

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Via E-Filing

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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”), the undersigned submit the following Reply to the Responses of the Association of American Railroads (AAR) and BNSF Railway Company (BNSF) to AAR’s Petition for Declaratory Order before the Surface Transportation Board (STB or “the Board”).

Nothing in the AAR and BNSF Responses can overcome two fundamental faults with AAR’s Petition. First, it is the proper role of the courts, not agencies such as the STB, to determine the extent to which the Interstate Commerce Commission Termination Act (ICCTA)¹ preempts² another statute such as the Clean Water Act (CWA).³ Second, AAR’s Petition and the Responses thereto fail to present any evidence of actual conflict between the statutes to support a finding that harmonization of ICCTA and the CWA is impossible in all conceivable applications. For those reasons and the reasons set forth in the Environmental Organizations’ Response to Association of American Railroads’ Petition for Declaratory Order, FD36369 (April 24, 2020) (“Commenters’ Response”), Commenters respectfully request that the Board deny the Petition.

¹ 49 U.S.C. §§ 10101 *et seq.*

² As Commenters explained in their Response, though Commenters at times follow the convention of AAR’s Petition and speak in terms of “preemption,” when dealing with the interaction of two federal statutes such as ICCTA and the CWA, the proper question is whether a later enacted statute constitutes an “implied repeal” and thus “precludes” an earlier statute. Commenters’ Response at 2 n.1 (citing *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014)); *id.* at 14 n.30 (citing *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1157 (9th Cir. 2020)).

³ 33 U.S.C. §§ 1251 *et seq.*

I. AAR and BNSF Fail to Acknowledge Controlling United States Supreme Court Precedent Explaining That Reconciliation of Federal Statutes is the Role of the Courts, Not Agencies Like the STB

AAR’s Petition and the AAR and BNSF Responses ask the Board to find that ICCTA, specifically 49 U.S.C. § 10501(b), preempts application of CWA Section 301’s⁴ prohibition on the discharge of pollutants without a permit to rail cars in transit, carving out a massive, agency-created exemption to one of the nation’s bedrock environmental laws. AAR’s request stands in direct contravention to the Supreme Court’s recent command that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies.”⁵ As commenters explained in their Response, the Supreme Court held in *Epic Sys. Corp. v. Lewis* that no deference was due to one agency’s interpretation of the interplay between two statutes despite the agency’s role as primary administrator of one of the statutes.⁶ The Court explained that “[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.”⁷ Courts, on the other hand, “exercise independent interpretive judgment” to

⁴ 33 U.S.C. § 1311.

⁵ Commenters’ Response at 4–7 (discussing *Epic Sys. Corp. v. Lewis*, __ U.S. __, 138 S. Ct. 1612, 1629 (2018)).

⁶ *Epic Sys.*, 138 S. Ct. at 1629; see also *Ohr v. Int’l Union of Operating Engineers, Local 150, AFL-CIO*, No. 18 C 8414, 2020 WL 1639987, at *3 (N.D. Ill. Apr. 2, 2020) (“[D]eference is not owed where the [agency] advances an interpretation of [a statute it administers] ‘in a way that limits the work of’ a different law, including the United States Constitution, ‘which the agency does not administer[.]’”) (quoting *Epic Sys.*, 138 S. Ct. at 1629).

⁷ *Id.* (internal quotations and citations omitted).

“preserve the balance Congress struck in its statutes.”⁸ In applying *Epic Systems*, the United States Court of Appeals for the Sixth Circuit explained that,

One purported rationale for [agency] deference is that agencies are more likely to get the answer right, given their expertise. But many canons [of statutory construction] reverse that rationale: *courts* are more likely to get the answer right. For instance, canons often call for an analysis of the statute as a whole in light of some other source of legal authority (common law, other statutes, or the Constitution). Courts are better equipped and more experienced than agencies in answering these types of questions. And these questions are far afield from the prototypical [agency deference] situation: an agency’s application of law to fact. In short, courts, not agencies, are the true experts in applying many of the canons.”⁹

Neither AAR’s Petition nor AAR’s and BNSF’s Responses attempt to grapple with this recent controlling precedent from the highest court in the land.¹⁰ Nor do they cite any decisions of the Board addressing ICCTA preclusion of a federal statute that post-date *Epic Systems*. Because AAR and BNSF have not identified, and cannot identify, any relevant exception to the Supreme Court’s unambiguous direction, the

⁸ *Id.* In applying its “independent interpretive judgment,” the Supreme Court in *Epic Systems* held that—contrary to the National Labor Relations Board’s finding that the National Labor Relations Act conflicts with and thus preempts the Arbitration Act in certain respects—the general language of the NLRA that failed to in any way mention the Arbitration Act does not preclude enforcement of arbitration agreements pursuant to the latter statute. *Id.* at 1624–28.

⁹ *Arangure v. Whitaker*, 911 F.3d 333, 341–42 (6th Cir. 2018) (internal quotations and citations omitted) (emphasis in original).

¹⁰ *Epic Systems* represents not merely a restatement of existing law, but a development in the law. Just one year prior to *Epic Systems*, the United States Court of Appeals for the D.C. Circuit stated that “[t]here is some legal uncertainty in this circuit about the appropriate level of deference a court owes to an agency’s determination of its own preemption.” *Delaware v. Surface Transportation Bd.*, 859 F.3d 16, 20 (D.C. Cir. 2017). *Epic Systems* removed any such uncertainty and placed the authority to reconcile interrelated statutory schemes solely with the courts.

Board should reject AAR and BNSF’s invitation to engage in precisely the sort of statutory reconciliation that “is a matter for the courts, not agencies.”¹¹

II. AAR and BNSF Fail to Carry Their Heavy Burden to Show That ICCTA Cannot Be Harmonized With the CWA

In *Epic Systems*, the Supreme Court addressed not only the question of *who* should conduct the analysis of whether one federal statute “preempts” (or precludes or impliedly repeals) another, but also *how* such an analysis should be conducted: very carefully and with the goal of giving effect to all acts of Congress. The Court explained that “[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.”¹² Congressional intent to repeal a previously enacted statute must be “clear and manifest” if it is to overcome the “‘stron[g] presum[ption]’ that repeals by implication are ‘disfavored’ and that ‘Congress will specifically address’ preexisting law when it wishes to suspend its normal operations in a later statute.”¹³ As the Court has stated elsewhere, “where there is no *clear* intention otherwise, a specific

¹¹ *Epic Sys.*, 138 S. Ct. at 1629.

¹² *Id.* at 1624; *see also BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 761–62 (9th Cir. 2018) (“Specific to the ICCTA, we have written, ‘If an apparent conflict exists between ICCTA and a *federal* law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible.’”) (quoting *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (emphasis in original)); *In re Bos. & Me. Corp. & Town of Ayer, Mass.*, No. 33971, 2001 WL 458685, at *6 n.28 (S.T.B. Apr. 30, 2001) (“[I]f two Federal statutes are capable of coexistence, the statutes should be harmonized and each should be regarded as effective unless there is a positive repugnancy or an irreconcilable conflict between the laws.” (quotations and citations omitted)).

¹³ *Id.* (first quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); then quoting *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988)).

statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”¹⁴

The presumptions against implied repeal and in favor of finding “harmony over conflict” exist “for good reasons.”¹⁵ Among those reasons is respect for Congress and the separation of powers, recognizing that it is “the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.”¹⁶

The Petition and Responses fall far short of carrying the heavy burden to show that ICCTA and the CWA are irreconcilable and cannot be given the effect Congress intended. ICCTA’s “General Jurisdiction” provision at 49 U.S.C. § 10501 that AAR and BNSF rely on “is broad and general.”¹⁷ Neither it nor any other provision of the statute “specifically address[es]”¹⁸ the CWA, much less provide an exemption thereto. Rather, Congress made explicit that the Board’s “exclusive” jurisdiction under ICCTA would be exercised “without detriment to the public health and safety.”¹⁹ In contrast to Congress’s lack of any clear indication that ICCTA would displace the CWA, Congress in the CWA was explicit that Section 301’s prohibition on the discharge of pollutants without a permit applies to rail cars in transit. As Petitioners explained in their Response, Congress

¹⁴ *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (emphasis in original) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

¹⁵ *Epic Sys.*, 138 S. Ct. at 1624.

¹⁶ *Id.* As explained in Section I, *supra*, it is even less appropriate for an agency, as opposed to a court, to engage in such supposition.

¹⁷ *BNSF Ry. Co.*, 904 F.3d at 766.

¹⁸ *Epic Sys.*, 138 S. Ct. at 1624; *see also id.* at 1627 (“[W]e’ve stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act.”).

¹⁹ 49 U.S.C. § 10101(8).

intentionally defined the range of “point sources” subject to Section 301(a)’s prohibition to include “rolling stock,” *i.e.*, moving rail cars, and the CWA allows no unstated exceptions to that prohibition.²⁰

When Congress seeks to exempt a particular class of sources from Section 301’s discharge prohibition—the “cornerstone” of the CWA’s goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”²¹—through later legislation, it does so explicitly. For example, in the Energy Policy Act of 2005, when Congress wished to exempt construction activities related to certain oil and gas operations from the CWA’s permit requirement, it amended the CWA to bring those activities within an express exemption.²² Likewise, Congress in passing ICCTA knew how to explicitly exempt particular operations from the requirements of federal environmental statutes, as it did in Section 401 when exempting the licensing of certain commercial space launching activities from the requirements of the National Environmental Policy Act.²³ AAR and BNSF have not come close to providing any such

²⁰ Commenters’ Response at 18–19 (discussing the definition of point source at 33 U.S.C. 1362(14), related provisions of the CWA, and *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1376, 1380–82 (D.C. Cir. 1977)).

²¹ 33 U.S.C. § 1251(a); *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).

²² See Energy Policy Act of 2005, Pub. L. 109-58, Title 3, Sec. 323, 119 Stat. 594 (Aug. 8, 2005) (amending CWA Section 502, 33 U.S.C. § 1362, by adding a definition of “oil and gas exploration, production, processing, or treatment operations, or transmission facilities” that brings discharges associated with not only the use, but also the construction of such operations and facilities, within the permit exemption in CWA Section 402(l)(2), 33 U.S.C. § 1342(l)(2)).

²³ See Pub. L. 104-88, Title 3, Sec. 401, 109 Stat. 803, 954 (Dec. 29, 1995).

“clear intention” of Congress that would allow ICCTA’s more general language to nullify the specific “cornerstone” requirement of the CWA.²⁴

AAR’s extensive reliance on statements by the Board that state laws that “directly regulate” rail transportation are preempted by ICCTA²⁵ does not remedy this failure. AAR’s claim that permits issued by states in accordance with CWA Section 402’s National Pollutant Discharge Elimination System (NPDES) are “purely creatures of state law”²⁶ does not carry the weight that AAR places on it. As Commenters explained in their Response, the Petition does not seek relief from any particular state law permit, but rather from Section 301 of the CWA generally. “[I]t 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.”²⁷

The United States Court of Appeals for the Ninth Circuit recently rejected an identical argument put forth in *BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin.*²⁸

²⁴ *Crawford Fitting Co.*, 482 U.S. at 445; see also *Swinomish Indian Tribal Cmty.*, 951 F.3d at 1160 (holding that the broad language of 49 U.S.C. § 10501(b) did not impliedly preempt the more specific Indian Right of Way Act of 1948, 25 U.S.C. §§ 323–328).

²⁵ See AAR Petition at 16-18, 21-23; AAR Response at 18–20.

²⁶ AAR Response at 20–25.

²⁷ *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).

²⁸ 904 F.3d 755 (9th Cir. 2018).

There, BNSF asked the Court to find that a state law passed pursuant to a provision of the federal Hazardous Materials Transportation Act (HMTA) allowing states to impose fees on railroads related to the transport of hazardous materials was preempted by the later-enacted ICCTA. Though the Court ultimately determined that the California state law imposing such fees should be vacated because it failed to comply with a requirement of the HMTA that the fees be “fair,” it made clear that state laws issued in compliance with the HMTA would not be subject to preemption, and that it was improper to apply the jurisprudence governing ICCTA preemption of purely state law regulations to such laws. In dismissing BNSF’s argument, which was adopted by one judge’s opinion concurring in the result but dissenting on the rationale, the Court explained that,

The concurrence states the matter too generally. We agree with the concurrence that the preemption provision of the ICCTA is broad. Indeed, we would entirely agree with the concurrence if the question were whether the ICCTA entirely preempts a State from regulating railroad rates when the State’s only source of authority is a state law passed under its traditional police powers. But the question here is different. The question is whether a State has been authorized *by federal law* to charge a fair fee related to the transportation of hazardous materials. In our view, the text of that federal law. . . is clear. The legislative history . . . if we must resort to it, tells us that Congress intended affirmatively to authorize state-imposed fees related to the transportation of hazardous materials so long as they are “fair.” Congress gave no indication that in enacting the broad preemption provision of the ICCTA it intended to preempt the fees that it had statutorily authorized only a year before.²⁹

The Court distinguished the Board’s statements in *CSX Transportation, Inc.—Petition for Declaratory Order*³⁰ that preemption would always apply to “any form of state or local

²⁹ *Id.* at 769 (emphasis in original).

³⁰ STB No. 34662, 2005 WL 1024490, at *2–3 (S.T.B. May 3, 2005).

permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations” and to “state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.”³¹ The Court explained that those pronouncements applied only to the particular facts of that case, where the state relied only on its inherent police powers, as opposed to a grant of authority from a federal statute to regulate rail operations.³²

CWA Section 301 is unlike the state and local regulations that have been preempted by ICCTA. It is a federal statute that governs water pollution throughout the United States, with the goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.”³³ In that regard, the CWA is similar to the public health and safety measures imposed by the Pipeline and Hazardous Materials Safety Administration (PHMSA) or the Federal Railroad Administration (FRA), which unquestionably “directly regulate” rail traffic. For example, in 2015 PHMSA and the FRA issued a final rule titled “Hazardous Materials: Enhanced Tank Car Standards and

³¹ *BNSF*, 904 F.3d at 768.

³² *Id.* at 768–69. This key difference likewise distinguishes the present case from *Delaware v. STB*, 859 F.3d 16 (D.C. Cir. 2017) and other cases relied upon by AAR and BNSF. See AAR Petition at 16–17 nn.53–57; AAR Response at 18–20. The Ninth Circuit’s decision also casts serious doubt on the dicta from four years prior in *U.S. EPA—Petition for Declaratory Order*, FD 35803 (STB served Dec. 30, 2014), on which AAR so heavily relies. See AAR Petition at 13–15; AAR Response at 16–18.

³³ 33 U.S.C. § 1251(a); see also, e.g., *United States v. Wilson*, 133 F.3d 251, 259 (4th Cir. 1997) (noting that Congress passed the CWA in response to, *inter alia*, public health threats posed by water pollution).

Operational Controls for High-Hazard Flammable Trains [HHFTs].”³⁴ That rulemaking resulted in the adoption of enhanced tank car standards and operational controls for HHFTs, including a mandate to retrofit the existing fleet of rail cars.³⁵ In addition, the proceeding required carriers of HHFTs to select a route that presents the “the least overall safety and security risk,” taking into account factors such as population density and sensitivity of environmental resources.³⁶ Despite this “direct regulation” of rail car design and operation that appears more invasive than anything AAR and BNSF speculate could result from application of CWA Section 301, no party has argued that federal hazardous materials transportation law³⁷ is preempted by ICCTA.

Finally, as Commenters explained in their Response,³⁸ AAR’s remaining claim that application of Section 301(a) to rail cars in transit would create a “patchwork of regulations” subjecting rail cars to fluctuating, burdensome standards as they cross state lines³⁹ is speculative and, thus, its Petition is premature. 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

³⁴ 80 Fed. Reg. 26,644 (May 8, 2015).

³⁵ *Id.* at 26,646 (explaining that the rule requires, among other things, new rail cars constructed after October 1, 2015 to meet enhanced design or performance criteria; existing tank cars to be retrofitted in accordance with DOT-prescribed retrofit design or performance standard; testing of unrefined petroleum rail cargo to determine environmental and other risks; restriction of operating speed to fifty miles per hour in all areas and lower speeds in certain areas; and installation of enhanced braking equipment).

³⁶ *Id.* at 26,707–09; *see also* 49 C.F.R. § 172.820.

³⁷ *See* 49 U.S.C. §§ 5101–28.

³⁸ Commenters’ Response at 7–12.

³⁹ *See* AAR Petition at 18–20; AAR Response at 16–18; BNSF Response at 21–24.

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....”⁴⁰ Again, AAR and BNSF offer 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. No State or Federal authority has required any rail car operator or transporter to obtain an NPDES permit for in-transit discharges, let alone multiple conflicting permits. There are no concrete facts to question, no “individual situations” to review, and no “specific burdens” to weigh. Thus, 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.

Because AAR and BNSF’s claims regarding the specific burdens imposed by application of the NPDES program to rail cars in transit are entirely speculative, Commenters do not address them in detail. However, Commenters point out that these

⁴⁰ *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); *see also Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 813–14 (5th Cir. 2011) (explaining that the inquiry is “fact-based” such that the railroad was required to “come forward with evidence of the specific burdens imposed” because “[g]eneral evidence that the [obligations for which preemption is sought] affect rail transportation is insufficient.”); *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.”) (quoting *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1133 (10th Cir. 2007)); *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357, 1364 (S.D. Ga. 2013).

arguments contain numerous inaccuracies. For example, BNSF claims that state water quality standards are “federally enforceable” under the CWA such that a permittee’s compliance with a permit that imposes effluent limitations in the form of Best Management Practices cannot protect it from liability under CWA Section 301. Hence, BNSF asserts that compliance can only be determined “after-the-fact based on an assessment of the quantity of freight discharged from the train to a particular receiving water.”⁴¹ That is simply not true. State water quality standards are only “enforceable” when they have been translated into effluent limitations in a CWA permit.⁴² And though EPA and the states may include permit conditions generally prohibiting discharges from violating water quality standards,⁴³ they are not required to do so and, indeed, most often do not. For example, the Kentucky general NPDES permit covering discharges from all “Inactive Mine Lands” applies effluent limitations solely through the use of Best Management Practices (BMPs) and contains no condition prohibiting violations of water quality standards.⁴⁴ Additionally, pursuant to CWA Section 402(k), compliance with the effluent limitations in such a permit, whether in the form of BMPs or numerical limitations, constitutes compliance with Section 301 and thus provides a shield to

⁴¹ See BNSF Response at 20 nn.77–79.

⁴² *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 996 F.2d 346, 350 (D.C. Cir. 1993) (“Of course, the water quality standards by themselves have no effect on pollution; the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits.”).

⁴³ See BNSF Response at 20 n.78.

⁴⁴ Kentucky Dep’t of Env’tl. Protection, *General Permit No. KYG05 – Inactive Mine Lands*, available at <https://eec.ky.gov/Environmental-Protection/Water/PermitCert/KPDES/Documents/KYG05Permit.pdf>.

liability.⁴⁵ Such inaccuracies in AAR and BNSF’s speculative arguments only further demonstrate that AAR’s Petition is premature and cannot make the “clear and manifest” showing necessary to find that ICCTA preempts the CWA as applied to rail cars in transit.⁴⁶

CONCLUSION

For the foregoing reasons, Commenters respectfully request that the Board reject AAR and BNSF’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 22nd day of May, 2020.

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⁴⁵ 33 U.S.C. § 1342(k) (“Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.”).

⁴⁶ *Epic Sys.*, 138 S. Ct. at 1624.

CERTIFICATE OF SERVICE

I certify that I have this 22nd day of May, 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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