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Finance Docket No. 36369

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ASSOCIATION OF AMERICAN RAILROADS—  
PETITION FOR DECLARATORY ORDER

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**Reply Comments of BNSF Railway Company in Support  
of AAR's Petition for Declaratory Order**

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Dated: May 22, 2020

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BNSF submits these Reply Comments pursuant to the Board's order served on March 19, 2020 in this matter.

This is a rare case where the Board's stakeholders all appear to be in agreement regarding the proper course of action for the Board to take here. Comments supporting AAR's Petition<sup>1</sup> were filed by Class I railroads, short-line railroads, commodity and grain shippers, rail equipment manufacturers, and mine interests. All of these parties understand the importance of the unified and exclusive regulation of rail transportation by the Board, and they all support AAR's request that the Board issue a declaratory order finding that the CWA's discharge prohibition and NPDES permit regime are preempted by ICCTA with respect to incidental discharges from rail cars in transit.

The primary opposition to AAR's Petition comes from a group of environmental organizations—the Sierra Club, Natural Resources Defense Council, Columbia Riverkeeper, Friends of the Columbia Gorge, Spokane Riverkeeper, RESources for Sustainable Communities, and Puget Soundkeeper (hereafter "Plaintiff Environmental Organizations")—that were the

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<sup>1</sup> Unless otherwise defined herein, the acronyms and defined terms used in these Reply Comments are the same as those used in the Comments of BNSF filed in this proceeding on April 24, 2020 ("BNSF Opening Comments").

plaintiffs in the *Sierra Club* litigation against BNSF in the U.S. District Court for the Western District of Washington, which BNSF described in its Opening Comments.<sup>2</sup> As part of their broader campaign to block coal use,<sup>3</sup> the Plaintiff Environmental Organizations sought trillions of dollars in CWA penalties from BNSF and injunctive relief that would have massively disrupted rail transportation. It is highly disingenuous for the Plaintiff Environmental Organizations to oppose AAR's Petition on the basis that a preemption ruling is premature, which is their primary argument. The Plaintiff Environmental Organizations sought and obtained a ruling by a federal court that the CWA applies to rail cars in transit, making the need for the requested preemption determination from the Board immediate and concrete. Moreover, their own arguments and claims in the *Sierra Club* litigation leave no doubt that they seek to create the very patchwork of highly disruptive injunctive remedies under the CWA that requires a Board response to AAR's Petition. Their arguments on the merits of the preemption analysis are also misplaced, as discussed further below.

In addition to the Plaintiff Environmental Organizations, two Indian tribal interests—Confederated Tribes of Warm Springs and Confederated Tribes and Bands of the Yakama Nation (the “Tribes”)—submitted comments opposing AAR's Petition.<sup>4</sup> The Tribes largely repeat the arguments of the Plaintiff Environmental Organizations. They also refer to certain treaty-based fishing rights but fail to explain why those treaties have any bearing at all on the preemption question here. In fact, Indian treaties are not relevant under the CWA, which treats Indian tribes in the same manner that it treats states.

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<sup>2</sup> Environmental Organizations' Response to AAR's Petition for Declaratory Order, No. 300563 (Apr. 24, 2020) (“Plaintiff Environmental Organizations Opening Comments”). BNSF referred to these Plaintiff Environmental Organizations as “Plaintiffs” in its Opening Comments.

<sup>3</sup> See, e.g., *Sierra Club, Beyond Coal*, <https://coal.sierraclub.org/>.

<sup>4</sup> 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) (“Yakama Nation Opening Comments”).

BNSF responds to the specific arguments of the Plaintiff Environmental Organizations and the Tribes below.

**I. The Supreme Court’s recent decision in *Epic Systems* has no bearing on AAR’s Petition.**

The primary objective of the Plaintiff Environmental Organizations is to prevent the Board from addressing the merits of AAR’s legal position on ICCTA preemption. To this end, they first argue that under the Supreme Court’s recent decision in *Epic Systems Corporation v. Lewis*,<sup>5</sup> the Board lacks authority to interpret the scope of ICCTA preemption in a case involving overlap with another federal statute.<sup>6</sup> This argument conflates the issues of whether an agency has authority to interpret the scope of its governing statute and the level of deference a court must afford that interpretation.

There is no question that the Board has authority to interpret the ICCTA preemption provision. Congress granted the Board statutory authority to “issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>7</sup> Through numerous prior decisions, the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have recognized the broad scope of this authority, finding, of particular relevance here, that its declaratory order authority extends to determining whether it has jurisdiction over a dispute, even when that jurisdictional determination involves overlap with another federal statute.<sup>8</sup> This authority also extends to

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<sup>5</sup> 138 S. Ct. 1612 (2018).

<sup>6</sup> Plaintiff Environmental Organizations Opening Comments at 4-7.

<sup>7</sup> See, e.g., *CSX Transp. Inc.—Petition for Declaratory Order*, FD 34662 (STB served Mar. 14, 2005) (citing 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 (formerly 49 U.S.C. § 721)).

<sup>8</sup> See, e.g., *Gulf Cent. Pipeline Co.—Petition for Declaratory Order*, 7 I.C.C. 2d 52, 53, 59 (1990) (“It is our prerogative and responsibility, in the first instance, to determine the scope of our jurisdiction, and this declaratory order proceeding is an appropriate vehicle for making that determination.”) (concluding that the federal Department of Energy Organization Act, Pub. L. No. 95–91, 91 Stat. 565 (1977), did not transfer jurisdiction over the movement of anhydrous ammonia by pipeline from the ICC to the Federal Energy Regulatory Commission).

interpreting the terms of the Board’s governing statute,<sup>9</sup> and encompasses the determination of whether another statute is preempted.<sup>10</sup> Indeed, courts often recognize the value of the Board’s expertise and expressly request the Board’s views on ICCTA provisions, including the preemption provision of ICCTA.<sup>11</sup>

The Supreme Court in *Epic Systems* did not address an agency’s authority to issue declaratory orders regarding the scope or meaning of its governing statute. Instead, the Court addressed the very different question from the one now before the Board: how much deference a court should give to an agency’s resolution of a potential conflict between two federal statutes when those statutes contain no express preemption provision. When the Court stated that “reconciliation of distinct statutory regimes is a matter for the courts, not agencies,” it was addressing the question of deference, not agency authority to issue declaratory orders or interpretive decisions, and it was simply reiterating the long-standing principle that the courts are ultimately responsible for applying the laws that are established by Congress.<sup>12</sup> The Court did not rule, or even suggest, that agencies should refrain from interpreting the statutes Congress has charged them with administering. The amount of deference that a future court will give to the

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<sup>9</sup> See *DesertXpress Enters., LLC—Petition for Declaratory Order*, FD 34914, slip op. at 11 (STB served May 7, 2010) (explaining that the Interstate Commerce Act does not define the term “interstate rail network” used in the statute, so the Board has “discretion to interpret the term in a reasonable manner”) (citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984)).

<sup>10</sup> *Thomas Tubbs, Tr. of the Thomas Tubbs Revocable Trust & Individually, & Dana Lynn Tubbs, Tr. of the Dana Lynn Tubbs Revocable Trust & Individually—Petition for Declaratory Order*, FD 35792 (STB served Oct. 31, 2014) (finding that ICCTA preempted a claim under state law for property damage); *CSX Transp. Inc.—Petition for Declaratory Order*, FD 34662 (STB served Mar. 14, 2005) (holding that a District of Columbia act governing the transportation of hazardous materials was preempted by ICCTA). As discussed further below, the Board in *U.S. Environmental Protection Agency—Petition for Declaratory Order*, FD 35803 (STB served Dec. 30, 2014) (“*EPA*”), addressed preemption in connection with the federal Clean Air Act.

<sup>11</sup> See, e.g., *Bos. & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 15 (1st Cir. 2003) (explaining that the district court had referred the matter of ICCTA preemption to the Board, stating that the “expertise of the Board” would assist the court) (citations and internal quotation marks omitted).

<sup>12</sup> See 138 S. Ct. at 1629.

Board’s interpretation of ICCTA preemption in hypothetical future court litigation does not have any bearing on whether the Board can or should respond to AAR’s Petition.<sup>13</sup>

The Plaintiff Environmental Organizations’ reliance on *Epic Systems* is also misplaced because neither statutory regime at issue in that case contained an express preemption provision. The administrative agency in *Epic Systems*—the NLRB—was therefore not interpreting specific preemption language in its governing statute (the National Labor Relations Act). Rather, the NLRB was drawing inferences about Congress’s intent from the nature of the statutory schemes established by Congress in two distinct statutory systems, thus inevitably forcing the agency to interpret the scope of a statutory scheme (the Federal Arbitration Act) that it did not administer.

The circumstances in *Epic Systems* bear no resemblance to the circumstances here: AAR asks the Board to issue a declaratory order on the scope of a specific statutory provision—ICCTA section 10501(b)—that Congress tasked the Board with implementing. Moreover, the fact that the conflict involves another federal statute is contemplated in the ICCTA preemption provision, because section 10501(b) expressly preempts remedies under other *federal* statutes. It is well within the scope of the Board’s authority to issue such a declaratory order, and the Board should do so here.

## **II. The Plaintiff Environmental Organizations’ prematurity argument is misplaced.**

In another attempt to prevent the Board from reaching the merits of AAR’s petition, the Plaintiff Environmental Organizations argue that AAR’s petition is premature. The Board

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<sup>13</sup> Although the question of deference is not an issue the Board needs to address, it is worth noting that courts do generally defer to the Board in its interpretation of ICCTA. *RLTD Ry. Corp. v. STB*, 166 F.3d 808, 812 (6th Cir. 1999) (“This court must give considerable weight and due deference to the STB’s interpretation of the statutes it administers unless its statutory construction is plainly unreasonable.”) (citation and internal quotation marks omitted). The Supreme Court itself has stated that courts generally defer under *Chevron* “to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (that is, its jurisdiction).” *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296-97 (2013). Moreover, the question of deference only comes into play when there is an ambiguity in the statute, and as discussed further below, the statutory preemption provision is clear on its face, at least in this context.

should address the merits of AAR's Petition now because a federal court has already ruled that the CWA applies to incidental discharges from rail cars in transit in response to a lawsuit filed by the same Plaintiff Environmental Organizations who now urge the Board to refrain from issuing an order on preemption.<sup>14</sup> There is nothing abstract or premature about the ICCTA preemption issue that AAR has asked the Board to address here. Indeed, the preemption question was fully briefed for summary judgment in the *Sierra Club* case, but the court deferred ruling on the issue until after trial, and the parties then reached a settlement. Moreover, the extreme requests for relief pursued by the Plaintiff Environmental Organizations in that litigation make AAR's Petition far more than a request for an "advisory opinion," as the Plaintiff Environmental Organizations claim.<sup>15</sup> The Board can see from the Plaintiff Environmental Organizations' own prior litigation demands exactly how far the relief in a CWA action could go in disrupting rail transportation.

Congress gave the Board a declaratory order power for a reason—to resolve uncertainties and to clarify legal and regulatory issues that are faced by the Board's stakeholders. As reflected in the range of parties that support AAR's Petition, the question of ICCTA preemption here is an important one that affects numerous interests. The interests of the Board's stakeholders and the Board itself would not be served by declining to issue a decision on this important issue.

The Plaintiff Environmental Organizations' prematurity argument also rests on the flawed premise that ICCTA preemption turns on an evaluation of the *degree* of burden imposed on rail transportation by specific NPDES permits and the *reasonableness* of such burdens in light of the CWA's environmental objectives.<sup>16</sup> But the case law is clear that direct regulation of rail

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<sup>14</sup> *Sierra Club* (ECF No. 113 at ¶¶ 4, 45, 53, 60) (May 6, 2015) (Third Amended Complaint); *Sierra Club* (ECF No. 337 at 19) (Oct. 25, 2016) (Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment).

<sup>15</sup> Plaintiff Environmental Organizations Opening Comments at 12.

<sup>16</sup> *Id.* at 8-10.

transportation through permit requirements is categorically preempted.<sup>17</sup> With categorical preemption, there is no evaluation of the degree or reasonableness of the burden on rail transportation; that fact-specific analysis only occurs with as-applied preemption, which is not at issue here.<sup>18</sup> Categorical preemption arises when another agency would regulate rail transportation, which ICCTA's grant of exclusive regulatory authority to the Board over rail transportation precludes regardless of the specific impact of such regulation by another agency.<sup>19</sup>

The Plaintiff Environmental Organizations cite several decisions to support their claim that the preemption question turns on a factual analysis of the burden on rail transportation that results from a particular regulation.<sup>20</sup> But none of the cases they cite involves an attempt to directly regulate rail operations. To the contrary, the cases cited (to the extent they contain a preemption analysis) concern regulation of matters that are incidental to rail transportation which may nevertheless have an impact on rail transportation. In those cases, the degree of impact is relevant to determine whether the regulation of the incidental or collateral conduct nevertheless amounts to a regulation of rail transportation.<sup>21</sup> No such inquiry is necessary where, as here, the

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<sup>17</sup> See *EPA*, slip op. at 7 (“[S]tate or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.”).

<sup>18</sup> See *id.*, slip op. at 7-8 (explaining that categorically preempted actions are preempted “regardless of the context or rationale for the action,” whereas as-applied preempted actions are preempted “only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case”) (citations and internal quotation marks omitted).

<sup>19</sup> *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 805 (5th Cir. 2011) (explaining that ICCTA “expressly preempts only laws that have the effect of *managing* or *governing* rail transportation”) (internal quotation marks omitted) (emphasis in original).

<sup>20</sup> See Plaintiff Environmental Organizations Opening Comments at 8-9.

<sup>21</sup> *Elam v. Kan. City S. Ry. Co.*, 635 F.3d at 813-15 (state law negligence claim for failing to maintain adequate warnings of a train's presence at a crossing); *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 220-22 (4th Cir. 2009) (breach of contract action between shipper and railroad regarding which party would cover the cost of track relocation); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-57 (3d Cir. 2007) (regulation of solid waste transloading facility); *Joint Petition for Declaratory Order—Bos. & Maine Corp. & Town of Ayer, Mass.*, 5 S.T.B. 500, 2001 WL 458685, at \*6-\*7 (2001) (“*Town of Ayer*”) (local regulation of automobile unloading facilities); *Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380 (1999) (“*Borough of Riverdale*”) (regulation of a truck terminal and corn processing plant). In *United States v. St. Mary's Railway West, LLC*, 989 F. Supp. 2d 1357, 1364 (S.D. Ga. 2013), cited by Plaintiff Environmental Organizations in support of their argument that factual analysis is needed, the court did not carry out

attempt to regulate rail operations is direct and unambiguous. As BNSF explained in its opening comments, the Plaintiff Environmental Organizations sought in the *Sierra Club* litigation to have the court directly regulate rail transportation through, among other things, operating requirements (including a newly designed fleet, car covers, and the elimination of weep holes), and injunctive relief prohibiting non-compliant rail transportation.<sup>22</sup> The objective was to have a court directly regulate how a railroad complied with its common carrier obligations. Because the CWA’s discharge prohibition and NPDES permits would directly regulate rail transportation, they fall squarely into the preemptive scope of § 10501(b) without the need for any additional facts.

Moreover, the Board and courts have already concluded that a core objective of ICCTA preemption is to prevent a patchwork of regulation from interfering with rail transportation.<sup>23</sup> A patchwork of regulation is inevitable here given the structure of the CWA and how it is implemented. As the EPA explains in its May 19, 2020 letter to the Board in this proceeding, the involvement of individual states in the issuance of permits and certification of local water quality standards is unavoidable.<sup>24</sup> In the Board’s *EPA* decision, the same inevitability of a patchwork

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an as-applied analysis of relative burden, but it did make an initial assessment of the nature of the regulation at issue (regulation of waste dumping) and concluded that the regulation was incidental to rail transportation and did not have the effect of managing or governing rail transportation. *See id.* at 1361, 1364-65. In addition, *Friends of the Aquifer*, *City of Hauser, Id.*, *Hauser Lake Water Dist.*, *Cheryl L. Rodgers*, *Clay Larkin*, *Kootenai Env’tl. All.*, *R.R. & Clearcuts Campaign*, 5 S.T.B. 880 (2001) (“*Friends of the Aquifer*”), also cited by Plaintiff Environmental Organizations, discusses the Board’s preemption analysis but turns on the Board’s jurisdiction. *See id.* at \*5.

<sup>22</sup> BNSF Opening Comments at 7.

<sup>23</sup> *See CSX Transp., Inc. v. City of Seebree, Ky.*, 924 F.3d 276, 285 (6th Cir. 2019) (explaining that the purpose of ICCTA’s “preemption provision [is] to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce”) (citation and internal quotation marks omitted); *Wichita Terminal Ass’n, BNSF Ry. Co., & Union Pac. R.R. Co.—Petition for Declaratory Order*, FD 35765, slip op. at 5-6 (STB served June 23, 2015) (same); H.R. Rep. No. 104-311, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08 (emphasizing the need for “uniformity” of federal standards for railroads and the risk of “balkanization” from state and local regulation).

<sup>24</sup> US EPA Letter Supplementing Its December 12, 2019 Initial Comments, No. 300640 (May 19, 2020).

of local regulation under a similar federal environmental law was the basis for the Board's preemption concerns.

The Plaintiff Environmental Organizations would like to ignore the Board's *EPA* decision, even though that decision is directly relevant here. In *EPA*, a California air quality management district had developed rules that regulated locomotive idling and through such regulation would affect the type of locomotives that railroads could use to provide their rail service. The EPA asked the Board to determine whether those anti-idling rules, if approved by the EPA under the Clean Air Act ("CAA") regime, would be preempted by ICCTA.<sup>25</sup> The Board found that if EPA were to approve the rules, "it is likely that the Rules would be preempted because of the potential patchwork of regulations that could result, contravening Congress's purpose in enacting § 10501(b)."<sup>26</sup> The Board did not need to wait until the patchwork of regulation was actually created. The problem created by local regulation of locomotive idling was clear: "locomotives would be subject to fluctuating rules as they cross state lines (and as they cross air quality regions), and the Rules would therefore likely directly interfere with the purpose of § 10501(b)."<sup>27</sup> The prospect of such patchwork of regulation could not be squared with ICCTA's emphasis on uniform regulation by the Board:

[I]t is not only the impact of the [specific air quality management district's anti-idling rules] that we must consider, but the fact that other states and local districts throughout the country could follow suit and adopt their own emission rules . . . . Approval of the Rules here would likely signal to other localities that they also could propose their own rules on locomotive operations to meet localized concerns through the [State Implementation Plan] process, thereby leading to the lack of uniformity of regulation that Congress intended to preclude in § 10501(b). Such a variety of localized regulations would likely have a practical and cumulative impact on rail operations on the national rail network.<sup>28</sup>

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<sup>25</sup> *EPA*, slip op. at 2-3.

<sup>26</sup> *Id.*, slip op. at 8.

<sup>27</sup> *Id.* (internal quotation marks omitted).

<sup>28</sup> *Id.*, slip op. at 8-9.

The Plaintiff Environmental Organizations note that while the Board addressed the merits of the preemption issue raised by the EPA in that case, the Board declined to issue a declaratory order. But the Board in *EPA* explained that it was not issuing a formal declaratory order because it was uncertain that there was a concrete legal issue that required clarification. The EPA had asked the Board a hypothetical—would ICCTA preempt incorporation of the anti-idling rules in a State Implementation Plan under the CAA?—but it was far from clear whether the EPA even had the authority to take such action.<sup>29</sup> In contrast, there is a recent federal court decision holding that the CWA applies to incidental discharges from rail cars in transit.<sup>30</sup> The question of ICCTA preemption in this case is not a hypothetical one. To the contrary, as a result of the lawsuit the Plaintiff Environmental Organizations themselves brought, the issue before the Board is actual and concrete.

Finally, even if the degree of burden on interstate rail transportation were a relevant consideration here, and it is not, the Board would need to look no further than the relief sought by the Plaintiff Environmental Organizations in the case they brought against BNSF to see that rail transportation would be enormously disrupted by the application of the CWA's discharge prohibition and the NPDES permitting regime. In addition to massive penalties, the Plaintiff Environmental Organizations sought injunctive relief that would have severely disrupted BNSF's ability to carry out its common carrier obligations, as BNSF explained in its Opening Comments.<sup>31</sup> The Plaintiff Environmental Organizations did not even attempt to rebut the

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<sup>29</sup> See *id.*, slip op. at 6.

<sup>30</sup> *Sierra Club* (ECF No. 337 at 19) (Oct. 25, 2016) (Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment).

<sup>31</sup> BNSF Opening Comments at 7.

extensive evidence presented by AAR in the Petition as to the nature, breadth, and intrusiveness of CWA remedies and how those remedies would disrupt rail transportation.<sup>32</sup>

**III. ICCTA cannot be reconciled with environmental regulation that relies on individual states regulating the movement of rail cars within and across state borders.**

**A. ICCTA preempts patchwork regulation of rail transportation.**

As discussed above, the Board recognized in *EPA* that a fundamental objective of ICCTA preemption is to avoid a patchwork of individual state regulation of rail movements within and across state borders. While the Plaintiff Environmental Organizations quibble over the question of whether state actions taken under the CWA should be considered as matters of state or federal law,<sup>33</sup> they do not take issue with AAR's description of the extensive role that states play in implementing the CWA, in establishing water quality standards for waterbodies within their borders, in the issuance of NPDES permits, and in water quality certification under section 401. The states' role in implementing the CWA NPDES program is further confirmed by the EPA's May 19, 2020 letter to the Board. A patchwork of individual requirements addressed to a multitude of local and parochial interests would be inevitable if the CWA discharge prohibition and NPDES permitting regime were applied to incidental discharges from rail cars in transit.

Indeed, the Plaintiff Environmental Organizations appear to recognize the serious problem under ICCTA created by the states' role in implementing the CWA. They suggest that the Board might try to split the baby by finding that the states' role in implementing the CWA is preempted, but a federal, EPA-focused role in regulating rail transportation through a nationwide

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<sup>32</sup> The Plaintiff Environmental Organizations' argument (at 13) that the Board could not grant AAR's Petition unless it finds that it would be impossible for the CWA to be applied without imposing undue burdens on rail transportation is preposterous in light of the relief that the Plaintiff Environmental Organizations themselves sought in that litigation that would have severely disrupted BNSF's transportation of coal. It is also without any support in the case law.

<sup>33</sup> Plaintiff Environmental Organizations Opening Comments at 13-14.

permit would not be preempted.<sup>34</sup> The problem with this suggestion is that it would require the Board to rewrite the CWA, which does not permit the exclusion of the states. As the EPA has explained in discussing states' authority to certify under CWA section 401 that a federal permit meets state water quality standards: "[U]nder the NPDES program, 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."<sup>35</sup> The CWA also imposes upon EPA the requirement that effluent limitations in permits it issues meet state water quality standards.<sup>36</sup> Put simply, the cooperative federalism at the heart of the CWA regulatory scheme, by design, would necessarily result in a patchwork of regulation for rail cars within and across state borders.

Moreover, even if Congress had enacted a different statute that permitted the exclusion of the states from exercising regulatory authority, which it did not, ICCTA would still preempt the regulation of rail transportation by a federal agency other than the Board. The statute is clear that the Board has *exclusive* authority to regulate rail transportation.<sup>37</sup> That authority would no longer be *exclusive* if another federal agency could determine when and under what circumstances transportation may occur by issuing and enforcing permits for freight movements. The Board could not exercise its exclusive authority to regulate the economic relationships between railroads and their customers—which the courts have found to be at the heart of

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<sup>34</sup> Plaintiff Environmental Organizations Opening Comments at 13, n.28.

<sup>35</sup> US EPA, 2013 VGP: EPA's Response to Public Comments, at 1225 (Mar. 28, 2013), *available at* <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0141-0926> (emphasis added).

<sup>36</sup> 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(3).

<sup>37</sup> 49 U.S.C. § 10501(b).

ICCTA<sup>38</sup>—if another federal agency had transportation permitting authority and the broad and intrusive powers that come from enforcing such permit requirements.

The comments of the two Tribes do not offer a solution to the patchwork problem. In fact, the discussion of their particular and unique interests serves only to highlight the certainty of a patchwork of regulation that would result from permits issued by individual states and Indian tribes.<sup>39</sup> As BNSF explained in its Opening Comments, the CWA allows tribes to petition EPA to be treated as states for purposes of administering CWA programs, including issuance of NPDES permits, and authorizes EPA to grant that request if tribes meet enumerated statutory criteria.<sup>40</sup> The Tribes refer to certain treaty-based fishing rights, although they never explain why those treaties have any relevance to the preemption analysis. Because the CWA expressly treats Indian tribes as *states*, the Tribes’ references to fishing rights based on treaties are irrelevant to the ICCTA preemption analysis. Nothing in the CWA refers to treaties or treaty-based rights or sets up Indian tribes as having rights beyond those of individual states. Moreover, enforcement of the Tribes’ treaty-based rights is the subject of long-standing litigation that is completely unrelated to the CWA.<sup>41</sup> AAR’s Petition has no bearing on those treaty-based disputes.

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<sup>38</sup> See *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010) (“[T]he core of ICCTA preemption is ‘economic regulation,’ which we take to refer to regulation of the relationship before us here, that of shippers and carriers.”).

<sup>39</sup> The Yakama Nation inaccurately portrays as current pre-2011 estimates of the quantity of coal lost from rail cars *before* BNSF adopted coal loading rules that were at issue in the Coal Dust proceeding. Yakama Nation Opening Comments at 3 (citing March 2011 BNSF FAQs archived on an anti-coal train website). The purpose of the coal loading rules, which have since been implemented, was to dramatically reduce any coal losses in transit.

<sup>40</sup> See BNSF Opening Comments at 20, n.77; 33 U.S.C. § 1377(e). Moreover, tribes’ rights as states are geographically limited to specific reservations. See 81 Fed. Reg. 30,183, at 30,191 n.11 (May 16, 2016) (“Many tribes have rights to hunt, fish, gather resources, or perform other activities in areas outside of their reservations. To the extent the lands on which these rights are exercised are not Indian reservation lands as defined at 18 U.S.C. § 1151(a), tribes cannot obtain [treatment as states] under the CWA for water resources pertaining to such lands.”).

<sup>41</sup> The Tribes cite *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), for the proposition that their respective treaty rights include an enforceable right to protect salmon habitat. See Comments of the Confederated Tribes of Warm Springs at 2; Yakama Nation Opening Comments at 2. But to the extent the Tribes suggest that opinion should be expanded to apply to AAR’s Petition, they overstate the court’s holding. The Ninth Circuit noted that its

**B. The Plaintiff Environmental Organizations misconstrue the case law on ICCTA preemption of environmental statutes.**

The Plaintiff Environmental Organizations boldly but incorrectly assert that “the Board and courts have uniformly held that ICCTA does not preempt federal environmental laws.”<sup>42</sup>

The Board in *EPA* concisely summarized the case law: “federal environmental statutes such as the [Clean Air Act], the Clean Water Act and the Safe Drinking Water Act 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 a discriminatory manner against railroads.”<sup>43</sup>

The key inquiry for purposes of AAR’s Petition is whether a federal environmental statute is being used to “regulate” rail operations. If so, as here, ICCTA plainly preempts the federal statute.

The cases cited by the Plaintiff Environmental Organizations do not support their incorrect description of the law.<sup>44</sup> The language they cite from the STB cases is dicta, because none of the STB cases other than *EPA* actually involved the application of federal environmental law. Moreover, the language from those cases merely recognizes, as the Board did in *EPA*, that implementation of federal environmental law does not *generally* involve an attempt to regulate rail operations, and therefore is not *generally* subject to ICCTA preemption.<sup>45</sup>

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holding in that case was limited to the circumstances before it—where it was undisputed that state-constructed culverts would block fish passage, and it has rejected the idea that treaty rights created a blanket environmental servitude prohibiting “all human-caused diminutions, or even . . . all State-caused diminutions” of the supply of salmon. *United States v. Washington*, 694 F.2d 1374, 1381 (9th Cir. 1985); *United States v. Washington*, 864 F.3d 1017, 1020 (9th Cir. 2017).

<sup>42</sup> Plaintiff Environmental Organizations Opening Comments at 15.

<sup>43</sup> *EPA*, slip op. at 8 (emphasis added).

<sup>44</sup> Plaintiff Environmental Organizations Opening Comments at 15-18.

<sup>45</sup> Most of the cases they cite also do not involve direct efforts by local authorities to regulate rail operations. See *Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (construction and operation of railroad refueling facility); *Town of Ayer*, 5 S.T.B. 500 (2001) (local regulation of automobile unloading facilities); *Friends of the Aquifer*, 5 S.T.B. 880 (2001) (whether the STB had jurisdiction over construction of railroad refueling terminal and associated changes, such as closing of another fuel terminal); *Borough of Riverdale*, 4 S.T.B. 380 (1999) (regulation of a truck terminal and corn processing plant); *Cities of Auburn & Kent, Wa.—Petition for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, 2 S.T.B. 330 (1997) (regulation of rail line

The court cases that the Plaintiff Environmental Organizations cite are also fully consistent with the Board's statement of the legal standard in *EPA*. When state and local authorities seek to regulate rail operations directly, ICCTA preempts those attempts at regulation.<sup>46</sup> When state and local authorities seek to regulate something collateral to rail transportation under federal environmental law, the preemption question is more complicated and it is necessary to ask whether the regulation is directed at rail operations as opposed to incidental regulation that has an effect on rail transportation.<sup>47</sup> But remedies under the CWA for incidental discharges from rail cars in transit, including NPDES permits that prescribe transportation requirements, are a direct form of regulating rail transportation and are therefore clearly preempted by ICCTA. As is evident from the relief sought by the Plaintiff Environmental Organizations in the *Sierra Club* case, the CWA can be used to regulate what can be moved, where it can be moved, and under what circumstances—i.e., the core circumstances governing how railroads comply with their common carrier obligations.

Finally, the Plaintiff Environmental Organizations erroneously claim that environmental laws are not preempted by ICCTA because ICCTA preemption is limited to economic regulation.<sup>48</sup> Many court decisions have directly repudiated this attempted limitation of ICCTA

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improvements); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (environmental land use statute as applied to transload facility construction).

<sup>46</sup> *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010) (regulation of locomotives through idling restrictions). The *AAR* case, of course, did not involve federal environmental law. But when the same local efforts to regulate locomotive idling came before the Board in connection with the Clean Air Act, the Board in *EPA* concluded that they would likely be preempted.

<sup>47</sup> See *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357, 1364-66 (S.D. Ga. 2013) (reasoning that the regulation at issue did not amount to managing or governing rail transportation). In *Humboldt Baykeeper v. Union Pacific Railroad Corporation*, 2010 WL 2179900, at \*2-\*3 (N.D. Cal. May 27, 2010), the court concluded that the cost of litigating a CWA claim did not constitute regulation of rail transportation, and it therefore rejected the claim of preemption based on litigation costs.

<sup>48</sup> Plaintiff Environmental Organizations Opening Comments at 19-20. Plaintiff Environmental Organizations rely on a quotation from *Fayus Enterprises*, a case involving preemption of state antitrust law, not federal environmental law, to suggest that ICCTA preempts economic regulation but does not preempt environmental regulation. Plaintiff Environmental Organizations Comments at 20. *Fayus* does not support this interpretation of ICCTA; one sentence before the Plaintiff Environmental Organizations' cherry-picked quotation, the decision states that several of the

preemption.<sup>49</sup> In any event, BNSF’s Opening Comments explain how disruptive it would be to economic relationships in the industry to apply the CWA discharge prohibition and NPDES permitting regime to rail cars in transit.<sup>50</sup>

**C. The preemption analysis here is driven by the plain language of the ICCTA preemption provision.**

The touchstone of any preemption analysis is Congress’s intent.<sup>51</sup> The best evidence of Congress’s intent is the language of the statute.<sup>52</sup> In this case Congress’s instruction in the statute is clear: “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.” Few federal statutes contain preemption language that is as clear and direct as section 10501.

Even with the clear language Congress used in section 10501, ambiguities can arise in particular situations where the application of the language is uncertain. For example, in the recent Ninth Circuit decision in *Swinomish v. BNSF*,<sup>53</sup> the court addressed the application of section 10501 to the enforcement of an easement agreement between BNSF and the Swinomish Tribe. The court noted that section 10501 preempted “regulation” of rail transportation, but also determined that the easement was a “voluntary agreement.” Citing cases that question whether

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cases reviewed, “in addressing these environmental regulations, note that the ICCTA does not preempt only explicit economic regulation.” 602 F.3d at 451 (internal quotation marks omitted).

<sup>49</sup> See, e.g., *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (ICCTA “does not preempt only explicit economic regulation . . . . What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as ‘economic’ or ‘environmental.’”); *Green Mountain*, 404 F.3d at 644-45 (rejecting the state’s argument that the law at issue was not preempted because it was an environmental, not economic, regulation); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (“[G]iven the broad language of § 10501(b)(2), . . . the distinction between ‘economic’ and ‘environmental’ regulation begins to blur. For if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.”).

<sup>50</sup> BNSF Opening Comments at 17-26.

<sup>51</sup> See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating the Supreme Court’s “oft-repeated comment” that “the purpose of Congress is the ultimate touchstone in every pre-emption case”) (citations and internal quotation marks omitted).

<sup>52</sup> See, e.g., *Holloway v. United States*, 526 U.S. 1, 6 (1999) (“[T]he language of the statutes that Congress enacts provides the most reliable evidence of its intent.”) (internal quotation marks omitted).

<sup>53</sup> 951 F.3d 1142 (9th Cir. 2020).

the enforcement of a private agreement amounts to “regulation,” the court concluded that the enforcement of the easement agreement that BNSF entered with the Swinomish Tribe would not “operate” as “regulation” that would be subject to ICCTA preemption.<sup>54</sup> The unique facts of that case also influenced the result. The easement that the court found could be enforced without running afoul of ICCTA was entered into as a settlement of claims by the Tribe that a BNSF predecessor had located its rail line on reservation property over 100 years ago without the consent of the Tribe.

But there is no ambiguity here over the application of the plain language of ICCTA to the remedies under the CWA as applied to rail cars in transit. Section 10501 preempts “remedies” under other state *and federal* law that seek to regulate rail transportation. The Plaintiff Environmental Organizations themselves recognize that injunctive relief and NPDES permits are “remedies” under the CWA.<sup>55</sup> And there is no question that an injunction or a permit that imposes conditions on the movement of trains amounts to “regulation” of rail transportation.<sup>56</sup> Moreover, as explained above, the unavoidable role of the states in implementing the CWA violates the core principle of ICCTA preemption, which is to avoid a patchwork of state and local regulation of interstate rail transportation.

Other arguments on the merits of the preemption question by the Plaintiff Environmental Organizations carry no weight. The Plaintiff Environmental Organizations claim that AAR is asking the Board to rewrite the CWA by reading out “rolling stock” from the statute.<sup>57</sup> But in

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<sup>54</sup> *Id.* at 1158.

<sup>55</sup> BNSF Opening Comments at 7 (describing injunctive relief sought by Plaintiff Environmental Organizations under the CWA in lawsuit against BNSF); Plaintiff Environmental Organizations Opening Comments at 14 (citing *W. Va. Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512, 528-29 (S.D. W. Va. 2009)).

<sup>56</sup> There is no need to carry out an implied repeal analysis, as argued by the Plaintiff Environmental Organizations. The only way to avoid the plain language of ICCTA in the context of CWA remedies is to pretend that the language does not exist.

<sup>57</sup> Plaintiff Environmental Organizations Opening Comments at 3.

fact AAR's narrow position is that the CWA discharge prohibition and permitting regime are preempted by ICCTA to the extent they are imposed on incidental discharges from railcars in transit. AAR's Petition does not ask the Board to address preemption related to railcars in other circumstances or related to the broader term "rolling stock" more generally.

The Plaintiff Environmental Organizations also point to Board regulations that relate to the Board's consideration of environmental issues for certain rail construction projects and other specified activities or transactions requiring Board approval.<sup>58</sup> The fact that the Board's regulations require applicants to submit a broad range of environmental-related information, including CWA-related information, if relevant, as part of the Board's environmental review process is neither surprising nor pertinent to the ICCTA preemption issue raised in AAR's petition. AAR has made it clear that it is not seeking a declaration that federal environmental laws are broadly preempted by ICCTA or that the CWA is preempted in its entirety as applied to all railroad activity. The AAR Petition is narrowly focused on preemption of the CWA discharge prohibition and NPDES permitting requirements to the extent they are imposed on incidental discharges from rail cars in transit. Nothing in the regulations suggests that any of the

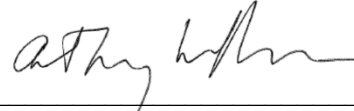
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<sup>58</sup> *Id.* at 21.

environmental agencies referenced therein have the authority to regulate such discharges, or any other aspect of rail operations subject to the Board's exclusive jurisdiction.

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Respectfully submitted,



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Dated: May 22, 2020

## CERTIFICATE OF SERVICE

I certify that I have, on May 22, 2020, served copies of these Reply Comments of BNSF Railway Company on all parties of record in this proceeding.



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