

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**ASSOCIATION OF AMERICAN RAILROADS –
PETITION FOR A DECLARATORY ORDER**

**COMMENTS OF
THE NATIONAL MINING ASSOCIATION**

The National Mining Association (NMA) provides these supplemental comments on the Petition for Declaratory Order (Petition) filed by the Association of American Railroads (AAR). In its Petition, AAR asked the Surface Transportation Board (STB or Board) to find that the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 10501(b), preempts the application of the Clean Water Act's (CWA) Section 301 discharge prohibition and the Section 402 National Pollutant Discharge Elimination System (NPDES) permitting regime to discharges incidental to the normal operation of rail cars in transit. NMA supports the ruling requested by AAR for the reasons below.

I. NMA's Members and Interest

NMA is a national trade association that represents the producers of most of America's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA members rely on rail

transportation to ship their coal, minerals, and metals throughout the nation for use in energy production, manufacturing, and other activities that support modern economic and social development.

Coal historically has been the “single most important commodity” transported by U.S. railroads.¹ Rail transport allows coal that is produced in a relatively small number of states to be transported and consumed in large amounts nationwide. According to the Energy Information Administration (EIA), 69 percent of U.S. coal shipments in 2018 were delivered by rail.² While rail coal volumes have declined in recent years, coal remains a crucial commodity for U.S. freight railroads. In 2018, coal accounted for 31.4 percent of originated tonnage for U.S. Class I railroads – far more than any other commodity.³ Coal also accounted for 16.1 percent of rail revenue in 2018 for Class I railroads.⁴ In 2019, U.S. railroads moved 4 million carloads of coal, with each rail car carrying enough coal to power 21 homes for an entire year.⁵ While the commodity specifically at issue here is coal, it is important to note that NMA members also produce other raw materials that are transported throughout the country using the rail system. These sectors also will be impacted by the Board’s ruling.

NMA’s President and CEO, Rich Nolan, filed a letter dated December 17, 2019, that supported AAR’s Petition and encouraged the Board to initiate a proceeding. The comments below

¹ Coal: Freight Rail Powers the Nation, Association of American Railroads. Available at <https://www.aar.org/article/freight-rail-coal/>.

² Annual Coal Distribution Report, U.S. Energy Information Administration, Oct. 3, 2019. Available at <https://www.eia.gov/coal/distribution/annual/>.

³ Railroads and Coal, Association of American Railroads, May 2019. Available at <https://www.aar.org/wp-content/uploads/2018/05/AAR-Railroads-Coal.pdf>.

⁴ *Id.*

⁵ Coal: Freight Rail Powers the Nation, Association of American Railroads. Available at <https://www.aar.org/article/freight-rail-coal/>.

supplement the concerns raised in that letter and highlight the potential practical impact of the Board's ruling on NMA's members.

II. Comments

NMA's members will be directly impacted by the Board's ruling on this matter. As such, NMA supports AAR's request that the Board find that ICCTA preempts both the application of the CWA discharge prohibition and the NPDES permitting regime to incidental discharges from rail cars in transit. A ruling by the Board will resolve uncertainty from the 2016 decision in *Sierra Club v. BNSF*, in which the court held that rail cars were "point sources" subject to the CWA's discharge prohibition and the NPDES permitting program.⁶ Importantly, however, the court did not reach the issue of whether ICCTA applied to the CWA's discharge prohibition and the NPDES permitting program.

NMA members need regulatory certainty in order to continue transporting the materials necessary for energy production and modern life. If the Board does not rule that ICCTA preempts the application of the CWA's discharge prohibition and NPDES permitting regime to discharges from rail cars in transit, NMA members will face significant uncertainty, could be at an increased risk of CWA litigation, and could be forced to operate in a potentially conflicting patchwork of regulatory requirements.

a. CWA Litigation

As stated, without the requested ruling, NMA members could be at risk of increased CWA litigation, expensive and excessive penalties, and costly citizen suits. Section 301 of the CWA

⁶ See *Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016).

prohibits the “discharge of any pollutant by any person” unless authorized by a permit.⁷ There is no de minimis exception – liability under the CWA is strict, and any discharge of any amount of a pollutant into jurisdictional waters without an NPDES permit violates the CWA.

The remedies for unpermitted discharges are severe and include injunctive relief, and administrative, civil, and criminal penalties.⁸ As described in the Petition, unless a rail car owner can ensure that “no particle of any commodity, no matter how small, will leave a rail car and enter a water body during transit,” the operator could face “administrative, civil, or criminal liability under the CWA, or may be required to obtain and comply with an NPDES permit.” Petition at 15. Without the Board’s clear ruling on ICCTA preemption, any small, incidental discharge of coal or any other commodity into a navigable water while in transit could be considered a violation of the CWA. NMA members and other regulated entities could be subject to hundreds of thousands of dollars in administrative penalties, costly and unnecessary citizen suits, and the outright stoppage of their operations.

b. Patchwork of Regulatory Requirements

The only way to avoid CWA liability for unpermitted discharges is to obtain an NPDES permit. But requiring rail cars in transit to obtain NPDES permits for discharges that occur incidental to normal operations in transit would be unworkable. In the first place, the effluent limitations and other permit conditions included in NPDES permits would regulate the very “core railroad operations” that numerous courts and the STB have found are preempted by ICCTA. Petition at 16. Moreover, requiring rail cars in transit to obtain NPDES permits would create a confusing patchwork of potentially conflicting regulatory requirements. EPA has authorized 47 states and

⁷ 33 U.S.C. § 1311(a).

⁸ 33 U.S.C. § 1319.

one territory to administer their own NPDES permitting programs. The effluent limitations contained in the permit can vary significantly depending on the state and the specific waterbody into which the permit authorizes discharges.

Rail cars carry coal and other commodities across hundreds or thousands of miles across the country, often crossing numerous states and bodies of water. On average, the length of haul for rail coal movements is 887 miles, but coal movements exceeding 1,500 miles are not uncommon.⁹ This means that trains carrying coal across various states and waterbodies could be subject to numerous and potentially conflicting state NPDES permit conditions and effluent limitations as they travel to their destination.

To make matters more complicated, various cars within a train may not always travel the same route. Petition at 20. Rail cars in the same train could be subject to regulation by multiple states and multiple permits with different permit conditions, depending on where they travel at any given time. A single rail car could be subject to numerous and conflicting permit conditions. The only way to continue to operate would be for each rail car to meet the strictest permit conditions, or to modify or build new routes around the permit conditions. Such a confusing regulatory framework would make it impossible to transport our members' coal and other commodities across the country where it is needed.

c. Other Practical Challenges

The lack of clarity on the issue of who must hold the NPDES permit creates further uncertainty for NMA members and other regulated entities. As discussed in the Petition, the CWA's

⁹ Railroads and Coal, Association of American Railroads, p. 7, May 2019. Available at <https://www.aar.org/wp-content/uploads/2018/05/AAR-Railroads-Coal.pdf>.

prohibition against unpermitted discharges does not identify who must hold the permit, and EPA regulations only state the “operator” must apply for the permit. Petition at 24. The identity of the operator could be one of several parties, including the railroad, the shipper, the entity that sells the coal to the shipper, the entity responsible for loading the coal, the car owner, the car manufacturer, or even the mine itself. As a result, depending on their operations, NMA members could be considered “operators” at any given point in the process, and therefore would be responsible for obtaining an NPDES permit.

III. Conclusion

In conclusion, NMA strongly supports AAR’s request that STB issue a declaratory order finding that 49 U.S.C. §10501(b) preempts the application of the CWA’s discharge prohibition and the NPDES permitting regime to discharges incidental to the normal operations of railcars in transit.

Respectfully submitted,



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Certificate of Service

I, Caitlin McHale, hereby certify that a true and correct copy of the Comments of the National Mining Association was served on all Parties of Record in Finance Docket No. 36369 by email.



Caitlin McHale