

300664

ENTERED
Office of Proceedings
May 22, 2020
Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36369

ASSOCIATION OF AMERICAN RAILROADS –
PETITION FOR DECLARATORY ORDER

REPLY COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

Kathryn D. Kirmayer
Timothy J. Strafford
Theresa L. Romanosky
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100

David Y. Chung
Scott L. Winkelman
D. Charlie Kazemzadeh
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2500

Counsel for the Association of American Railroads

May 22, 2020

INTRODUCTION

The Association of American Railroads (“AAR”) hereby submits these reply comments in support of its Petition for Declaratory Order (“Petition”) filed on November 27, 2019. For the reasons stated below, in the Petition, and in AAR’s Opening Comments filed on April 24, 2020, the Board should declare that Section 10501(b) of the ICC Termination Act of 1995 (“ICCTA”) precludes the imposition of the Clean Water Act’s (“CWA”) prohibition against unpermitted discharges (*see* 33 U.S.C. § 1311) and the National Pollutant Discharge Elimination System (“NPDES”) permitting regime (*see* 33 U.S.C. § 1342) with respect to discharges incidental to the normal operation of rail cars in transit.

The Board is Congress’s choice to be the only authority on the regulation of railcars traveling in interstate commerce. There is no other logical conclusion to be drawn from ICCTA’s plain language. 49 U.S.C. § 10501(b) (“The jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive.”). In seeking to deprive the Board of the power it has exercised for the better part of three decades—*i.e.* to regulate rail transportation—those opposing AAR’s Petition¹ all but ignore that plain language. *See id.* (“[T]he remedies provided under [ICCTA]...with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”).

The reason why Congress centralized regulatory authority over rail transportation by enacting ICCTA is obvious: to prevent a patchwork of regulations throughout the Nation that risks balkanization of the interstate rail network. Tellingly, no commenters arguing against

¹ *See* Comments of the Confederated Tribes of Warm Springs, No. 300489 (Mar. 17, 2020); Comments of the Confederated Tribes and Bands of the Yakama Nation, No. 300561 (Apr. 24, 2020); Environmental Organizations’ Response to AAR’s Petition for Declaratory Order, No. 300563 (Apr. 24, 2020).

displacement and preemption dispute that ICCTA reflects Congress's clear intent to prevent a patchwork of conflicting regulations. Nor do any commenters seriously question that such a patchwork is virtually guaranteed because of the CWA's emphasis on states' authority to adopt state-specific requirements and its command that NPDES permits meet various state-specific limitations and requirements. *See* 33 U.S.C. §§ 1251, 1313, 1370; *see also id.* §§ 1342(a)(1), 1311(b)(1)(C). Instead, those opposing the Petition argue chiefly that: (i) harmonization is a matter for courts and thus, the Board should refrain from issuing a declaratory order in this proceeding; (ii) any such order would be premature absent further factual development; (iii) ICCTA does not displace or preempt the CWA; and (iv) granting the requested declaratory order risks impairing certain Tribes' treaty-reserved rights. These reply comments address each of these contentions.

Lost in the opposing commenters' mischaracterization of the Petition is the fact that AAR is merely asking the Board to act according to the same legal principles it has embraced time and time again: to wield the power with which Congress entrusted it to prevent the impermissible regulation of railcars in interstate transportation. Despite assertions to the contrary, the Board has routinely found similar regulation to be categorically impermissible, without any need to investigate anything more than basic facts. *See, e.g., CSX Transportation, Inc.—Petition for Declaratory Order*, No. FIN 34662, 2005 WL 1024490, at *4 (May 3, 2005) (finding categorical preemption of attempt to regulate railcars in transit). To be sure, AAR does not seek to preempt or displace the CWA's discharge prohibition or NPDES permitting requirements *in toto*, much less nullify the CWA altogether. In fact, the requested order merely seeks to maintain the current regulatory landscape (no NPDES permitting requirements for rail cars in transit) and remove the uncertainty about whether a single court ruling (that railroads can be liable under the CWA for

actual discharges from rail cars in transit) will lead to an unworkable patchwork of new regulatory requirements that runs contrary to ICCTA Section 10501(b). Such an order would ensure that the Board remains the exclusive forum for determining what regulations and remedies that have the effect of directly regulating railcars in transportation are appropriate.

ARGUMENT

I. CONGRESS AUTHORIZED THE BOARD TO MAKE DETERMINATIONS ON ICCTA DISPLACEMENT AND PREEMPTION OF THE CWA.

A. The Board Plainly Has Authority To Interpret ICCTA And Determine Whether ICCTA Can Be Harmonized With The CWA.

No party disputes that the Board is the sole agency with the power to interpret and apply ICCTA’s statutory language. *See* 49 U.S.C. § 10501(b). Congress unambiguously legislated that the remedies ICCTA provides with respect to the “regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.* It is therefore squarely within the Board’s jurisdiction and expertise to determine not only whether Federal and State actions seek to directly regulate railcars in interstate transportation, but to defuse such threats as appropriate by finding these impermissible attempts at regulation displaced and preempted by ICCTA. *See United States Environmental Protection Agency – Petition for Declaratory Order*, FD 35803 (hereinafter, “*EPA*”), 2014 WL 7392860, at *7 (STB served Dec. 29, 2014).²

Despite assertions to the contrary by some commenters in this proceeding, ICCTA preemption analysis is not exclusively a matter for federal courts. The Board frequently

² Although this proceeding does not raise the question of what level of deference a reviewing court will give to the Board’s interpretations of ICCTA, even the Environmental Organizations acknowledge that “the Board enjoys broad latitude and deference in interpreting ICCTA[.]” Environmental Organizations’ Response at 7. Indeed, the Board’s interpretation of ICCTA and its jurisdictional force is entitled to *Chevron* deference. *BNSF Ry. Co. v. California Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 762 (9th Cir. 2018) (“We owe *Chevron* deference to the STB’s ‘guidance on the scope of ICCTA preemption.’”).

interprets ICCTA against the backdrop of the larger federal statutory framework. *EPA*, 2014 WL 7392860, at *7; *CSX Transportation*, 2005 WL 1024490, at *4. And no commenter cites any authority to support the proposition that the Board lacks the ability to conduct a harmonization analysis merely because the Board's interpretations of ICCTA's preemption provision would implicate other federal statutes, such as when the Board interprets what "remedies provided under *Federal* or State law" are displaced or preempted by the remedies provided under ICCTA "with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). Denying the Board the authority to conduct a harmonization analysis would render the statutory reference to "Federal" law inoperative.

Epic Sys. Corp. v. Lewis, cited by three commenters, does not require the Board or any court to conclude otherwise. *See* 138 S. Ct. 1612, 200 L.Ed.2d 889 (2018). *Epic* relates to the level of deference to which an agency interpretation is entitled; it does not prohibit agencies from interpreting statutes they administer. *Id.* at 1629. Furthermore, as the Environmental Organizations admit, the *Epic* court was faced with a statute that was "silent" on the issue at bar. *See* Environmental Organizations' Response at 5 ("[T]he National Labor Relations Act was silent as to how "judges and arbitrators must try legal disputes"). The National Labor Relations Board, therefore, lacked explicit statutory support for its conclusion that the National Labor Relations Act "effectively nullif[ied]" the Federal Arbitration Act. *Epic*, 138 S. Ct. at 1621. But ICCTA is hardly "silent" on the scope of the Board's jurisdiction over railcars in transit. 49 U.S.C. § 10501(b). *Epic*, therefore, does not apply here because ICCTA contains unambiguous evidence that Congress intended it to displace other federal statutes and regulations and to give the Board exclusive jurisdiction over particular matters. *See Matter of Henry*, 941 F.3d 147, 151-53 (5th Cir. 2019) (declining to extend *Epic*, and holding that Congressional intent for one

statute to displace another may be “deduced from statutory text, legislative history, or from an inherent conflict between arbitration and the statute’s underlying purposes.”).

To state the obvious, when the Board endeavors to interpret and harmonize ICCTA with other federal statutes, the Board will need to understand those other statutes, such as the CWA. But the Board may not necessarily need to interpret the other statute. Here, for example, the only court to have addressed the issue has concluded that a railroad can be liable under the CWA when commodities (*e.g.*, coal particles) incidentally fall from moving rail cars directly into navigable waters. *Sierra Club*, 2016 WL 6217108, at *8-9. Moreover, relevant CWA provisions on states’ ability to establish state-specific requirements and insert them into either state- or EPA-issued permits are clear. *See infra* Part II.A.1. The Board is deciding in this proceeding whether ICCTA preemption is appropriate based on a straightforward reading of the aforementioned holding from the *Sierra Club* decision and the CWA’s clear statutory text. Nonetheless, if the Board finds that it needs to interpret the CWA to resolve this proceeding, *Epic* merely illustrates that the Board’s interpretations of the CWA may not receive *Chevron* deference from a reviewing court. *Epic* does not strip the Board of the authority to conduct a harmonization analysis in the first instance.

Accordingly, the Board must conclude that it retains, as it always has, the power to interpret what Congress meant when it proclaimed that “[t]he jurisdiction of the Board over transportation by rail carriers . . . is exclusive” and 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.” 49 U.S.C. § 10501(b). This interpretive authority necessarily encompasses determining whether ICCTA can be harmonized with other federal statutes, such as the CWA. *E.g.*, *EPA*, 2014 WL 7392860, at *7. To conclude otherwise would be to limit the

Board's authority, and in turn ICCTA's preemptive scope, to matters involving preemption of purely state law matters. Such a conclusion, however, is irreconcilable with ICCTA's plain language because it writes the term "Federal" out of Section 10501(b).

II. THE BOARD MAY ISSUE THE REQUESTED DECLARATORY ORDER WITHOUT AWAITING FURTHER FACTUAL DEVELOPMENT.

A. No Commenter Disputes That The CWA Guarantees The Sort Of Patchwork That ICCTA Prohibits.

One of AAR's core arguments stands unrebutted: ICCTA prohibits the patchwork of local regulation that the CWA guarantees through permitting of railcars in transit. *See* AAR Petition at 18-20; *see also* *Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016) ("The purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce."). AAR's Opening Comments expanded upon this core argument, emphasizing the following:

- Both technology-based and water quality-based effluent limitations in NPDES permits will vary from state to state, and even within a single state, due to a variety of reasons, *e.g.*, the exercise of individual permit writers' discretion; states' ability to impose state-specific requirements more stringent than nationally applicable requirements; the inherent variation among water quality standards (both within and beyond a state's borders). *See* AAR Opening Comments at 4-8.
- Permit requirements will vary regardless of whether a State issues permits or whether EPA is the permitting authority. In particular, CWA Section 401 allows states to insert state-specific requirements in EPA-issued permits. *See id.* at 9-10.
- Even if it were possible for EPA to issue a nationwide permit, it must accommodate states' ability to insert state-specific requirements, which is exactly what happened when EPA issued a nationwide general permit for vessels. *See id.* at 10-13.

No commenters refute that the CWA’s text, structure, and purpose guarantee a regulatory patchwork.³ In fact, those opposing AAR’s Petition do not substantively dispute any of AAR’s discussion about how the CWA operates. The Environmental Organizations (at 13 n.28) assert only that if the Board were “to find that ICCTA is fundamentally incompatible with a requirement that railroads obtain separate NPDES permits from each jurisdiction in which they operate,” it should nevertheless decline to issue the declaratory order requested in the Petition because “EPA would issue a nationally-uniform general permit as it did for discharges of pollutants from floating vessels.” This assertion is meritless because it depends on the demonstrably false premise that EPA’s vessel general permit was “nationally-uniform.”⁴ When EPA issued that permit, it left zero doubt that “it is *not possible* to have a ‘single nationwide system’ that does not accommodate the states’ ability to include state-specific requirements to implement their own water quality standards and requirements.” AAR Opening Comments at 11 (quoting EPA Response to Comments document; emphasis added). Although EPA was sympathetic to commenters’ concerns about an unworkable patchwork, the CWA’s requirements left the Agency powerless to prevent it. If the Board finds that ICCTA and NPDES permitting

³ Indeed, EPA’s May 19, 2020 comment letter submitted in this proceeding confirms how NPDES permits, including those issued by EPA, contain state-specific requirements and limitations. *See* Letter from David Ross, U.S. EPA, Supplementing EPA’s December 12, 2019 Initial Comments, No. 300640 (May 19, 2020).

⁴ Moreover, the Environmental Organizations do not explain whether or how EPA would have the authority to issue a national permit for railcar discharges applicable in all states. As explained in the Petition (at 8-9) and AAR’s Opening Comments (at 10 n.4), EPA’s rationale for issuing a national vessel general permit was based on its position that its delegated authorization to states to administer the NPDES program did not include a delegation of authority to issue NPDES permits for vessel discharges because they were the subject of a longstanding regulatory exclusion. The regulatory exclusion at issue was unique to vessels and EPA likely could not apply the same reasoning to issue a national permit for railcar discharges.

requirements for rail cars in transit are indeed incompatible (they are), it should issue the declaratory order requested in AAR's Petition.

The Environmental Organizations further misread relevant Board decisions in suggesting that AAR's purported failure to provide specific evidence demonstrating that a patchwork would place an unreasonable burden on interstate commerce necessarily dooms the Petition. But such a showing is not required. A regulatory patchwork by its very nature unreasonably burdens interstate commerce, which is why Congress enacted Section 10501(b). *EPA*, 2014 WL 7392860, at *7 (citing *Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35701, slip op. at 6 & n.14) (STB served Nov. 4, 2013) ("Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce."); *see also id.* (quoting *Fayus Enters. v. BNSF Ry.*, 602 F.3d 444, 452 (D.C. Cir. 2010), for its holding that "application of state antitrust laws to rail transportation would subject shipments to fluctuating rules as they crossed state lines *and therefore directly interfere with the purpose of § 10501(b)*") (internal quotation marks omitted).

Moreover, as the Board has recognized, any "federal environmental laws . . . being used to regulate rail operations directly" fall within the scope of § 10501(b). *EPA*, 2014 WL 73292860, at *7. The Board went on to conclude in *EPA*, without analyzing the degree of interference with interstate commerce, that any "potential patchwork of regulations would therefore likely directly interfere with the purpose of §10501(b)." 2014 WL 7392860, at *7; *see also id.* at *9 (concluding that allowing state and localities to create a variety of complex rules governing locomotives, even if authorized by federal law, "would directly conflict with the goal of uniform national regulation of rail transportation" and thus, should be preempted by Section 10501(b)). Finally, as evidenced by ICCTA's legislative history, Congress intended the federal

regulatory scheme to be “completely exclusive,” noting that “[a]ny other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.” H.R.Rep. No. 104–311, at 96 (1995).

As the foregoing demonstrates, the unworkable patchwork that would inevitably result from imposing the CWA’s discharge prohibition and NPDES permitting requirements on rail cars in transit would directly undermine Congress’s goal in enacting ICCTA Section 10501(b).

B. The Lack Of Permits Issued for Rail Cars in Transit Should Not Preclude The Board From Issuing the Requested Declaratory Order.

AAR need not present evidence of an actual NPDES permit for the Board to issue a declaratory order that ICCTA precludes imposition of the CWA’s discharge prohibition and permitting requirements on rail cars in transit. Environmental Organizations’ implication that impermissible regulation under ICCTA may only take the form of unreasonably burdensome state permits misstates ICCTA’s plain language and existing ICCTA preemption jurisprudence. *See* Environmental Organizations’ Response at 7-12. As has been frequently recognized by the Board and federal courts, lawsuits involving threats to enforce state laws in ways that would amount to direct regulation of railroad operations are a form of impermissible regulation and therefore are barred by Section 10501(b). *See, e.g., Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005); *Thomas Tubbs et al., Petition for Declaratory Order*, S.T.B. No. FD 35792, 2014 WL 5508153, *1 (Oct. 31, 2014), review denied by 812 F.3d 1141 (8th Cir. 2015).

Here, a federal district court has already held that railroads can be found liable under the CWA to the extent citizen plaintiffs can prove actual discharges from rail cars in transit directly into navigable waters. *See Sierra Club v. BNSF Ry. Co.*, No. 2:13-cv-00967, 2016 WL 6217108,

at *8-9 (W.D. Wash. Oct. 25, 2016) (“*Sierra Club*”). And of course, the remedy provided under the CWA in such citizen suits includes injunctive relief and civil penalties. *See* 33 U.S.C. § 1365(a). The effect of this decision is to expose railroads to unchecked attempts by private parties to use the courts to directly regulate railcars in transit (and potentially obtain a ruling enjoining rail transportation and assessing substantial civil penalties), the very outcome ICCTA plainly prohibits and the Board has sought for decades to prevent. *See* AAR Opening Comments at 23-24. And nothing in that decision is limited to citizen suit enforcement; railroads are equally exposed to governmental enforcement actions. *See* 33 U.S.C. § 1319 (providing administrative, civil, and criminal enforcement remedies). That the *Sierra Club* case settled before the court had to make findings on whether (and to what extent) the railroad was liable does not diminish the considerable threats to rail transportation that railroads and others face due to that decision. It is in situations of uncertainty such as this that the Board has acted to preserve the uniformity of federal regulation under ICCTA. *See V&S Ry., LLC Petition for Declaratory Order-railroad Operations in Hutchinson, Kan.*, No. FD 35459, 2012 WL 2865884, at *4 (July 9, 2012).

The Board should reject the Environmental Organizations’ disingenuous attempt to downplay the significance of the *Sierra Club* decision in these proceedings. *See* Environmental Organizations’ Response at 11. The allegations in the *Sierra Club* complaint (filed by the identical parties that make up the Environmental Organizations here) asserted that the CWA affords private citizens the right to challenge the manner in which a railroad may operate its railcars. *See Sierra Club*, Third Am. Compl., ECF No. 113, ¶¶ 54-59 (May 6, 2015) (alleging that “Defendants discharge coal pollutants *during the transportation* of the coal in both normal and abnormal operating conditions . . .” (emphasis added)). Furthermore, the remedies sought by the plaintiffs in that case were tantamount to the direct regulation of rail transportation. *Id.*,

Request for Relief C-F (seeking injunctive relief: prohibiting the railroad from operating rail cars that release any amount of coal or petroleum coke particles to jurisdictional waters; requiring the railroad to append covers to all rail cars carrying coal; replace its current fleet of coal cars with cars that met certain specifications; and *otherwise operate in a manner guaranteed to prevent the alleged discharges*).

These allegations and requested remedies, coupled with the district court's decision not to address whether ICCTA preempted and displaced the CWA strike at the heart of the Board's exclusive authority. *See Sierra Club*, 2016 WL 6217108, at *11. *Sierra Club* is nothing more than an attempt to circumvent the Board's authority and directly regulate rail transportation through citizen suit remedies and permitting-like requirements. It is undeniable that the Board has held this type of regulation of railcars in transportation to be contrary to ICCTA's fundamental purpose. *See Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016); *see also Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997) ("At the outset, we reaffirm here our determination in King County that a state or local permitting process for prior approval . . . of any aspect of . . . interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted.").

Against this backdrop of uncertainty, AAR's petition is not premature. Again, it bears emphasis that AAR seeks only to ensure that the Board, whose expertise in the field is not denied by any party, remains the exclusive forum for the regulation of rail transportation and the determination of what remedies are available under ICCTA, as Congress intended.

C. Additional Facts Are Not Needed To Resolve AAR's Petition.

The Board does not need additional factual development to resolve whether ICCTA *categorically* preempts and displaces imposition of the CWA's discharge prohibition and permitting requirements on rail cars in transit. As discussed in AAR's Opening Comments (at 22-25), ICCTA categorically preempts "any form of state or local permitting or preclearance requirement that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations" and does so "regardless of the context or rationale for the action." *Petition of Norfolk S. Ry. Co. for Expedited Declaratory Order*, No. FD 35949, 2016 WL 750944, at *2 (Feb. 22, 2016). Of particular relevance here, courts have held that State-issued NPDES permitting requirements are matters of state law, thus bringing any such requirements imposed on rail cars in transit squarely within the scope of categorical preemption by Section 10501(b). *See* AAR Opening Comments at 22-23.⁵

Categorical preemption of NPDES permitting requirements for rail cars in transportation is appropriate regardless of whether states or EPA act as the permitting authority. As explained in AAR's prior comments and above, federally-issued NPDES permits would necessarily contain state-specific requirements, and the CWA's states-first design and operative language ensure a patchwork of regulatory requirements.

Equally important, Congress knows what it means for one law to "preempt" another, so its choice to "preempt the remedies provided under Federal or State law" in ICCTA demonstrates that ICCTA's displacement of federal law is similar to its preemption of state law. *See* 49 U.S.C.

⁵ Plaintiffs cite *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512 (S.D.W. Va. 2009) for the proposition that citizen suit enforcement of the CWA's discharge prohibition remains a matter of federal law. *See* Environmental Organizations' Response at 14, n.29. That proposition is not in dispute.

§ 10501(b). In this case (*see infra* Part III.A), the relevant test is whether a regulation “may reasonably be said to have the effect of managing or governing rail transportation.” *AAR*, 622 F.3d at 1097; *see also EPA*, 2014 WL 7392860, at *7 (articulating similar standard). Because NPDES permitting of rail cars in transportation would directly regulate rail operations, it is categorically preempted, regardless of who the permitting authority is. *See, e.g., Ass’n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 U.S. Dist. LEXIS 65685, at *7 (C.D. Cal. Apr. 30, 2007) (“Because the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable.”); *CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662, slip op. at 3-4 (STB served May 3, 2005) (“[T]he preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.”).

The Board is routinely joined by courts in finding that questions about ICCTA’s preemptive scope are purely legal questions and ripe for a ruling without evidentiary development. *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) (“We . . . need not conduct a fact-based inquiry weighing the economic impact of Act 250’s permitting process upon Green Mountain . . . the Act 250 pre-permitting process is necessarily preempted by the Termination Act.”); *Griffoen v. Cedar Rapids and Iowa City Ry. Co.*, 914 N.W.2d 273, 278 (Iowa 2018) (“In this instance, as in so many preemption cases, we do not believe further development of the record is needed, and accordingly we affirm the district court’s grant of judgment on the pleadings”); *CSX Transportation, Inc.—Petition for Declaratory Order*, No. FIN 34662, 2005 WL 1024490, at *4 (May 3, 2005).⁶

⁶ Cases cited by the Environmental Organizations to the contrary, particularly *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009), do not deal with attempts to regulate (Continued...)

Applying these precedents here, no party can dispute that state involvement in the NPDES permitting regime, whether the permit is ultimately issued or administered by a state or federal agency, would necessarily result in an uneven patchwork of permitting. The evidence AAR has presented on this point, coupled with the myriad of Board decisions finding comparable permitting regimes categorically preempted, is sufficient for the Board to conclude that ICCTA Section 10501(b) preempts and displaces the imposition of the CWA’s discharge prohibition and permitting requirements on rail cars in transit.

III. ICCTA CANNOT BE HARMONIZED WITH IMPOSITION OF THE CWA’S DISCHARGE PROHIBITION AND PERMITTING REQUIREMENTS ON INCIDENTAL DISCHARGES FROM RAIL CARS IN TRANSIT.

A. The Central Question In This Proceeding Is Whether Imposition Of The CWA’s Discharge Prohibition And Permitting Requirements On Incidental Discharges From Rail Cars In Transit Would Regulate Rail Operations.

The Board has correctly held that where other federal laws are “used to regulate rail operations directly or [] applied in a discriminatory manner against railroads,” an irreconcilable conflict is created and thus, ICCTA preemption is appropriate. *See EPA*, 2014 WL 7392860, at *7; *see also Grafton & Upton R.R.—Petition for Declaratory Order*, STB Docket No. FD 35779, slip op. at 6 (STB served Jan. 27, 2014) (“[F]ederal environmental statutes are generally outside the scope of § 10501(b) preemption, *unless the federal environmental laws are being used to regulate rail operations directly* or being applied in discriminatory manner against railroads.”).

That ICCTA cannot be harmonized with another federal law to the extent that other law allows for the direct regulation of railcars in transportation is the only logical conclusion to draw

rail transportation and thus, they are distinguishable. *Cf. Funderburk v. S.C. Elec. & Gas Co.*, 406 F. Supp. 3d 527, 541 (D.S.C. 2019) (distinguishing *PCS* and finding plaintiffs’ attempt to use state law claims to “regulate the manner in which CSX constructs and operates its culverts and resultant drainage system” preempted by ICCTA); *see also CSX Transportation, Inc. v. City of Seabee, Kentucky*, 924 F.3d 276, 287 (6th Cir. 2019) (distinguishing *PCS*).

from the breadth of the jurisdiction Congress granted the Board. 49 U.S.C. § 10501(b) (“[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or state law”). The Environmental Organizations highlight decisions where courts or the Board have found that Congress generally did not intend to preempt federal statutes, but even they appear to concede that the general rule is inapposite, where, as here, federal environmental laws are being used to regulate rail operations directly. *See* Environmental Organizations’ Response at 16, n.36 (quoting *EPA*, 2014 WL 7392860, at *7, for the proposition that federal environmental statutes are “generally” outside the scope of ICCTA preemption “unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads”).

Here, there can be no doubt that the imposition of the discharge prohibition and permitting requirements on rail cars in transit would constitute direct regulation of rail transportation, and thus be irreconcilable with the foundational purpose of ICCTA. *See supra* at 10-12; *see also* Opening Comments at 28-29.

B. The Board Has Already Noted That ICCTA Likely Cannot Be Harmonized With Federal Environmental Regulations That Impose A Patchwork of Requirements That Directly Regulate Rail Transportation.

The Board previously examined whether ICCTA can be harmonized with state and local environmental permitting regulations promulgated under a federal environmental statute and approved by a federal agency in *EPA*. 2014 WL 7392860, at *7. It concluded that Clean Air Act requirements “likely” could not be harmonized with the purposes of § 10501(b) due to “the potential patchwork of regulations that could result.” *Id.* at 8. The Board specifically noted that the CAA would “directly interfere” with ICCTA by subjecting locomotives “to fluctuating rules as they cross[] state lines.” *Id.* In addition to emphasizing the “potential[] creat[ion] of a patchwork” of local requirements, the Board further supported its conclusion by finding that the

regulations at issue “would likely disrupt uniformity in rail operations by opening the door to varying operations and/or equipment requirements for locomotives across the country.” *Id.* at *8; *see also id.* at *9 (“[I]t appears that allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation” and thus, “the Rules likely would be preempted by § 10501(b).”).

Nothing in this proceeding counsels in favor of a departure from the Board’s prior positions in *EPA*. No commenter really disputes that the CWA effectively guarantees a regulatory patchwork, regardless of whether EPA or a state issues a permit and regardless of whether that permit is governed only by state law, or whether it is governed by both state and federal law. *See* Opening Comments at 21-26. And the positions taken by the Environmental Organizations in the *Sierra Club* litigation belie any assertion that it is merely speculative or hypothetical that imposition of the discharge prohibition on rail cars in transportation would directly regulate rail operations. *See, e.g.,* AAR Petition at 10-12; BNSF Opening Comments, No. 300566, at 5-7 (Apr. 24, 2020). Because a patchwork of requirements that severely disrupt rail operations is the inevitable result of imposing the CWA’s discharge prohibition and permitting requirements on rail cars in transportation, the Board should issue the requested declaratory order. *See EPA*, 2014 WL 7392860, at *7.

C. Environmental Organizations Misstate The Significance Of Decisions Involving ICCTA Preemption Of The CWA.

The Environmental Organizations’ assertion that courts “routinely reject ICCTA preemption arguments against the CWA” is a mischaracterization. *See* Environmental Organizations’ Response at 17-18 (citing *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp.

2d 1357 (S.D. Ga. 2013) and *Humboldt Baykeeper v. Union Pac. R.R. Co.*, No. 06-cv-2560, 2010 WL 2179900 (N.D. Cal. May 27, 2010)). Not surprisingly, the Environmental Organizations do not cite any decisions addressing ICCTA preemption of the CWA in the context of rail cars in transit. No such decision exists because no court has ever resolved that issue.

The only two cases the Environmental Organizations actually cite are inapposite and lack persuasive force. The court in *St. Mary's* was faced with the question of whether ICCTA displaced the CWA's discharge prohibition entirely, which it answered in the negative. 989 F. Supp. 2d at 1360. But that is not the question presented here. AAR seeks only an order declaring that the CWA's discharge prohibitions and NPDES permitting regimes are displaced by ICCTA to the extent that they apply to incidental discharges from the normal operation of railcars in transit. *See* AAR Opening Comments at 1. *St. Mary's* furthermore involved only the CWA's applicability to activities incidental to construction, not to the operation of railcars in transit. 989 F. Supp. 2d at 1359.

Humboldt Baykeeper v. Union Pac. R.R. Co. provides even less support for the Environmental Organizations' argument. That case merely held that the burden of having to defend against a CWA citizen suit is not a sufficient basis for finding ICCTA preemption, a question not before the Board here. *See* 2010 WL 2179900, at *3 ("NCRA's only argument that Plaintiffs' attempted enforcement of the Clean Water Act unreasonably burdens interstate commerce is that the cost of litigating this action is high. NCRA fails to provide any authority demonstrating that the mere cost of litigating a claim may be found to unreasonably burden interstate commerce."). Here, in sharp contrast, the Petition involves matters that the Board has previously recognized are what Congress intended to prevent when it enacted ICCTA—namely, the use of other federal laws to “regulate rail operations directly” and the creation of an

unworkable “patchwork of local regulation.” *See EPA*, 2014 WL 7392860, at *7. Moreover, imposition of the CWA’s discharge prohibition and NPDES permitting requirements on rail cars in transit would conflict with the Board’s exclusive jurisdiction over transportation by rail carrier. *See Ark. Elec. Coop. Corp.—Petition for Declaratory Order*, FD 35305 (STB served Mar. 3, 2011).

D. AAR’s Requested Declaratory Order Does Not Implicate Any Treaty-Reserved Rights.

Nowhere in its Petition does AAR seek to abrogate treaty rights. If rail transportation were, hypothetically, to impair treaty-reserved rights, Tribes remain free to pursue enforcement of those rights. For instance, Tribes are free to seek relief from the Board, and they have done so. *See e.g., Wisconsin Cent. Ltd.-Abandonment Exemption-in Langlade, Menominee & Shawano Crys.*, Wi, No. AB-303 (SUB 25X), 2001 WL 92975, at *1 (Feb. 1, 2001).

It is also important to bear in mind, under the CWA, Tribes may petition EPA to be “treat[ed] . . . as a State” for purposes of the NPDES permitting program, and other provisions, and EPA may grant that request so long as the Tribe meets certain enumerated requirements. *See* 33 U.S.C. § 1377(e); *see also* 40 C.F.R. §§ 123.31-123.34, 131.4, 131.8. Any treaty-reserved rights, however, arise from specific treaties themselves and *not* from the CWA. Consequently, any ruling from the Board that ICCTA displaces and preempts the imposition of the CWA’s NPDES permitting requirements and discharge prohibition on the incidental discharges from rail cars in transit would have no effect on treaty rights. Such a ruling would not preclude Tribes from seeking whatever remedies are available to them in resolving concerns over treaty-reserved rights.

Finally, as AAR has consistently maintained, the Petition does not seek a complete overhaul of the legal landscape. The parties to this proceeding agree that there are currently no

NPDES permits for rail cars in transit. *See, e.g.*, AAR Petition at 2; Environmental Organizations' Response at 8. Thus, as a matter of fact, Tribes have never depended on the issuance of such permits and enforcement of the discharge prohibition as to rail cars in transit to preserve their treaty-reserved rights.

E. Even If The Board Applies The Implied Repeal Test, It Should Issue The Requested Declaratory Order.

The appropriate test for the Board to apply in this proceeding is whether imposition of the CWA's discharge prohibition and NPDES permitting requirements on rail cars in transit directly regulates rail operations. *See supra* Part III.A. This test is based on application of Congress's plain language in the statute that the Board administers. But even if the Board asks whether ICCTA repealed the relevant CWA provisions with respect to incidental discharges from rail cars in transit, it should answer that question in the affirmative.

ICCTA provides for a more specific grant of authority in a later enacted statute. It must therefore displace the CWA. *See ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc.*, 504 F.3d 1208, 1210 (11th Cir.2007); *see also Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engineers*, 619 F.3d 1289, 1299 (11th Cir. 2010) ("When two statutes conflict, the later enacted statute controls."). As the Eleventh Circuit Court of Appeals noted in *Conart*:

[W]hen presented with a potential overlap between the broadly sweeping terms of a statute of general application that appear to apply to an entire class, and the narrow but specific terms of a statute that apply to only a subgroup of that class, we avoid conflict between the two by reading the specific as an exception to the general.

504 F.3d at 1210. This is the situation presented here: ICCTA's grant of power to the Board, while exclusive and comprehensive, applies specifically to interstate rail transportation. This is a more focused grant of power than that which is found in the CWA, a statute of general applicability whose general and ambiguous terms are subject to interpretation. Furthermore,

ICCTA was passed in 1995, 23 years after the discharge prohibition and NPDES permitting requirements in the CWA.

As a narrower focused statute passed later in time, ICCTA's grant of exclusive jurisdiction over interstate rail transportation, and rail cars in transit in particular, must prevail over the CWA's general NPDES permitting regime, which the Environmental Organizations seek now to re-cast as a specific statute aimed directly at railcars in transit. *See* Environmental Organizations' Response at 19. But such an analysis is unnecessary. AAR asks only that the Board interpret § 10501(b) of ICCTA the same way it always has: as preempting any other federal remedy that tries to regulate how railroads have chosen to operate railcars while in transit.

F. The Environmental Organizations' Reliance On Board Regulations Is Misplaced.

The Environmental Organizations cite to various Board regulations governing the submission of environmental reports *to the Board* for the proposition that Congress intended for the CWA to displace ICCTA and the Board's authority on environmental matters. *See* Environmental Organizations' Response at 21 (citing 49 C.F.R. §§ 1105.6 & 1105.7). Despite the Environmental Organizations' contrary suggestions, those regulations merely contemplate that CWA permitting might apply to certain rail construction, abandonment, discontinuance, and transactions involving the rail industry. *See* 49 C.F.R. § 1105.7(a); *see also* 49 C.F.R. § 1105.6(b). Nothing in the cited regulations suggests that the Board believes NPDES permits are required for rail cars in transit. *See id.*

CONCLUSION

For the reasons discussed above, the Board should declare that application of the CWA's NPDES permitting regime (Section 402) and the prohibition against unpermitted discharges

(Section 301) is displaced and preempted by ICCTA as it relates to incidental discharges from rail cars in transit.

Respectfully submitted,

s/ David Y. Chung

David Y. Chung
Scott L. Winkelman
D. Charlie Kazemzadeh
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2500

Kathryn D. Kirmayer
Timothy J. Strafford
Theresa L. Romanosky
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100

*Counsel for the Association of American
Railroads*

May 22, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 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.

s/ David Y. Chung
David Y. Chung
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004
(202) 624-2500