



**National Grain  
and Feed Association**

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**Public Record**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 36369**

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

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**COMMENTS OF NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the decision served in this proceeding on February 19, 2020, the National Grain and Feed Association (“NGFA”) strongly supports the Petition for a Declaratory Order filed by the Association of American Railroads (“AAR”) requesting that the Surface Transportation Board (“Board” or “STB”) determine that 49 U.S.C. §10501(b) preempts the Clean Water Act’s (“CWA”) discharge prohibition and National Pollutant Discharge Elimination System (“NPDES”) permitting requirements as applied to discharges incidental to the normal operation of railcars in transit.

As such, NGFA urges the Board to promptly issue a declaratory order affirming such a determination as a result of this proceeding. NGFA also wishes to associate itself with the comments submitted to this docket by the North America Freight Car Association.

## **I. Identity and Interest of NGFA**

Established in 1896, NGFA consists of more than 1,100 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 75 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, NGFA has a strategic alliance and is co-located with the North American Export Grain Association and has a strategic alliance with the Pet Food Institute.

## **II. Comments in Support of the AAR Petition**

NGFA agrees with AAR that a declaratory order from the Board that 49 U.S.C. §10501(b) preempts the CWA's discharge prohibitions and state-operated NPDES permitting systems is appropriate, justified and warranted at this time to provide certainty to the rail industry and its customers regarding future movements of railcars, rather than delaying action while awaiting another potential court case that seeks to cite the Washington federal district court's 2016 ruling.<sup>1</sup> The need for action by the Board is reinforced by the potential risk posed for efficient rail transport of a wide array of products and commodities, including grains, oilseeds and agricultural products.

As NGFA has pointed out previously in numerous dockets before the Board, agricultural shippers own or lease the vast majority of rail cars used to transport raw and processed agricultural commodities. Nearly 78 percent of grain hopper cars are privately

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<sup>1</sup> *Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash., Oct. 25, 2016.)

owned or leased, as are nearly 100 percent of all rail tank cars used within the grain processing industry.

Further, within the grain, oilseed and grain/oilseed processing sector, the majority of transportation costs ultimately are passed back to agricultural producers in the form of lower farmgate prices for their commodities. That is a reflection of the fact that those costs generally cannot be absorbed by the shipper or receiver, nor passed forward to domestic or global consumers given the highly competitive domestic and global marketplace in which the U.S. agricultural sector operates.

In addition, rail is the only viable transportation mode available to many agricultural producers and shippers. For instance, nearly all grains and oilseeds produced in Montana, more than 70 percent of grains and oilseeds grown in North Dakota and more than half of the agricultural commodities produced in Arizona, Oklahoma and South Dakota are transported by rail.<sup>2</sup>

NGFA is concerned that unless addressed preemptively by the Board, as requested in the AAR petition, rail carriers and their customers will continue to confront the uncertainty of a potential patchwork of 47 different state discharge prohibitions and NPDES rules, as well as others implemented by Tribal authorities. Petition at 18. Such an outcome clearly would disrupt the interstate rail transportation of grain and grain products; create unnecessary uncertainty and risk for rail carriers, railcar manufacturers and lessors, as well as rail shippers and receivers that own or lease such equipment; pose potential legal uncertainty and liability risk for parties engaged in rail transportation, based upon which party is determined to be the “operator” (Petition at 25); further escalate already increasing rail freight rates and accessorial charges as carriers seek to mitigate the risk and cost of any violations or inefficiencies resulting from such

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<sup>2</sup> ***Study of Rural Transportation Issues***, U.S. Department of Agriculture and U.S. Department of Transportation (2010).

rules; and result in shifting transport of some ag products to other modes, particularly trucks.

As noted in the AAR petition, “individual railcars might be required to have NPDES permit coverage before they could transport certain commodities. A range of entities, from railroads to loading facilities to rail car owners to rail shippers, might be required to obtain NPDES permits before they can use the rail network. NPDES permitting authorities or courts could block the movement of trains altogether, or require an expensive and time-consuming permitting process that could render interstate rail transport of some goods all but impossible.” Petition at 17. In addition, as AAR’s petition points out, NPDES permits typically are issued pursuant to a single water source, and contain specific technology-based restrictions and effluent limits based upon the water quality standards applicable to specific bodies of water, which raises the prospect of different permitting requirements existing within single states. Permit at 18. As noted in the AAR petition, “NPDES permits for railcars in transit would thus unavoidably involve a patchwork of state and local requirements that cars and/or trains would have to meet as they move from state-to-state and even as they move past different bodies of water.” Petition at 20.

As the AAR petition notes, the “uncertainty over the scope of potential permit regulation, combined with the CWA’s strict liability and monetary penalties would force railroads and shippers to consider wide-ranging changes to their operations...,” with railroads potentially needing to “reroute trains or cars carrying certain commodities to avoid waterways during the development of or as a result of permits, which may not even be feasible depending on the rail infrastructure and geography.” Petition at 24. AAR also raises the specter that carriers may decide to discontinue transporting entire classes of commodities or certain commodities within specific geographic areas. Petition at 24.

Further, such discharge prohibitions and NPDES permitting requirements could become a “moving target” if states or tribal governments modify such standards in future years.

All of the aforementioned potential outcomes clearly would be undesirable, untenable, disruptive and not in the national interest, which NGFA believes warrants the Board exercising its authority to issue a declaratory order as an outcome of this proceeding. In this regard, NGFA also concurs with the AAR petition’s articulation of the applicable legal principles and Agency precedent justifying such action on this matter.

### **III. Conclusion**

For the reasons outlined in these comments and the underlying AAR petition, NGFA strongly supports AAR’s request that the Board issue a declaratory order finding that 49 U.S.C. §10501(b) preempts the application of the Clean Water Act’s (“CWA”) discharge prohibition and NPDES permitting rules as they pertain to discharges incidental to the normal operation of railcars in transit.

NGFA appreciates the Board’s consideration of its comments.

Respectfully submitted,

A handwritten signature in black ink, reading "Randall C. Gordon". The signature is written in a cursive, flowing style.

Randall C. Gordon  
President and Chief Executive Officer  
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April 24, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th 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.

A handwritten signature in black ink, reading "Randall C. Gordon". The signature is written in a cursive, flowing style.

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