problem is unavoidable here. Consistent with the

cooperative federalism at its core, implementing the CWA necessarily involves actions by states, under state law, to establish state-specific requirements for controlling water pollution. *See, e.g.*, 33 U.S.C. §§ 1251, 1313, 1341, 1370. States routinely exercise that authority regardless of whether EPA administers the NPDES program directly or states “establish and administer [their own programs] under state law.” *Id.* § 1342(b). Given the CWA’s emphasis on state authority, application of the discharge prohibition and the NPDES permitting regime to rail cars in transit would unavoidably create just the sort of patchwork that Congress intended to prevent in enacting ICCTA.

In addition, application of the CWA discharge prohibition and the NPDES permitting regime would also directly regulate how rail cars are designed and used, how railroads conduct core rail operations, and how railroads interact with shippers and others involved in rail transportation—all matters that are within the Board’s exclusive purview. These considerations provide additional reasons for issuing a declaratory order finding preemption.

These comments expand on AAR’s petition in three ways:

First, they explain in more detail how application of CWA Section 402’s permitting requirements to rail cars in transit, whether by EPA-issued or state-issued permits, would create exactly the sort of patchwork regulation of rail operations that Congress prohibited. These comments demonstrate that the patchwork problem is unavoidable here because action by individual states under state law is at the core of the CWA.

Second, they highlight previous decisions issued by the Board and relevant opinions of federal courts to illustrate the categorical incompatibility of preclearance, permitting, and discharge regulations related to railcars in transit with ICCTA, and how ICCTA’s preemptive sweep is at its apex regarding attempts to regulate rail cars in transit.

Third, they reinforce that the Board should act now rather than await issuance of an actual NPDES permit or further CWA citizen enforcement actions aimed at rail cars in transit.

For the reasons set forth in the petition and below, AAR urges the Board to issue the requested declaratory order finding that any application of the CWA Section 402 permitting scheme or the Section 301 prohibition against unpermitted discharges to rail cars in transit is both displaced and preempted by ICCTA. Because incidental discharges from rail cars in transit have never been subject to permitting requirements under the NPDES program, issuing the requested declaratory order would simply preserve the existing regulatory status quo. It would also avoid a massive expansion of the NPDES program, for which agencies are unlikely to have adequate resources, and a patchwork of competing regulations that would create havoc in the rail industry.

BACKGROUND

I. THE CLEAN WATER ACT'S COOPERATIVE FEDERALISM FRAMEWORK GUARANTEES A PATCHWORK OF STATE REGULATION.

CWA Section 301 prohibits the “discharge” of “any pollutant” from a “point source” into “navigable waters,” except as in compliance with specific enumerated provisions of the Act. 33 U.S.C. § 1311(a). One such provision is Section 402, which established the NPDES permitting program. *See id.* § 1342. “Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation’s waters.” *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102 (2004). The CWA defines pollutant broadly, *see* 33 U.S.C. § 1362(6), and courts have interpreted the definition broadly such that it would encompass incidental commodity loss, *e.g.*, coal dust, grain, ballast rock, no matter how minimal. *See, e.g., Hudson River Fishermen’s Ass’n v. City of New York*, 751 F. Supp. 1088, 1101 (S.D. N.Y. 1990), *aff’d*, 940 F.2d 649 (2d Cir. 1991).

Although Congress authorized EPA to issue NPDES permits in the first instance, *see EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 206 (1976) (citing 33 U.S.C. § 1342(a)), 47 states currently administer their own NPDES programs under state law. *See* EPA, *State Program Authority*, <http://www.epa.gov/npdes/npdes-state-program-information> (last visited Apr. 20, 2020). Indeed, Congress authorized states to “establish and administer under State law” their own NPDES permitting programs, 33 U.S.C. § 1342(b), in accordance with its express policy to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” *Id.* § 1251(b). In fact, Congress dictated that EPA “shall approve” a state permit program unless it determines that the state lacks adequate authority to perform nine specific functions. *See* 33 U.S.C. § 1342(b); *see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (“By its terms, the statutory language is mandatory and the list exclusive; if the nine specified criteria are satisfied, the EPA does not have the discretion to deny a transfer application.”). Not later than ninety days after a state submits its program to EPA for approval, EPA “shall suspend the issuance of permits . . . as to those discharges subject to such program” unless it determines that it cannot approve the state program. *See* 33 U.S.C. § 1342(c).

A. Technology-Based Effluent Limitations In NPDES Permits Vary From State To State.

NPDES permits must incorporate applicable technology-based effluent limitations—discharge restrictions that are based on the degree of pollutant control that is achievable using varying levels of control technology. *See* 33 U.S.C. §§ 1342(a)(1), 1311(b)(1). To help guide permit writers in deriving appropriate technology-based effluent limitations, EPA establishes (by rulemaking) nationally applicable effluent limitations guidelines for various categories of discharge sources. *See id.* §§ 1311(b), 1314(b). These guidelines are not self-executing. They

“achieve their bite only after they have been incorporated into NPDES permits” by individual EPA or state permit writers. *See Tex. Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928 (5th Cir. 1998); *see also California*, 426 U.S. at 205 (“An NPDES permit serves to transform generally applicable effluent limitations and other standards—including those based on water quality—into the obligations (including a timetable for compliance) of the individual discharger[.]”).

The existence of EPA-promulgated effluent limitations guidelines for a particular category of discharge sources does not mean that all dischargers subject to those guidelines will receive identical permit terms. “Once EPA establishes effluent limitations guidelines, [an individual] permit writer is responsible for translating the limitations and other requirements of the effluent limitations into [technology-based effluent limitations] and other conditions appropriate for inclusion in an NPDES permit.” US EPA, NPDES Permit Writers’ Manual, EPA-833-K-10-001, at 5-22 (Sept. 2010) (“NPDES Permit Writers’ Manual”), *available at* https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. In other words, EPA and state permit writers do not simply copy and paste uniform requirements from EPA’s effluent limitations guidelines into permits. Rather, they must exercise their judgment and interpret the federal guidelines throughout a multi-step process before arriving at specific permit terms. *See id.* at 5-23 to 5-44 (detailing nine steps for applying effluent limitations guidelines to direct discharges).

The reasons for variation among technology-based effluent limitations do not end there. If EPA has not issued nationally-applicable effluent limitations guidelines for a particular source category (as in the case of rail cars in transit), state permit writers must set limits on a case-by-case basis using their “best professional judgment,” often referred to as “BPJ limits.” Individual permit writers—within the same state and across different states—will not always make identical

determinations when exercising their best professional judgment to derive technology-based effluent limitations for a particular discharge source, and application of these varying judgments inevitably leads to variation among BPJ limits.

Yet another reason permitting requirements can vary between states is that states are free to establish technology-based requirements more stringent than EPA's nationally applicable guidelines. The Act allows "any State or political subdivision thereof . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution" that is more stringent than what the federal government adopts. *See* 33 U.S.C. § 1370; *see also id.* §§ 1342(a)(1) & 1311(b)(1)(C) (requiring NPDES permits to incorporate "any more stringent limitation . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of this title)"). Under these provisions, EPA-promulgated nationally applicable requirements operate as the "floor," and states can (and often do) impose additional technology-based requirements. *See U.S. Steel Corp. v. Train*, 556 F.2d 822, 837-38 (7th Cir. 1977) (explaining that "state limitations adopted by Indiana pursuant to its plenary power preserved by [33 U.S.C. § 1370]" had to be included in a NPDES permit because of the interplay between 33 U.S.C. § 1342(a)(1) and 33 U.S.C. § 1311(b)(1)(C)). Permit terms tailored to state-specific requirements that are more stringent than the federal "floor" create a patchwork.

B. Water Quality-Based Effluent Limitations In NPDES Permits Vary From State To State.

In addition to technology-based effluent limitations, NPDES permits must also contain "any more stringent limitation . . . required to implement any applicable water quality standards established pursuant to [the CWA]." 33 U.S.C. § 1311(b)(1)(C); *see also* 33 U.S.C. § 1342(a)(1). Water quality standards, which are "primarily the states' handiwork," consist of the designated

uses for a body of water and narrative and/or numeric criteria to support those uses.¹ *See Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) (discussing 33 U.S.C. § 1313). Unlike technology-based effluent limitations, water quality-based effluent limitations in NPDES permits are derived “based on the physical attributes of the water quality segment necessary to support the designated uses” rather than an evaluation of what pollution control technologies are available and what levels of control they can feasibly achieve. *See Westvaco Corp. v. EPA*, 899 F.2d 1383, 1384 (4th Cir. 1990). Once a state establishes water quality standards for its water bodies, “NPDES permit limitations must be established to assure compliance, regardless of the availability or effectiveness of treatment technologies.” *Id.*

Water quality-based effluent limitations in NPDES permits differ from state to state, and sometimes from waterbody to waterbody within the same state, depending on what the applicable water quality standard is in the water(s) that receive a discharge. NPDES permit writers must undertake the following multi-step process in determining whether and what water quality-based effluent limitations to include in permits: (i) determine the applicable water quality standards; (ii) characterize the discharger’s effluent and the receiving water; (iii) determine the need for water quality-based effluent limitations; and (iv) calculate the specific limitations. *See*

¹ The CWA requires each state to adopt water quality standards for all waters of that state and to review such standards at least every three years. *See* 33 U.S.C. § 1313(a), (b), (c)(1). States begin by classifying the uses for which the water is to be protected, *e.g.*, fishing, swimming, public water supply. *See id.* § 1313(c)(1). Next, states determine what level of water quality (*i.e.*, criteria) is needed to protect those uses. Criteria can be either numerical (*e.g.*, 10 milligrams per liter) or narrative (*e.g.*, no toxic pollutants in toxic amounts). States must submit their new or revised standards to EPA for review and approval. Such submissions include, among other things: (i) use designations for each water body; (ii) a description of methods and analyses used to support revisions of standards; (iii) criteria sufficient to protect the designated uses; (iv) an antidegradation policy to protect existing uses and high quality waters; (v) certification of compliance with state law; and (vi) information to assist EPA in assessing the adequacy of the scientific basis for the standards. *See* 40 C.F.R. § 131.6.

generally NPDES Permit Writers’ Manual at Chapter 6. Each of these basic steps, in turn, entails its own multi-step analysis. *See id.* Thus, not only will water quality standards vary from state to state, so too will permit limits developed by individual permit writers exercising their discretion.

Importantly, permit requirements driven by state law can be very stringent and disruptive to interstate commerce. In *U.S. Steel Corp.*, for instance, the Court rejected the permittee’s challenge to limitations on the discharge of six chemicals that were based on Indiana’s water quality standards, explaining that even if the limits “are impossible to achieve with present technology,” “it does not follow that they are invalid.” 556 F.2d at 838. The Court emphasized that “[i]t is clear from §§ 301 and 510 of the Act, and the legislative history, that the states are free to force technology.” *Id.* The Court further noted that “[i]f the states wish to achieve better water quality, they may, *even at the cost of economic and social dislocations caused by plant closings.*” *Id.* at 838 (emphasis added).

* * *

EPA’s guidance manual for NPDES permit writers underscores just how much NPDES permit terms are likely to vary from state to state. According to that guidance, a single permit could have technology-based effluent limitations based on the individual permit writer’s interpretation of EPA-issued effluent guidelines, technology-based limits derived through the exercise of the permit writer’s best professional judgment, technology-based limits based on more stringent state law, and water quality-based effluent limitations based on state-specific water quality standards. *See* NPDES Permit Writers’ Manual at 5-14. Taking into consideration that rail cars typically move through numerous states and over many different water bodies, it is a virtual certainty that NPDES permit writers in different states (or even within the same state) will develop differing requirements for discharges from rail cars in transit.

C. NPDES Permitting Requirements Will Vary From State To State Regardless Of Whether EPA Or A State Is The Permitting Authority.

A patchwork of state-specific requirements may be unavoidable even in the few states where EPA administers the NPDES program. This is because the CWA allows states to insert state-specific requirements into EPA-issued permits using their Section 401 certification authority. Section 401 requires the state in which a discharge originates to certify that any such discharge will comply with applicable requirements of the CWA *and* to specify “any effluent limitations and other limitations, and monitoring requirements necessary to assure” compliance with “any other appropriate requirement of State law.” 33 U.S.C. §§ 1341(a), (d). EPA cannot issue a permit authorizing discharges into the waters of a state until that state has issued a water quality certification under CWA Section 401 or has waived its right to certify. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 309 (1982) (citing 33 U.S.C. § 1341). Consistent with the CWA’s states-first approach, EPA permit writers lack discretion to reject states’ Section 401 certification conditions.² *See id.*

CWA Section 401 certifications are powerful tools that allow states to “effectively veto[]” even large projects that have “secured approval from a host of other federal and state agencies.” *Islander East Pipeline Co., LLC v. McCarthy*, 525 F.3d 141, 164 (2d Cir. 2008).³

² EPA is currently in the process of updating its regulations on Section 401 certifications by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures. *See generally* 84 Fed. Reg. 44,080 (Aug. 22, 2019). But that rulemaking does not diminish the need for the Board to act on AAR’s petition because EPA’s pending rulemaking does not (nor could it) change the statutory command that limitations in certifications that conform to the statutory requirements “shall become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d).

³ For instance, in 2016, the State of New York denied an application for a Section 401 certification for an interstate natural gas pipeline project in Pennsylvania and New York. *See Constitution Pipeline v. N.Y. Dep’t of Envtl. Conservation*, 686 F.3d 87, 91, 96 (2d Cir. 2017). Late last month, the project proponents announced that they were abandoning that \$1 billion (Continued...)

Because they allow states to insert state-specific requirements in EPA-issued NPDES permits the potential exists for: (i) a state to use the certification process to try to regulate, or even block altogether, rail transportation of one or more commodities; and (ii) a patchwork of requirements from several states that regulate the movement of rail cars across state borders.

Notably, even in the sole instance that EPA has been able to issue a single nationwide general permit covering all states and territories, a patchwork of state-driven requirements nevertheless resulted. *See Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel*, 78 Fed. Reg. 21,938 (Apr. 12, 2013).⁴ As AAR previously explained (petition at 7-10), when EPA developed that permit, 25 states exercised their Section 401 certification authority and insisted on additional permit requirements beyond those established by EPA. Responding to a comment on that permit criticizing EPA for “fail[ing] to ensure a single national standard for discharges,” EPA articulated why the CWA precludes the ability to craft a single permit that denies states the ability to graft on state-specific requirements:

EPA acknowledges commenters support for uniform standards and concerns regarding the possibility that there may be times when vessels will pass through multiple states during a single voyage, and could be subject to differing state

project. *See* M. Esch, “Costs, delays scuttle 124-mile Constitution Pipeline project” (Feb. 24, 2020), available at <https://apnews.com/468d090d04e702a32be11e33ecc26fa4>.

⁴ EPA explained that it was able to issue a single nationwide permit for vessels because discharges covered by the Vessel General Permit are not considered a part of any currently authorized state permitting program. *See* 78 Fed. Reg. at 21,941-42. And when EPA subsequently approved Idaho’s NPDES program, it retained authority to regulate “discharges from non-military, non-recreational vessels and all ballast water discharges.” 83 Fed. Reg. 27,769, 27,770 (June 14, 2018). As explained in AAR’s petition (at 18-19), the rationale justifying EPA’s issuance of a nationwide permit for vessel discharges would not appear to apply to rail cars because EPA did not exempt by regulation or otherwise discharges from rail cars in transit when it approved any of the 47 state NPDES programs that were established and administered under state law. Thus, those 47 states would presumably be the permitting authority for such discharges.

requirements. However, *under the NPDES program, it is not possible to have a 'single nationwide system' that does not accommodate the states ability to include state-specific requirements to implement their own water quality standards and requirements.* CWA § 510 expressly preserves State authority to issue more stringent requirements than the Federal government and, under CWA § 401, federally issued-NPDES permits are subject to certification by the states as to compliance with state water quality standards and other requirements of state law. Therefore VGP Part 6 includes conditions provided by the states in accordance with the CWA § 401 certification process. Legislation is outside of the scope of today's action.

US EPA, 2013 VGP: EPA's Response to Public Comments, at 1225 (Mar. 28, 2013), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0141-0926> (emphasis added).

Similarly, in addressing a comment urging EPA to “ensure that vessel operators are not faced with inconsistent and unnecessarily burdensome state requirements as they travel through the waters of multiple states,” EPA made it clear that it was powerless to stop neighboring states from creating a patchwork of conflicting requirements:

EPA cannot require states that share a waterway or coastline to resolve their conflicts before certifying the VGP. Conducting the process of requesting state certification is mandated by the CWA in Section 401, and EPA cannot limit this statutory requirement, as commenter suggests. Furthermore, *it is Congress's intent that states have the authority provided by CWA 401 to review and certify Federal licenses and permits and add water quality-related conditions to those licenses and permits.*

Id. at 1231-32 (emphasis added).⁵

To use one example from that permit, three neighboring states imposed three different numeric limits for discharges of ballast water from vessels employing ballast water treatment systems using chlorine. This happened even though those states have identical acute water

⁵ Trade associations representing commercial ship owners and operators attempted to challenge the state-specific requirements, alleging that EPA deprived them of the opportunity to comment on the “potential conflicts and burdens created by the cumulative effects of the state conditions.” *See Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011). In rejecting that challenge, the Court found that EPA “correctly concluded that it did ‘not have the ability to amend or reject conditions in a state’s CWA 401 certification.’” *Id.* at 10.

quality criteria and very similar chronic water quality criteria for the pollutant in question (total residual chlorine). Specifically:

- Illinois, Indiana, and Wisconsin have all established numeric water quality criteria for total residual chlorine. The acute criterion is 0.019 mg/L in all three states. *See, e.g.*, 327 IAC 2-1-6(a)(3) (statewide minimum surface water quality standards applicable to all Indiana waters except those within the Great Lakes System); 327 IAC 2-1.5-8(b)(3) (minimum surface water quality standards applicable to all Indiana waters within the Great Lakes System); 35 Ill. Adm. Code 302.208 (statewide numeric water quality standards for chemical constituents); Wis. Adm. Code ch. NR 105 Table 1 (acute water quality criteria).
- Additionally, Illinois and Indiana have established chronic criterion for total residual chlorine at 0.011 mg/L, whereas Wisconsin has established a chronic toxicity criterion of 0.007 mg/L. *Compare* 327 IAC 2-1-6(a)(3) *and* 35 Ill. Adm. Code 302.208 *with* Wis. Adm. Code ch. NR 105 Table 1.
- In the Vessel General Permit, all three states insisted on different permit conditions for ballast water discharges to ensure compliance with the foregoing water quality criteria. In Illinois, such discharges “shall not exceed the laboratory quantification level of 0.05 mg/L[.]” *See* Final 2013 VGP § 6.9.4. In Indiana, such discharges “shall not exceed a maximum total residual chlorine limit of 0.02 mg/L.” *Id.* § 6.10.8. Finally, in Wisconsin, such discharges “must meet a daily maximum total residual oxidants limit, measured as total residual chlorine of [0.038 mg/L].” *Id.* § 6.25.4(f).

These disparate requirements would apply to a single vessel moving between waters under those states' jurisdiction. As this example illustrates, there is no way to ensure uniformity from state-to-state even when EPA issues a nationally-applicable general permit.⁶

II. THE CWA'S CITIZEN SUIT PROVISION MAY EXPOSE RAIL OPERATORS AND OTHERS TO SIGNIFICANT PENALTIES, INJUNCTIONS, AND PERMITTING OBLIGATIONS.

In addition to the authority of EPA and states to enforce the CWA's requirements, including its discharge prohibition, any citizen may commence a civil action against any "person" that is alleged to be in violation of an "effluent standard or limitation" under the CWA. *See* 33 U.S.C. § 1365 (CWA citizen suit provision). Section 1365(f) broadly defines the term "effluent limitation or limitation" to include, among other things, an unlawful act under section 1311, such as the discharge of pollutants from a point source without a permit. Defendants in CWA citizen suits can be liable for potentially crippling civil penalties. *See id.* § 1365(a) (cross-referencing 33 U.S.C. § 1319(d), which provides that "any person who violates section 1311 . . . shall be subject to a civil penalty not to exceed \$25,000 per day for each violation."). EPA adjusts those statutory penalty amounts for inflation from time to time. The current daily penalty amount is \$55,800 per violation, per day. *See Civil Monetary Penalty Inflation Adjustment*, 85 Fed. Reg. 1,751, 1,754 (Jan. 13, 2020).

As detailed in AAR's petition (at 10-12), citizen plaintiffs have already sued a railroad under the CWA's citizen suit provision, seeking, among other things: (i) a prohibition on use of any railcar that is designed in a manner that would allow coal pollutants to be discharged into jurisdictional waters; and (ii) a court order mandating installation of mechanical covers on rail

⁶ AAR's petition (at 7-10) described some of the many operational and regulatory differences between vessels and rail cars in transit.

cars and requiring replacement of existing rail cars with newly designed cars. *See Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016). In denying cross motions for summary judgment, the Court in that case held that coal that falls directly into jurisdictional waters from a moving rail car is a discharge from a point source that requires an NPDES permit. *See id.* at *8-9. And although the parties settled that case, the citizen plaintiffs in that case sought *several trillions of dollars in civil penalties* for alleged violations of the CWA in Washington State alone. *See* Plaintiffs’ Response to BNSF’s Motion for Leave to File Overlength Motion in Limine, *Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967 (ECF No. 182) (filed Aug. 5, 2016).

ARGUMENT

I. ICCTA PREEMPTS THE CWA’S DISCHARGE PERMITTING PROGRAM.

Congress initially asserted federal authority over the railroad industry by enacting the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), acknowledged as “among the most pervasive and comprehensive of federal regulatory schemes.” *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025, 1029 (9th Cir. 1998) (citation omitted). Congress further clarified its intent to create a single, comprehensive scheme of rail regulation in 1995 when it enacted ICCTA, 49 U.S.C. §§ 10101 et seq., and included within ICCTA an express preemption of “regulation of rail transportation” under other laws. With its enactment of ICCTA, Congress intended to “significantly reduce state and local regulation of railroads,” *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004), and prevent the development of a patchwork of regulations that would unduly interfere with interstate commerce. *Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016). To this end, Congress established the Surface Transportation Board and empowered it with authority

to regulate all aspects of railroad operations. *See* 49 U.S.C. §§ 701(a), 702. ICCTA § 10501 reserves for the Board exclusive jurisdiction over:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,...

49 U.S.C. § 10501(b). Removing all doubt, § 10501 concludes that the Board’s jurisdiction over this broad sweep of rail operations is “exclusive” and “preempt[s] the remedies provided under Federal or State law.” *Id.* (emphasis added).

As explained below (Part I.A), ICCTA precludes the imposition of the CWA’s discharge prohibition (*e.g.*, through federal, state, or tribal enforcement or through citizen suit litigation) and NPDES permitting requirements on rail cars in transit because such imposition cannot be harmonized with ICCTA. The direct regulation of rail transportation by a range of public entities and private citizens would lead to a patchwork of regulation of interstate rail movements that Congress expressly sought to avoid through preemption. Moreover, preemption applies with particular force here due to the fact that state-issued NPDES permitting requirements are matters of state law, as several courts have held. Such requirements for rail cars in transit are categorically preempted by ICCTA (Part I.B), in the same manner and to the same extent as the broad range of state and local permitting and preclearance requirements that the Board and courts have deemed preempted by ICCTA.

A. The CWA's NPDES Permitting Regime And The Discharge Prohibition Cannot Be Harmonized With The Board's Regulation Of Transportation By Rail Carrier.

The CWA is a federal statute. As explained in the petition, the Board seeks to harmonize federal statutes and regulations where they may be in conflict with ICCTA. *Joint Petition for Declaratory Order-Bos. & Maine Corp. & Town of Ayer, Ma*, 5 S.T.B. 1041 (2001). In many cases, federal environmental laws, even when those laws are implemented by state or local authorities, apply to railroads and do not create conflicts with ICCTA.⁷ But where another federal law is “used to regulate rail operations directly or [] applied in a discriminatory manner against railroads,” an irreconcilable conflict is created that preempts the other law. *See EPA*, 2014 WL 7392860, at *7; *see also Grafton & Upton R.R.—Petition for Declaratory Order*, STB Docket No. FD 35779, slip op. at 6 (STB served Jan. 27, 2014). Such an irreconcilable conflict is created by the application of the CWA's NPDES permitting regime and the discharge prohibition to railcars in transit.

1. Patchwork Regulation Of Rail Transportation By States Cannot Be Harmonized With ICCTA.

The Board has already concluded that an irreconcilable conflict would arise, and therefore that harmonization would not be possible, from the application of a federal law that subjects railroads “to fluctuating rules as they cross state lines.” *See EPA*, 2014 WL 7392860, at *8. In *EPA*, a California air quality management district sought to have certain anti-idling rules implemented under the Clean Air Act (CAA) as a part of the EPA's California State Implementation Plan (SIP). 2014 WL 7392860, at *8. Implementation of such rules under the CAA would have given them the full effect of federal law. *Id.* at *2. The Board counseled that

⁷ AAR's Petition clarifies that railroads do currently hold NPDES permits for certain stationary facilities, and that exercise of NPDES permitting authority is not at issue in this proceeding.

even if the anti-idling rules had been implemented by the EPA, they would have contravened ICCTA's core purpose and likely been displaced:

If EPA were to approve the Rules as part of California's SIP, it is likely that the Rules would be preempted because of the potential patchwork of regulations that could result, contravening Congress's purpose in enacting § 10501(b). If the Rules were adopted into the California SIP, locomotives would be subject "to fluctuating rules as they cross[] state lines" (and as they cross air quality regions), and the Rules would therefore likely "directly interfere" with the purpose of § 10501(b).

Id. at *8. Although the Board declined to issue any declaratory order in the case,⁸ the Board cautioned that "the Rules likely would be preempted by § 10501(b)." *Id.* at *9.

Following the rationale in *EPA*, the Board should find that ICCTA displaces any imposition of the NPDES permitting program on rail cars in transit. As explained above in Background Part I, the CWA inevitably creates a patchwork of regulatory requirements regardless of whether states or EPA act as the permitting authority because of the CWA's cooperative federalism core. In the CWA, Congress expressed a preference for state-led action and reserved to states the ability to graft state-specific requirements on top of any EPA-established requirements. Such a patchwork would "contraven[e] Congress's purpose in enacting § 10501(b)." *EPA*, 2014 WL 7392860, at *8. To allow application of NPDES permitting requirements to railcars in transit would be to condone the enforcement of the very same type of

⁸ The Board declined to issue any declaratory order in the case because there was an ongoing dispute as to whether the EPA was prohibited by California law and the text of the CAA from even implementing the Rules in question. *See id.* at *5. ("[T]he Railroad Parties argue that EPA cannot properly approve the Rules into the California SIP in the first place, for a number of reasons. For example, they claim that the CAA requires states to show that federal or state law does not prohibit a proposed SIP rule, and that here, the District cannot make this showing. The Railroad Parties point to the fact that the District Court found the Rules to be unlawful under California state law in AAR 2007. In addition, the Railroad Parties argue that the Rules are prohibited by the CAA itself because, under that law, states cannot create "any standard or requirement relating to the control of emissions" from new locomotives.").

regulation the Board suggested would be displaced by ICCTA in *EPA*: rules adopted pursuant to federal legislation by multiple independent permit issuers in various states, inevitably risking a patchwork of regulation driven by localized interests. *See id.* at *8.

Even if EPA had the ability to issue a nationwide permit for discharges from rail cars in transit, the Vessel General Permit illustrates why a patchwork is nevertheless unavoidable. The CWA allows state-level authorities to include state-specific requirements based on purported localized needs, and unique to each territory, even in an EPA-issued permit. Simply put, the CWA’s emphasis on a diversity of state approaches to regulation is anathema to ICCTA.

Moreover, as noted in the petition, states authorized by EPA to administer the NPDES program issue permits under state law. *See* Petition at 14-15. But even if states’ actions pursuant to the CWA were matters of federal law—which the courts have concluded is not the case—the *federalization* of state-centric patchwork regulations would do nothing to alleviate conflicts with ICCTA because railcars would still be subject to “fluctuating rules as they cross state lines.” *See EPA*, 2014 WL 7392860, at *8; *see also id.* at *9 (“[A]llowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (*even if federalized under the CAA*) would directly conflict with the goal of uniform national regulation of rail transportation. For this reason, based on the current record, we find that the Rules likely would be preempted by § 10501(b).”).

2. In Addition To The Fatal Patchwork Problem, Direct Regulation Of Rail Transportation Outside Of ICCTA Cannot Be Harmonized With ICCTA.

Assuming for the sake of argument that nationally uniform NPDES permitting of rail cars in transit were somehow possible under the CWA, ICCTA would nevertheless preclude such regulation because any form of preclearance or permitting to conduct the movement of trains fundamental to rail transportation is incompatible with the Board’s “exclusive jurisdiction” over

“transportation by rail carriers.” 49 U.S.C. § 10501. As explained in the petition, the requirement to obtain a permit before providing rail transportation directly regulates the railroads’ core obligation to provide service on reasonable request. The withholding of such a permit or the imposition of overly stringent requirements would prevent railroads from complying with their common carrier obligations.

AAR further explained in the petition that permit conditions developed for rail cars in transit would allow the permit issuer (even if it were a single, federal entity) to effectively regulate how rail cars are equipped and operated, particularly if railroads had to replace their fleets to comply. *See* Petition at 16-18, 21-23 (detailing how Section 402 permitting of rail cars in transit would impermissibly regulate railroad operations and directly conflict with the Board’s exclusive regulation of the economic relationship between railroads and their customers). Such requirements cannot be harmonized with ICCTA, for it would amount to using the CWA’s NPDES permitting program “to regulate rail operations directly.” *EPA*, 2014 WL 7392860, at *7; *see also id.* at *8 (expressing concern that the regulation at issue “appears to decide for the railroads what constitutes unnecessary idling and also to influence the railroads’ choice of equipment and how to configure that equipment”).

Imposition of the CWA’s discharge prohibition on rail cars in transit – through federal, state, or tribal enforcement or in citizen suits – cannot be harmonized with ICCTA for the same reasons. As *Sierra Club* demonstrates, citizen plaintiffs seeking to enforce the discharge prohibition in a citizen suit have already tried to impose operating requirements on railroads. Specifically, the plaintiffs in that case requested injunctive relief requiring the railroad to cover all railcars carrying coal, replace its existing railcar fleet, use only cars that met plaintiffs’ desired specifications, and to otherwise operate in a manner guaranteed to prevent discharges.

See Third Amended Complaint, *Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967, at Relief Requested D, E, F (ECF No. 13) (seeking relief that would require the railroad to cover all railcars carrying coal, discard its entire fleet, use cars that meet plaintiffs’ desired specification, and otherwise operate in way guaranteed to prevent discharges). Because ICCTA provides that its remedies “with respect to regulation of rail transportation are exclusive and preempt the remedies provided for under Federal or State law,” 49 U.S.C. § 10501(b), the CWA’s discharge prohibition cannot be applied to rail cars in transit in this manner.

Finally, as AAR explained in the petition, imposition of the NPDES permitting program and enforcement of the discharge prohibition would allow other agencies and courts to regulate the critical economic relationship between railroads, shippers and other entities involved in rail transportation. The courts have found that “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.” *Fayus Enterprises v. BNSF et al.*, 602 F.3d 444 (D.C.Cir. 2010). ICCTA cannot be harmonized with another law that seeks to displace the STB’s exclusive authority over economic regulation.

B. Preemption of State NPDES Permitting Is Even Stronger Here Than in *EPA* Because State-Issued NPDES Permits Are Purely Creatures of State Law.

While the CWA’s discharge prohibition and EPA-administered NPDES programs are matters of federal law, several courts have found that state NPDES permits are matters of state law. Given the state law character of NPDES permits, the case for preemption here is at its apex. Courts have repeatedly recognized that Congress’s intent to preempt actions by states that interfere with rail regulation is clear and unambiguous.⁹

⁹ The central role of states and state action in the CWA regulatory scheme distinguishes the preemption analysis here from the Ninth Circuit’s decision in *Swinomish Indian Tribal* (Continued...)

As discussed above in Background Part I, the CWA plainly allows states to “establish and administer under State law” their own NPDES programs. *See* 33 U.S.C. § 1342(b). Based on an examination of the statutory text and the legislative history, federal courts have concluded that “Congress made clear that state [Section 402] permits would be issued under State law and would be State, not Federal actions.” *District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980); *see also Mianus River Preservation Committee v. Administrator, EPA*, 541 F.2d 889, 904 (2d Cir. 1976) (“Such a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program creates a separate and independent State authority to administer the NPDES pollution controls[.]”). State courts have reached the same conclusion. *E.g., Michigan Farm Bureau v. Dep’t of Env’tl. Quality*, 292 Mich. App. 106, 130–31, 807 N.W.2d 866, 884 (2011) (clarifying that the state agency’s “authority to promulgate administrative rules concerning NPDES permitting in Michigan is purely a matter of state law” and that Michigan’s “NPDES program is administered pursuant to state law rather than federal law”).

The fact that states act under state law to implement the CWA is an important factor in the preemption analysis. Courts and the Board have long recognized the exceedingly broad reach of ICCTA preemption of state and local laws. *See, e.g., Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (“It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.”); *CSX Transp., Inc. v. Ga. Pub. Serv.*

Community v. BNSF Railway Co., No. 18-35704, 2020 WL 1038679 (Mar. 4, 2020). There, the court found that ICCTA would not preempt an injunction giving effect to easement restrictions in an easement created under the Indian Right of Way Act. That case, however, was based on unique considerations involving Indian tribes, treaties and Indian law. The court went out of its way to distinguish preemption considerations involving state law, which are at the heart of the CWA regulatory scheme, and relied on the unique federal interest in cases involving Indian tribes.

Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (“It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (“[T]he plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.”).

Accordingly, states cannot interfere with “a rail carrier’s ability to conduct rail operations.” *EPA*, 2014 WL 7392860, at *6. Railroads’ operational control over rail cars in transit is subject to ICCTA preemption. *See City of Alexandria, Virginia--Petition for Declaratory Order*, No. FIN 35157, 2008 WL 4829285, at *4 (Nov. 5, 2008); *CSX Transportation, Inc.--Petition for Declaratory Order*, Fed. Carr. Cas. (CCH) ¶ 37186, 2005 WL 584026 (Mar. 14, 2005); *Vermont Ry., Inc. v. Town of Shelburne*, 287 F. Supp. 3d 493, 500 (D. Vt. 2017), *aff’d*, 918 F.3d 82 (2d Cir. 2019) (preempting state ordinance that “would place significant restrictions on when and where rail cars move and when and where rail commodities are shipped and stored.”).

Nor can states impose preclearance and permitting regulation related to rail transportation, which the Board and the courts have found to be *categorically* preempted by ICCTA. *See Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016) (“The Board has found two broad categories of state and local actions to be categorically preempted regardless of the context or rationale for the action. The first is any form of state or local permitting or preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized.”); *Soo Line R.R. Company Petition for Declaratory Order*, No. FD 35850, 2014 WL 7330097, at *4 (Dec. 22, 2014) (“[S]tate or local permitting or

preclearance requirements, including . . . environmental and land use permitting requirements, are categorically preempted.”); *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (state rules that “requir[e] railroads to reduce emissions” were “plainly” preempted because they “have the effect of managing or governing rail transportation,”); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) (pre-construction permit requirement preempted because it unduly interfered with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations, and because it allowed local body to delay construction of railroad facilities almost indefinitely).

Again, the exclusivity of ICCTA’s remedies is at its apex with regard to state action aimed at the movement of railcars. Illustrating the point is *CSX Transportation, Inc.--Petition for Declaratory Order*, Fed. Carr. Cas. (CCH) ¶ 37186, 2005 WL 584026 (Mar. 14, 2005), in which the District of Columbia sought to regulate the passage of hazardous material through the District, arguing that the statute did not restrict interstate commerce because it allowed railroads to seek a permit from the District to transport otherwise banned materials. *Id.* at *8. In declaring the statute categorically preempted, the Board noted that “[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations.” *Id.* The Board found preemption because “[t]he D.C. Act’s permitting regime is even more closely *tied to actual movement of rail cars* than those local permitting regimes that courts have already found to be preempted,” and because it would “likely lead to further piecemeal attempts by other localities to regulate rail shipments.” *Id.* at *7, *9 (emphasis added). To the same effect is *Nottke v. Norfolk S. Ry. Co.*,

where plaintiffs sought to use state law to enjoin the use of brake retarders and force the railroad to “implement another means of decelerating trains or to install noise-reducing technology to ameliorate the noise levels the retarders currently generate.” 318 F. Supp. 3d 1036, 1039 (N.D. Ohio 2018). The court refused to engage in any “as-applied [preemption] analysis,” finding ICCTA to categorically preempt their claims. *Id.* at 1039-40.

Since state-issued NPDES permitting requirements are matters of state law, such permitting requirements for rail cars in transit would be categorically preempted under the relevant precedents from the Board and the courts. They would curtail and dictate rail operations, which only the Board can do, and they would “lead to further piecemeal attempts by other localities to regulate rail shipments.” *CSX Transportation, Inc.--Petition for Declaratory Order*, 2005 WL 584026, at *7, *9. As explained in more detail in AAR’s petition (at 16-18), Section 402 permitting of rail cars in transit would directly impact how rail carriers move various commodities, and individual railcars might be required to obtain permits before they could transport those commodities. This would amount to direct regulation of rail carriers’ core common carrier obligation because the denial of a permit or the establishment of overly restrictive permit conditions could prevent the railroad from complying with its statutory obligation.

CWA Section 402 permitting of rail cars in transit would also result in an unworkable patchwork of state regulation that is incompatible with ICCTA’s goal of national uniformity in laws governing rail transportation. *See* Argument I.A *supra*. Allowing the 47 states that administer their own NPDES programs under state law to establish permitting requirements for rail cars in transit would inevitably create an unmanageable patchwork, and the burden of attempting to achieve compliance with all state-specific requirements that would be included in

NPDES permits for rail cars in transit would balkanize the national rail network. If states can regulate the rail industry through NPDES permits and force the adoption of particular technologies, equipment, or practices to comply with state-specific requirements, that would upend the comprehensive *federal* regulatory scheme that Congress carefully designed for the railroad industry.

For these reasons, AAR urges the Board to find that ICCTA categorically preempts application of the CWA Section 402 to rail cars in transit.

II. THE BOARD SHOULD NOT AWAIT ANOTHER SPECIFIC CONTROVERSY TO ARISE TO ISSUE A DECLARATORY ORDER.

The Board should not wait for another CWA citizen suit or for a State or the EPA to issue a permit pursuant to CWA Section 402 to address the uncertainty of an inconsistent patchwork of State and federal regulation facing railroads. *See Alabama Ry. Llc Petition for Declaratory Order*, No. FD 35583, 2012 WL 336550, at *1 (Jan. 27, 2012) (“Under 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy *or remove uncertainty*.”). The Board has explained that such orders may be issued

[S]imply to remove uncertainty as to the legal effect of the fact pattern, as we understand it, presented by the party requesting the declaration. It is not a verification of those facts, nor does it apply to any different circumstances. In short, our order will determine the legal consequences of the factual predicate presented.

Advantage Tank Lines, Inc.-Petition for Declaratory Order-Ex-Pipeline Movements, 10 I.C.C.2d 64, 66 (I.C.C. Mar. 4, 1994).

The Board has found the exercise of this discretion appropriate where, as here, the questions involve the “special expertise” of the Board, and “impact the uniformity of the regulated field.” *See V&S Ry., LLC Petition for Declaratory Order-railroad Operations in Hutchinson, Kan.*, No. FD 35459, 2012 WL 2865884, at *4 (July 9, 2012). The Board has

frequently used its discretion to issue declaratory orders to address whether federal railroad regulations applied to particular fact patterns, even absent live controversies. *See id.* (“[T]he Board here is not exercising its jurisdiction over any particular rail operations. Rather, we have been asked to provide guidance regarding the legal status of the Line and which entities may conduct operations on it under the Interstate Commerce Act (IC Act).”); *see also Wisconsin Dep't of Transportation Petition for Declaratory Order Reedsburg Line Near Madison, Wis.*, No. FD 35854, 2014 WL 5784507, at *1 (Nov. 6, 2014) (interpreting 49 U.S.C. § 10102(5) and 49 U.S.C. § 10901 in the context of railway acquisitions by state agencies).

Here, the uncertainty facing the rail industry related to the possible consequences of applying the CWA’s NPDES regime and discharge prohibition to rail cars in transit is real and significant. While states and EPA have not yet begun to insist that rail cars in transit somehow be permitted, the *Sierra Club* litigation discussed above paves the way for future regulatory actions. To illustrate, citizen suit litigation was the catalyst for regulation under the NPDES program of certain discharges related to pesticide application activities, as EPA explained when it issued its *Final National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges From the Application of Pesticides*, 76 Fed. Reg. 68,750, 68,752-53 (Nov. 7, 2011). At first, certain States within the Ninth Circuit began requiring NPDES permits for such discharges following a pair of decisions from that Court holding that aerial application of pesticides required permits. *See id.* at 68,752 (discussing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) and *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002)). After further litigation, the expansion of the NPDES permitting program was complete: EPA had developed a general permit, and it had assisted the 44 states with authorized NPDES programs at the time in developing their own permits. *See* 76 Fed. Reg. at

68,752-53. With this example in mind, expansion of the NPDES program to discharges from rail cars in transit is not purely theoretical.

Permitting requirements aside, railroads and others remain potential targets of citizen plaintiffs seeking civil penalties and injunctive relief based on allegations that rail cars in transit are violating the CWA's prohibition against unpermitted discharges. The Board should act now to ensure that the discharge prohibition is not enforced in a manner that would ultimately result in injunctive relief against railroad operations or otherwise impose operational requirements on rail cars in transit.

Furthermore, as discussed throughout these Comments, the question of ICCTA's relationship with direct regulation of rail transportation and with preclearance and permitting regimes is far from novel to the Board. In fact, preclearance and permitting regulations are two of only a handful of regulatory schemes which the Board has found preempted "regardless of the context or rationale for the action." *Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016); *see also Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997) ("At the outset, we reaffirm here our determination in King County that a state or local permitting process for prior approval . . . of any aspect of . . . interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted."). Moreover, the Board also has extensive experience from the Coal Dust proceedings overseeing efforts by rail carriers to limit the loss of freight in transit.

As such, this question is well suited to determination without in depth factual investigation. *See Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) ("We . . . need not conduct a fact-based inquiry weighing the economic impact of Act 250's

permitting process upon Green Mountain . . . the Act 250 pre-permitting process is necessarily preempted by the Termination Act.”).

Given the extensive Board and federal jurisprudence on the dangers of patchwork regulation of rail operations and the Board’s exclusive jurisdiction over rail transportation under ICCTA, and in order to clear up the extensive uncertainty surrounding the question following *Sierra Club v. BNSF Railway Co.*, No. 13-cv-967 (W.D. Wash.), the Board should exercise its discretion to issue a declaratory order finding that ICCTA preempts and displaces application of the CWA’s Section 402 permitting regime and the Section 301 discharge prohibition to incidental discharges from rail cars in transit. The CWA’s states-first approach and its emphasis on state authority to impose state-specific requirements are incompatible with the uniformity of operational conditions that Congress sought to ensure under ICCTA.

CONCLUSION

For the reasons discussed above, the Board should declare that application of the Clean Water Act’s National Pollutant Discharge Elimination System (Section 402) permitting regime and the prohibition against unpermitted discharges (Section 301) is displaced and preempted by ICCTA as it relates to incidental discharges from rail cars in transit.

Respectfully submitted,

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April 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2020, I 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 STB Finance Docket No. 36369.

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