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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

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ENTERED
Office of Proceedings
May 26, 2020
Part of
Public Record

May 22, 2020

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

The Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

The Honorable Patrick J. Fuchs
Board Member
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Docket No. FD 36369, Association of American Railroads (AAR) Petition for a
Declaratory Order

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

We appreciate your critical role in ensuring the efficient operation of our nation's railways. We also applaud your willingness to open a proceeding on a pending petition to determine whether the Interstate Commerce Commission Termination Act (ICCTA) preempts the Clean Water Act's (CWA) discharge prohibition and National Pollutant Discharge Elimination System (NPDES) permitting regime as applied to the normal operation of rail cars in transit. As members of the Senate Environment and Public Works Committee, we urge you to issue a declaratory order finding that the ICCTA preempts the CWA as discussed below.

The need for a declaratory order first arose from a CWA citizen suit brought by Sierra Club against the BNSF Railway Company for alleged discharges of coal to waterways within Washington.¹ While BNSF raised the ICCTA preemption issue, the court never ruled on the question, leaving the railroads with regulatory uncertainty. The Board has the authority and responsibility to clarify that regulatory uncertainty.

Many commodities' shipment by rail could be impeded if it is not clear the NPDES program is preempted for rail cars in commerce. Approximately 69% of coal, the commodity at issue in *Sierra Club*, is moved by rail.² Many agricultural products are shipped predominantly by rail car as well. A U.S. Department of Agriculture study found that railroads transport nearly all

¹ *Sierra Club v. BNSF Railway Company*, 2016 WL 6217108 (W.D. Wash., Oct. 25, 2016).

² Annual Coal Distribution Report, U.S. Energy Information Administration, Oct. 3, 2019. Available at <https://www.eia.gov/coal/distribution/annual/>.

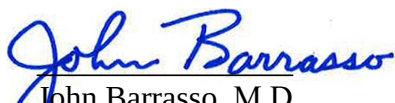
grains and oilseeds produced in Montana, over 70% produced in North Dakota and over 50% produced in Arizona, Oklahoma, and South Dakota.³

Subjecting incidental discharges from the normal operation of rail cars in transit to the CWA discharge prohibition and its permitting requirements would be unprecedented and impede interstate commerce. Congress created the NPDES program in 1972 and, in 48 years, EPA has never required rail cars in transit to secure an NPDES permit.

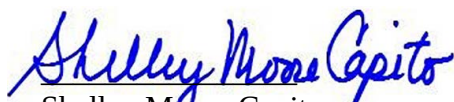
Under the CWA, states can obtain delegated authority to implement the CWA discharge permitting system. Currently, forty-seven states and one territory have authority to issue NPDES permits. As a result, discharge permits typically vary state-by-state. Complying with a patchwork of inconsistent and potentially conflicting requirements would likely disrupt, if not cripple, transit of commodities by rail. Because regulated discharges to jurisdictional waters are not allowed without a permit, rail transport could be hampered or even cease while states develop permits that often take years to issue. Without a permit, the operator, shipper or other rail party would risk being subject to exorbitant CWA penalties, injunctive relief, and citizen suits.

Issuing the declaratory order finding that the ICCTA preempts the CWA in the limited circumstances requested by the petition would preserve the Board's sole authority to regulate transportation by rail. Of note, the Board has already exercised its exclusive authority to regulate coal dust from railroad cars, the commodity at issue in *Sierra Club* that prompted AAR's petition. A patchwork of CWA permitting is incompatible with the Board's jurisdiction over railcars and cannot be harmonized with the Board's authority.

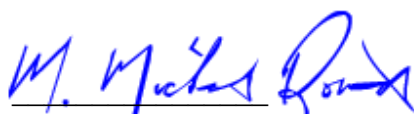
Sincerely,


John Barrasso, M.D.
Chairman


Kevin Cramer
U.S. Senator


Shelley Moore Capito
U.S. Senator


James M. Inhofe
U.S. Senator

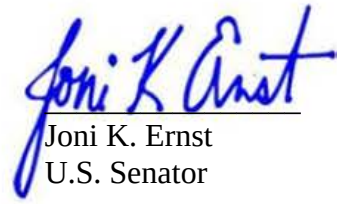

M. Michael Rounds
U.S. Senator


Dan Sullivan
U.S. Senator

³ <https://www.ams.usda.gov/sites/default/files/media/RTIReportChapter6.pdf>



John Boozman
U.S. Senator



Joni K. Ernst
U.S. Senator