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May 22, 2020
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May 22, 2020

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Finance Docket No. 36369 Association of American Railroads – Petition for Declaratory Order – Reply Comments

Dear Ms. Brown:

The American Coal Council (ACC) provides these reply comments on the Petition for Declaratory Order filed by the Association of American Railroads (AAR) in Finance Docket No. 36369. AAR's Petition asked the Surface Transportation Board (STB) to declare that the Interstate Commerce Commission Termination Act (ICCTA) preempts application of the Clean Water Act's (CWA) discharge prohibition and the National Pollutant Discharge Elimination System (NPDES) permitting regime to rail cars in transit. These reply comments follow our initial comments filed on March 20, 2020 and incorporate them by reference. ACC supports AAR's request and we urge the STB to proceed expediently to issue a declaratory order to affirm its authority and provide regulatory clarity and certainty in this important matter.

The ACC has represented the collective business interests of the American coal industry for 38 years. Our membership is made up of companies from throughout the coal supply chain. This includes coal suppliers, transportation companies and terminals, electric utilities and independent power producers, industrial coal consumers, and many industry support services providers.

Coal continues to be the highest-volume product transported on the U.S. freight rail system, accounting for 31.4 percent of originated tonnage in 2018 for U.S. Class I railroads.¹ This is far

¹ Association of American Railroads, "Railroads and Coal", May 2019, p. 1. Available at <https://www.aar.org/wp-content/uploads/2018/05/AAR-Railroads-Coal.pdf>

more than any other commodity.² Coal hauled by U.S. railroads originates at mines in the Eastern, Western, and Midwestern coal-producing regions and is transported to coal-consuming power and industrial plants around the country and to export terminals on the East, West, and Gulf Coasts as well as intermediate terminals. Thus, the coal supply chain including ACC members stands to be directly and significantly impacted by STB's decision in this docket.

The importance of the coal supply chain to our nation has been illustrated recently by the U.S. Department of Homeland Security (DHS) in its response to the coronavirus pandemic emerging earlier this year. DHS reinforced that the coal supply chain is essential infrastructure – including the coal mines, transportation, and coal-fueled power plants. Our nation's coal plants are critical power generation assets that directly support the reliability and resilience of the electric grid. Coal plants store inventory onsite and are dispatchable, which gives them the capability of operating anytime 24/7 to ensure electricity demand is met. These plants rely on the efficient, effective transportation of coal by rail and would be hampered by negative outcomes certain to occur if the STB does not issue the declaratory order. These negative outcomes include operating in a patchwork of potentially conflicting federal, state and local regulatory requirements, additional regulatory burdens and costs, possible interruption to operations, and the potential for increased CWA litigation including citizen suits.

Most states administer their own CWA NPDES programs, so requiring rail cars of coal to hold NPDES permits for every state they travel through would be extraordinarily burdensome. Coal shipments are transported hundreds or thousands of miles in movements around the country, often crossing numerous states. This means rail cars could be subject to numerous and potentially conflicting state NPDES permit conditions in the movements from mine origins to plant destinations. The magnitude of the difficulty created by such a permitting system is obvious when considering actual train operations. Coal rail cars can move as singles or small blocks as part of other trains, or in full trainloads of up to or greater than 150 railcars. Each rail car would need to have its own permit for each state traversed. Considering the more than four million coal carloads transported in the U.S. in 2019,³ this would be a huge problem.

Moreover, since CWA NPDES permits for other commodities in addition to coal would also likely be required, the huge problem multiplies exponentially. A CWA NPDES permitting system would be an administrative and operational nightmare and a disaster for industry and commerce. This is not

² Association of American Railroads, "Railroads and Coal", May 2019, p. 1. Available at <https://www.aar.org/wp-content/uploads/2018/05/AAR-Railroads-Coal.pdf>

³ Association of American Railroads, "Coal: Freight Rail Powers the Nation". Available at <https://www.aar.org/article/freight-rail-coal/>

in the public interest and surely is not what Congress intended with the Rail Transportation Policy (RTP). The STB does not need to wait until actual permits are issued to act. Such a regulatory scheme should be averted now.

The application of the CWA to incidental discharges from rail cars in transit with coal or other commodities would undermine and conflict with the STB's role and would unnecessarily and radically harm our national rail network and interstate commerce. The STB should protect its exclusive jurisdiction over rail transportation.

ACC urges the STB to grant AAR's petition for declaratory order promptly to provide stakeholders with clarity and certainty.

Sincerely,

A handwritten signature in black ink that reads "Betsy B. Monseu". The signature is written in a cursive, flowing style.

Betsy B. Monseu
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Certificate of Service

I, Betsy B. Monseu, hereby certify that on May 22, 2020 a true and correct copy of the letter from the American Coal Council regarding the Petition for Declaratory Order in Finance Docket No. 36369 was served on all Parties of Record.

A handwritten signature in black ink that reads "Betsy B. Monseu". The signature is written in a cursive style with a large, stylized 'B' at the beginning.

Betsy B. Monseu