

ENTERED
Office of Proceedings
May 21, 2020
Part of
Public Record



Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington DC 20515

Peter A. DeFazio
Chairman
Katherine W. Dedrick
Staff Director

Sam Graves
Ranking Member
Paul J. Sass
Republican Staff Director

May 21, 2020

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

Dear Chairman Begeman, Vice Chairman Fuchs, and Board Member Oberman:

Thank you for considering the Petition for Declaratory Order submitted by the Association of American Railroads (AAR) requesting that the Surface Transportation Board (STB) address the relationship between the *Interstate Commerce Commission Termination Act of 1995* (ICCTA) and the *Clean Water Act* (CWA).¹ We strongly support AAR's petition. While the CWA serves a valuable purpose in keeping surface waters clean, its application to the transportation of critical goods by rail car is an inappropriate overreach.

This matter stems from a 2016 federal court case in Washington State that raised the question of whether the ICCTA preempts application of the CWA for railroad cars transporting bulk commodities.² Specifically, the issue was whether a freight train carrying coal or petroleum coke that crosses a water body must obtain a CWA National Pollutant Discharge Elimination System (NPDES) permit given the potential that trace amounts of coal/coke particles could drift into the water.³ The U.S. Environmental Protection Agency (EPA) has granted authority to

¹ 49 U.S.C. § 10501 et. seq.; 33 U.S.C. § 1311 et. seq.

² *Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967, 2016 WL 6217108, W.D. Wash. (Oct. 25, 2016).

³ *Id.*

implement the NPDES permitting program to 47 states and one territory, which means that an applicant operating in more than one state would need to obtain multiple NPDES permits to conduct operations.⁴

Historically, states and the EPA have not regulated rail cars in transit or required permits for incidental losses of commodities from rail cars. The ICCTA makes clear that the STB holds exclusive jurisdiction over transportation by rail carrier.⁵ The application of the CWA to transport by freight car is unprecedented and a broad expansion of government control over an already heavily regulated industry.

New regulatory burdens imposed by applying the CWA to state and federal agencies – and to the entire freight rail industry – would create detrimental new challenges. Freight railroads routinely operate across state lines and adjacent to water bodies that are within the CWA’s jurisdiction. Accordingly, the application of the CWA to freight rail cars could require multiple state and federal NPDES permits. This imposes new regulatory and financial burdens on all sectors of the rail industry, creates undue delays, interferes with interstate commerce, and generates an unmanageable patchwork of conflicting conditions that will drastically slow the movement of vital freight by rail. Moreover, these new regulations likely would apply not only to the transport of coal and coke, but also to the transport of other important commodities.⁶ As the American Short Line and Regional Railroad Association (ASLRRRA) noted in comments to this proceeding, the transport of bulk commodities such as grain, ores and minerals, scrap materials, and other critical goods that are regularly and easily transported by freight rail may also require NPDES permits.⁷

Requiring NPDES permits to haul goods by rail would also expose railroads to costly new fines and penalties. Rail lines would face new uncertainties due to the potential of federal and state enforcement actions as well as private citizen lawsuits permitted under the CWA. Citizen lawsuits could potentially be brought against not only railroads, but also railcar owners, shippers, and producers involved in transport.⁸ The industry could face steep new monetary penalties of roughly \$55,800 daily, or even criminal penalties.⁹

Without this declaratory order, issues like these would cripple the railroad industry, including the Class I railroads, short line railroads, and the numerous small businesses that rely on the rail industry. The industry would be forced to purchase expensive new equipment, and to overhaul its procedures for traditional, routine operations. Trains would also have to reroute trips

⁴ EPA, *NPDES State Program Information* (last accessed May 11, 2020) available at <http://www.epa.gov/npdes/npdes-state-program-information>.

⁵ ICCTA, 49 U.S.C. § 10501(b)(2) (stating that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”).

⁶ ASLRRRA E-Filing Re: FD 36369, Association of American Railroads – Petition for Declaratory Order, filed with STB (April 24, 2020).

⁷ *Id.*

⁸ See generally 33 U.S.C. § 1365 (permitting citizens to bring suit under the Clean Water Act).

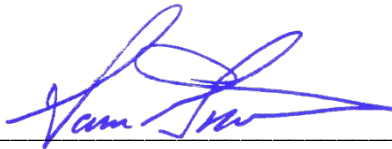
⁹ *Civil Monetary Penalty Inflation Adjustment*, 85 Fed. Reg. 1751, 1754 (Jan. 13, 2020).

to avoid crossing over water, which would unnecessarily lengthen and complicate the transport of critical goods. The Nation cannot afford to delay delivery of supplies and add new permitting burdens to the freight rail industry during the COVID-19 pandemic.

The STB previously led efforts to coordinate with all parties regarding the prevention and minimization of commodity losses in rail transit. It should continue to do so now. We respectfully urge the STB to declare that ICCTA preempts the application of the NPDES permitting program to rail cars in transit.

Thank you for your consideration, and we look forward to working together to ensure common-sense regulation of the U.S. rail industry.

Sincerely,



Sam Graves, Ranking Member
House Transportation & Infrastructure Committee



Rick Crawford, Ranking Member
Subcommittee on Railroads, Pipelines, and Hazardous Materials
House Transportation & Infrastructure Committee