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SURFACE TRANSPORTATION BOARD

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Finance Docket No. 36734

SOO LINE RAILROAD COMPANY a/k/a CPKC

SOO LINE RAILROAD COMPANY a/k/a CPKC – PETITION FOR
DECLARATORY ORDER

REPLY TO STATE OF WISCONSIN'S MOTION TO LIFT ABEYANCE AND TO
STATE OF WISCONSIN'S REPLY TO PETITION FOR DECLARATORY ORDER
AND REQUEST FOR LEAVE TO FILE A REPLY TO REPLY TO PETITION FOR
DECLARATORY ORDER

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Soo Line Railroad Company a/k/a CPKC hereby replies to the State of Wisconsin’s (“Wisconsin” or “State”) Motion to Lift Abeyance (“Wisc. Motion”) filed December 9, 2024. Although CPKC anticipates settlement discussions may continue, CPKC does not oppose lifting the stay. CPKC files this reply to address Wisconsin’s argument that the Surface Transportation Board’s (“STB” or “Board”) consideration of the Petition for Declaratory Order (“Petition”) would nevertheless be premature. CPKC also seeks leave to file a reply to Wisconsin’s reply to the Petition, in order to address and correct certain statements and arguments set forth in Wisconsin’s reply.¹ CPKC requests that the Board accept this reply in the interest of a complete record.

INTRODUCTION

The relevant facts in this proceeding are straightforward and not in dispute.² In 2017, to ensure safe passage of passenger and freight trains over the Menomonee River in Milwaukee, Wisconsin, CPKC made emergency repairs to stabilize a bridge abutment severely undermined by scour. In accordance with CPKC’s engineering standards and practice, which are consistent with industry best practices (including those issued by the State of Wisconsin Department of Transportation), CPKC placed cementitious grout to fill the void caused by the scour under the abutment and then placed a protective grout bag and mat against the abutment. In light of the urgency of the situation and requirement to protect safe rail operations, and consistent with

¹ CPKC’s reply is set forth in Part I, *infra*, and its proposed sur-reply is contained in Parts II-IV, *infra*.

² A complete recitation of the factual background is set forth in CPKC’s Petition, at 2-11.

ICC Termination Act (“ICCTA”) preemption, CPKC provided detailed information to Wisconsin’s Department of Natural Resources (“DNR”) regarding the planned repair, but made the safety-critical emergency repairs to its rail line without waiting for DNR to issue pre-construction environmental permits. In the seven years since making the emergency repair, the grout mat has been effective in protecting the bridge from further scour.

Wisconsin disagrees with this method of repair and demands that CPKC remove the grout mat and replace it with rip rap. After prolonged interactions that included discussions, detailed correspondence, and on-site meetings beginning in 2017, and then several years with no response from DNR, in 2023 Wisconsin threatened to bring two separate state enforcement actions. According to the draft complaints,³ the enforcement actions each would seek an injunction compelling CPKC to remove the grout mat and replace it with DNR’s preferred method of repair as well as impose substantial monetary penalties for non-compliance with Wisconsin’s permitting regime.

Faced with the threat of multiple state enforcement actions, on October 27, 2023, CPKC filed its Petition seeking a declaratory order that Wisconsin’s preconstruction environmental permitting requirements, and by extension any legal action seeking to enforce those requirements, are federally preempted under ICCTA. On January 10, 2024, the Association of American Railroads (“AAR”) filed comments in support of CPKC’s Petition and Wisconsin filed its reply (“Wisc. Reply”). In its

³ As of this filing, no enforcement action has been initiated in state court.

comments, the AAR asks the Board to issue a declaratory order “confirming that ICCTA preempts states from asserting permitting authority over the emergency repair and maintenance of facilities necessary for the continued and safe operation of railroads.” AAR Comments at 3.

In its 160-page reply, Wisconsin argues that certain aspects of the railroad bridge repair are subject to state jurisdiction, and that the federal Clean Water Act (“CWA”) grants Wisconsin the right to regulate bridge repairs. Wisc. Reply at 20-29. Wisconsin also argues the action was premature because a factual record had not yet been developed in state courts and because the parties had not concluded settlement negotiations. *Id.* at 17-19.

Shortly after, the parties agreed to seek a stay while they continued settlement negotiations.⁴ The STB granted the stay on February 5, 2024, which was extended several times while discussions continued.⁵ Unfortunately, those talks have apparently reached an impasse, and Wisconsin now asks the Board to lift the stay and allow it to pursue its enforcement actions in state court.

This dispute is properly before the Board and ripe for adjudication. There are no issues of state law, contract interpretation or fact whose resolution would aid in the preemption analysis. The issues fall squarely within the primary jurisdiction of the Board. A Board decision will remove uncertainty and promote the expeditious and efficient resolution of this dispute.

⁴ Joint Motion to Hold in Abeyance, FD 36734, Filed February 2, 2024.

⁵ Parties jointly requested the Board continue to hold the proceedings in abeyance on March 29, 2024; May 31, 2024; August 29, 2024; and October 30, 2024.

Wisconsin's Reply includes several legal errors that cloud rather than clarify the preemption issues. Wisconsin insists its Chapter 30 pre-construction permit is not actually a pre-construction requirement, even though Wisconsin is threatening enforcement actions based on CPKC's failure to obtain a permit. Wisc. Reply at 20-29. Wisconsin wrongly analogizes the grout mat to discarded waste and debris, even though it is a functional component of a scour repair methodology (one recognized by the Wisconsin Department of Transportation) for the rail bridge that was—and is—essential to rail safety and proper maintenance. *Id.* at 22. And Wisconsin wrongly analogizes the dispute to a state law trespass or condemnation claim even though CPKC's repair of its rail line raises no such issues. *Id.* at 27-28. Indeed, Wisconsin does not seek to prohibit CPKC from installing bridge protection in the waterway; rather, it seeks to use the permitting requirements to impose its own design preferences on those structures. *Id.* at 33. Thus, Chapter 30 is a classic pre-clearance environmental permit requirement that ICCTA categorically preempts.

Chapter 30 also cannot be harmonized with ICCTA. Contrary to Wisconsin's argument, federal CWA does not transform Chapter 30 into what courts have termed a "federal hybrid" law. *Id.* at 5. Indeed, the authority Wisconsin relies upon establishes the opposite: Chapter 30 remains state law. Wisconsin's efforts to use Chapter 30 permit requirements to regulate CPKC's design, repair and maintenance of its rail line are categorically preempted.

ARGUMENT

I. The Case Is Ripe for Decision by the STB.

Wisconsin moves the STB to lift the stay, but also argues it would be premature for the STB to decide preemption because alleged issues of fact exist that a state court should first resolve. Wisc. Motion at 2. That is, while asking the STB to lift the stay, Wisconsin also asks the STB to hold the proceeding in abeyance (or dismiss the proceeding) to allow for proceedings in state court. *Id.* Neither further abeyance or dismissal is warranted.

Abeyance may be appropriate “where it would promote efficiency and not be fundamentally unfair to any party.” *Baylands Development, Inc.—Pet. for Declaratory Ord.*, FD 36660, slip op. at 4 (STB served Sep. 18, 2023). However, the Board typically denies abeyance if a court proceeding is initiated after a petition for relief is filed at the STB. *See e.g., Metro. Council—Pet. for Declaratory Ord.*, FD 36178, slip op. at 4 (STB served May 22, 2018). Likewise, the Board denies abeyance where litigation in court would not resolve threshold issues or when the issues raised are within the Board’s primary jurisdiction. *See e.g., City of Peoria & The Village of Peoria Heights, IL – Adverse Discontinuance – Pioneer Industrial Railway Co.*, STB Docket No. AB-878, slip op. at 2 (STB served Nov. 18, 2005) (finding “no reason” to hold petition to reopen in abeyance pending state court proceeding); *Am. Coach Lines, Inc., Pet. for Declaratory Ord.*, No. MC-C 30038, 1987 WL 99440, at *1 (ICC Sept. 15, 1987) (denying request to hold in abeyance declaratory order seeking interpretation

of ICC’s authority when questions regarding operations are clearly within primary jurisdiction of the ICC).

By contrast, abeyance may be appropriate where resolution of a threshold question of state property law or contract interpretation in a pending court action would aid resolution of the preemption issues. *See e.g., Baylands Development*, FD 36660, slip op. at 5 (STB served Sept. 18, 2023) (deferring to pending state court action the issue of whether the railroad had acquired a property interest in land that it was using to store maintenance equipment).⁶

Wisconsin relies on *CSX Transp., Inc.—Pet. for Declaratory Ord.*, FD 35832, slip op. at 4 (STB served Feb. 29, 2016) to support deferral to a state court. Wisc. Reply at 18-19. That reliance is misplaced: there, a state court proceeding was already pending. Moreover, that proceeding involved an unresolved factual question material to the landowner’s claim which the Board viewed as determinative of preemption; namely, whether the landowner’s state law claims arose from flooding caused by the accumulation of waste and debris in a railroad culvert, which might not be preempted, or from the railroad’s design of the culvert, which would be preempted. Here, Wisconsin seeks to enforce pre-construction environmental permit requirements arising from CPKC’s railroad structural engineering decision-making

⁶ *See also Grafton and Upton RR Co.—Pet. for Declaratory Ord.*, FD 36518, slip op. at 3 (STB served Nov. 3, 2021) (deferring to pending state court proceeding to resolve state property law and contractual issue of whether adjacent landowner possessed easement to maintain rail crossing); *Ballard Terminal R.R. Co., LLC—Pet. for Declaratory Ord.*, FD 36261, slip op. at 5 (STB served June 27, 2019) (deferring to pending state court proceeding on issue of contract interpretation).

and purposeful placement of a grout mat to protect its bridge abutment as an integral component of its bridge repair. It is the *design* of the structural repair to the rail bridge with which the State takes issue – not any waste or debris from the railroad (there are no such allegations here, nor could there be). *CSX Transp.* is inapt.

Applying the Board's abeyance principles, abeyance or dismissal is inappropriate here because no state action is pending and no predicate issues of state law or fact need be resolved for the STB to consider the Petition. Indeed, the facts germane to the preemption analysis are not disputed and are part of a well-developed record consisting of extensive filings supported by hundreds of pages of documents.⁷ Whether ICCTA preempts the state's pre-clearance permitting requirements with respect to CPKC's construction and maintenance of its rail facilities is thus squarely and properly before the Board and ripe for decision.

Denying CPKC its choice of forum and forcing CPKC to expend time and resources defending itself in two state court actions also would be fundamentally

⁷ Even if there were factual issues that the Board determined needed to be further developed, that record can be developed in this proceeding. *See e.g., Richmond Waterfront Indus. Park, LLC – Pet. For Declaratory Ord.*, FD 36710, slip op. at 2 (STB served May 9, 2024) (ordering discovery where both parties had requested and additional facts obtained may assist the Board).

unfair and inefficient, particularly when the preemption issues are already briefed, within the Board's primary jurisdiction, ripe for decision, and dispositive.

II. ICCTA Categorically Preempts Application of the Chapter 30 Permitting Regime to Railroad Bridge Repair.

A. Chapter 30 is a Pre-Clearance Requirement that Wisconsin Seeks to Enforce on an Integral Part of Rail Transportation.

Wisconsin does not dispute the critical role grout mats serve in protecting the engineering integrity and safety of a bridge. Instead, Wisconsin takes issue with the design elements of CPKC's bridge repair, equating a grout mat to waste and debris and therefore not an "integral" part of bridge repair and maintenance. But this argument urges a contorted and narrowed definition of what may be "integral" to rail transportation that is fundamentally at odds with ICCTA preemption and precedent.

Structures such as grout mats and rip rap protect river-based bridge abutments from scour and erosion and are an integral and essential part of a bridge. Rittmeyer Verified Statement ("VS") at ¶ 6–7, 9. Such armor preserves, protects and maintains bridge integrity, thereby increasing bridge safety, extending longevity and reducing maintenance burden. CPKC's engineering standards require such armor consistent with industry standards for bridges. *Id.* at ¶ 9. In fact, it would be unthinkable to design and construct a bridge without such structures. *Id.* at ¶ 7. The Watertown Bridge is over a century old, and as constructed included structures to protect against scour. Due to changes in river flow, among other factors outside of CPKC's control, the existing structures became inadequate. This inadequacy was demonstrated by the extensive scour damage to the abutment— damage that may

have occurred over a short period of time. *See* Rittmeyer VS at ¶¶ 4, 5, 6, 10. Here, CPKC’s placement of the grout mat as a critical component of the protection was essential to the continued integrity and safety of the bridge and the movement of freight and passenger trains on the bridge. *See Id.* at ¶ 7. The grout mat is an important functional engineering structure – not waste or debris. Wisconsin does not dispute this, but merely states that the “the type of work that Petitioner was proposing [was] not something we have seen permitted before.” *See* Michelle Hase VS at ¶ 8.

The Board and courts properly distinguish between state claims regarding dumping of rail materials and debris from claims that address maintenance and applicable structural standards to rail infrastructure, *Tubbs v. STB*, 812 F.3d 1141, 1146 (8th Cir. 2013); *CSX Transp. Inc.—Pet. for Declaratory Ord.*, FD 35832, slip op. at 5 (STB served Feb. 29, 2016). For example, as the Board explained in *CSX Transp. Inc.*:

It was evident from the record before the Board in *Tubbs* that the state law claims at issue were based on harms stemming directly from the actions of a rail carrier in designing, constructing, and maintaining an active rail line (which includes the embankment and associated drainage structures). The Board found that, whether reviewed under an as applied or a categorical approach, those sorts of activities clearly are part of “transportation by rail carriers” and therefore subject to the Board’s exclusive jurisdiction under § 10501(b)—and that if those claims were allowed to proceed, they would have the effect of managing or governing rail transportation. However, if the *Tubbses* had shown that, as part of its “maintenance” program, the carrier’s practice was to

discard debris into a drainage ditch, then it is possible that neither form of preemption would have applied.

FD 35832, slip op. at 5 (citations omitted). In *Tubbs*, the Eighth Circuit affirmed the STB's holding that ICCTA preempted tort claims against BNSF for flood damage allegedly due to the design of the embankment supporting its rail line. 812 F.3d 1141 at 1146. The Eighth Circuit distinguished *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), in which the Tenth Circuit ruled that the dumping of waste and vegetation in a railroad drainage ditch was not subject to ICCTA preemption:

The factual differences between *Emerson* and this case are significant. Where *Emerson* dealt with the improper disposal of railroad ties and vegetation debris, this case deals with the structural standards applicable to an earthen embankment on which a railroad runs, standards that would have a significant impact on the construction and maintenance of a rail line.

Tubbs, at 1146.

As in *Tubbs*, it is evident here that the state claims allege “harms stemming directly from the actions of a rail carrier ... in designing, constructing, and maintaining an active rail line.” Thus, the state’s claims are “federally preempted, whether they are viewed as ‘categorical’ or ‘as applied.’” *Tubbs—Pet. for Declaratory Ord.*, FD 35792, slip op. at 4 (STB served Oct. 31, 2014).

Wisconsin also seeks to distinguish Chapter 30 based on its indication that DNR has the ability to issue after-the-fact permits, which it suggests may curb the potential for abuse. Wisc. Reply at 23. However, this feature neither converts Chapter 30 to something other than a pre-clearance permitting regime, nor changes the

crucial fact that the State is applying Chapter 30 to regulate the railroad's design, construction and maintenance of its rail line and facilities. Whether the State regulates railroad bridge repair by requiring a permit before the work is completed, or demands that the railroad obtain a permit after work is completed (threatening enforcement if it fails to do so), the State is attempting to regulate rail transportation.⁸

Further, DNR's ability to grant an after-the-fact permit does not alter the fact that the law itself requires a permit pre-construction. A party that proceeds without a permit faces significant peril including the potential for an order to remediate the work and/or fines of \$5,000 per day, as Wisconsin now threatens CPKC. Wisc. Reply, Ex. 3 at 2. Nor does it alter the fact that the permitting regime can be used to delay or veto railroad maintenance work. Here, Wisconsin attempted to delay the emergency repairs by, among other things, demanding erosion and stabilization studies before work commenced. Rittmeyer VS at 10.

Wisconsin also argues that a Chapter 30 permit is akin to building, fire, or plumbing codes that are applied on a non-discriminatory basis and are not necessarily preempted.⁹ However, such codes do not involve the exercise of discretion,

⁸ Notably, Wisconsin argues that its § 401 certification does not allow after-the-fact permits. Wisc. Reply at 49. Thus, even if Chapter 30 were not a pre-clearance requirement, it operates as pre-clearance when used as criteria for a certification decision.

⁹ Wisconsin attaches to its Reply, VS of Rossman Ex. 1, as an alleged example of a pre-construction permit that CPKC obtained for work at its rail yard in Bensenville, Illinois. That permit, however, was issued for *the Village of Franklin Park's* "village pump station" which is across the road from CPKC's yard. Neither this permit nor an

nor do they operate as a pre-clearance permit. By contrast, Chapter 30 requires a pre-clearance permit (whether before or after the fact), and as demonstrated by this dispute, Wisconsin's decision to issue a permit involves the exercise of discretion. Further, Wisconsin is plainly seeking to use Chapter 30 to regulate the design, construction and maintenance of CPKC's rail bridge.

B. Chapter 30 Directly Conflicts with ICCTA.

Wisconsin argues the remedies it seeks in the enforcement cases, which include removal of the grout mat, are somehow unrelated to the remedies over which ICCTA provides the Board exclusive authority. Wisc. Reply at 24. But bridges and maintenance fall squarely within the Board's exclusive jurisdiction. By regulating CPKC's repair and maintenance of its bridge, Wisconsin's enforcement of Chapter 30 is in direct conflict with ICCTA.

Wisconsin relies on *Gordon v. New England Cent. R.R., Inc.* (Wisc. Reply at 26) which involved a trespass claim against a railroad for inadvertently constructing part of a rail embankment on an adjacent landowner's property without the landowner's permission. No. 2:17-cv-00154, 2017 WL 6327105, at *3 (D. Vt. Dec. 8, 2017). *Gordon* stands for the unremarkable proposition that ICCTA preemption does not protect a railroad's unauthorized use of a third party's private property. Unlike *Gordon*, this

actual example of a railroad's voluntarily compliance with a pre-clearance permit is relevant to the preemption analysis.

proceeding concerns repairs and maintenance performed within the existing railroad right of way.

Indeed, Wisconsin does not dispute that installation of engineering structures in the riverbed to protect the bridge abutments is necessary or that CPKC has a right to do so. Rather, it takes issue with the design of those structures and seeks to use the permitting regime to regulate them, which ICCTA prohibits.

Wisconsin contends more generally that Chapter 30 enforcement claims are “akin to a condemnation or trespass suit” and are therefore not categorically preempted. Wisc. Reply at 28. The analogy defies logic. State property law rights are not at issue, and the State has conceded that the railroad may place structures in the waterway to protect the bridge abutments. Rather, the State seeks to use its permitting authority to dictate its preferred design of those structures. Fundamentally, Chapter 30 requires pre-construction permits, which are categorically preempted.

Wisconsin also relies on the irrelevant fact that CPKC has not previously challenged the permitting regime that has been in place for decades. Wisc. Reply at 28-29. CPKC’s prior conduct in other circumstances has no bearing on whether Wisconsin’s actions here are preempted under ICCTA. Rather, if anything, it reflects that, in the vast majority of cases, railroads endeavor to work cooperatively and collaboratively with states and municipalities to accommodate reasonable concerns. Nothing requires a railroad to assert preemption in every situation in which it may apply. CPKC invokes the protection of federal preemption only in rare instances

where it becomes absolutely necessary. Wisconsin's efforts to interfere with an emergency bridge repair is such an instance.

The State's application of Chapter 30 here would regulate the design, construction and maintenance of—and thus the very ability to safely use—CPKC's rail line and is accordingly categorically preempted.

III. Chapter 30 Would Be Preempted Under an “As Applied” Analysis.

Wisconsin argues that Chapter 30 would survive an “as applied” preemption analysis because Wisconsin's actions did not delay the emergency bridge repair and because CPKC has not met its burden of showing that removing the grout mat and replacing it with the State's preferred solution would unreasonably burden rail transportation. Wisc. Reply at 30-31. Neither argument is correct.

While the State did not delay the emergency bridge repair, that is because it did not have the opportunity at the time: CPKC invoked ICCTA preemption and proceeded with the bridge repairs without submitting to the Chapter 30 pre-clearance requirements. Further, the ensuing factual history fatally undermines the State's position, because, although CPKC submitted an after-the-fact permit application in 2020 in response to the State's invitation (under protest, but in an effort to be cooperative), Wisconsin *still has not issued a permit*. Instead, the State waited years, and then resurfaced to threaten lawsuits that would seek immediate mandatory injunctions to remove the mat. Rittmeyer VS Ex. 17 at 14.

CPKC has submitted ample evidence both to Wisconsin over the past seven-years and on the record both in support of its engineering decision and design as well

as demonstrating that removal of the grout mat would unreasonably interfere with rail transportation. Rittmeyer VS at ¶ 22-23. Wisconsin offers no contrary evidence.

Instead, Wisconsin argues that the Board should disregard any burden on rail transportation because it was purportedly self-inflicted by CPKC in making the repair without Wisconsin's approval.¹⁰ Wisc. Reply at 35. Wisconsin's circular argument, however, merely emphasizes that the State's actions here seek to regulate CPKC's design, construction, and repair of its rail line and are therefore preempted.

In addition, the State's position here threatens cascading consequences for rail transportation. The imposition of state law standards to bridge repair would create a patchwork of regulation applicable to rail line construction and maintenance, the very thing ICCTA preemption is aimed at preventing.

IV. ICCTA Preempts, or Conflicts with, Wisconsin's State-Law Certification of the Clean Water Act Permit.

While ICCTA preempts all state law that would manage or govern rail transportation, in rare cases, a federal environmental law grafts state law into the implementation of federal law. *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010). One court has referred to these creations as a federal-state "hybrid." *State Dept. of Ecology v. Pub. Util. Dist. No. 1 of Jefferson Cnty.*, 849 P.2d 646, 654 (Wash. 1993) ("*PUD No. 1*"). As CPKC explained in its Petition, ICCTA does not preempt these rare hybrids, so long as the state is exercising

¹⁰ Wisconsin's reliance on *United States v. St. Mary's Ry. W. LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013) is misplaced as that case involved a federal agency enforcing federal law. Here the State is seeking to enforce state law.

delegated federal authority and the regulation has been approved by the federal agency. Pet. at 23.

Wisconsin's Reply argues that its Chapter 30 permit, used as criteria for a state certification under § 401 of the Clean Water Act, is this sort of hybrid. Wisc. Reply at 38. It is not. Neither courts nor the Board have decided whether the permit at issue, a dredge-and-fill permit under § 404 of the CWA, transforms a state certification process, like Wisconsin's, into a hybrid.¹¹ However, federal courts *have* found that, in order for a hybrid to be created, the federal government must have approved the substance of the included state law. Here, the federal government did not approve Wisconsin's imposition of its open-ended permitting conditions. Thus, § 404 does not create a federal-state hybrid. The State's requirement remains state law.

A. Federal Environmental Law Creates a Hybrid Only if the State Law is Subject to Federal Oversight.

In applying its Chapter 30 criteria, and withholding its § 401 certification, Wisconsin admits to applying pure state law. Wisc. Reply at 38. Wisconsin argues that § 404 of the CWA transforms the state law into a federal hybrid. *Id.* at 38–40.

¹¹ The CWA framework at issue here is detailed in the Petition at 26–27. In short, the CWA requires two permits relevant for the discussed case law. A § 402 water quality permit allows a permittee to discharge effluent into waters of the United States. A § 404, or “dredge-and-fill” permit allows a permittee to fill or otherwise build in waters of the United States. Most states, including Wisconsin, administer the § 402 program. The federal government, via the Army Corps of Engineers, administers the § 404 program. Both permits are subject to state certification under § 401; however, the USEPA approves the state criteria for § 402 water quality permits only. *See* Wisc. Reply 40–41.

But unlike other federal hybrids, Wisconsin’s Wis. Admin. Code § NR 299 criteria, including Chapter 30’s “public interest” standard, are not subject to federal approval.

The absence of federal approval dooms Wisconsin’s argument. “[I]t is the EPA’s approval of statewide plans that imbues local environmental regulations with the force of federal law.” *BNSF Ry. Co. v. Clark Cnty., Washington*, 11 F.4th 961, 968 (9th Cir. 2021). Wisconsin attempts to distinguish *Clark County* on the basis that the federal statute there, the Gorge Act, did not on its face create a federal-state hybrid. Wisc. Reply at 41–42. But Wisconsin has the logic backwards: the Gorge Act did not create a hybrid *because* it did not allow federal oversight of the state law. *Clark Cnty.*, 11 F.4th at 968–69. The court contrasted the Gorge Act with the Clean Air Act (“CAA”), and found that the latter’s “final federal approval” created the kind of hybrid federal-state law that is not preempted by ICCTA. *Id.*¹²

Chapter 30, unlike the examples cited in *Clark County*, allows the legislature unfettered discretion to set whatever limits, and grant whatever exceptions, on the use of public waters so long as the action is in the (state’s subjective definition of) “public interest.” Wisc. Reply at 47–48. Indeed, Wisconsin’s brief makes much of this unfettered right, *id.* at 41, but it is precisely this lack of federal oversight or approval authority that prevents Wisconsin’s law from becoming a hybrid. Because, as Wisconsin concedes, the federal government cannot approve or deny Wisconsin’s

¹² The Court also noted that the CWA can create federal-state hybrids, but used as an example the provisions that allow a state to create its own permits. 11 F.4th at 968–69. Wisconsin does not have its own § 404 program. *See* fn. 8, *supra*.

certification of dredge-and-fill permits, this case is much closer to the Gorge Act than the CAA.

The principal case cited by Wisconsin proves the point. In *PUD No. 1*, the Washington Supreme Court explicitly relied upon the federal government’s approval of state effluent standards under CWA § 402 to find that the state law became a hybrid, noting as one ground for its decision, “[t]he [Clean Water] Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval.” 849 P.2d at 653, citing 33 U.S.C. § 1313. It is the EPA approval that “gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them” *Id.* at 654.

Wisconsin’s repeated assertion that the federal government has no right to approve or deny its “public interest” criteria for certification confirms that the dredge-and-fill permit does not create a hybrid. Indeed, Wisconsin does not cite a single case where *unapproved* state law becomes part of a federal environmental statute, precisely because such a law would lack the crucial hybrid character that would insulate it from preemption.

B. Even if the CWA Transformed Wisconsin’s “Public Interest” Law into a Federal Hybrid, that Hybrid Could not be Harmonized with the Latter-Passed ICCTA.

In the case of a federal hybrid, the state law is not vertically preempted by the Supremacy Clause, but it may be horizontally preempted by other federal law. *See Ass’n of Am. Railroads-Pet. for Declaratory Ord.*, FD 36369, slip op. at 3, 11-13 (STB

served Dec. 30, 2020) (“*Clean Water Act Guidance*”). In that case, the Board or court must strive to harmonize the two laws. *Id.*, see also *Joint Pet. for Declaratory Ord.—Boston and Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500, 508 n. 29 (S.T.B. 2001). Here, the inclusion of unfettered state law into a federal dredge-and-fill permit presents an irreconcilable conflict because it would create a patchwork of state bridge regulation.

Wisconsin argues that § 404 of the CWA can be harmonized with the ICCTA. Wisc. Reply at 42–43. That is not the issue here. As CPKC stated in its Petition, the two statutes can be, and often are, harmonized. Petition (“Pet.”) at 28 fn. 5. A glance at the case caption in Wisconsin’s cited case law, *St. Mary’s Ry. W.*, 989 F. Supp. 2d at 1361 reveals that the case is inapposite. Section 404 can be harmonized when the United States, via the Army Corps, issues and enforces the § 404 permit without added state criteria. *St. Mary’s* did not involve *state* law. And the *federal* permit at issue in *St. Mary’s* is not at issue here; Wisconsin admits CPKC complied with the federal conditions set forth by the Army Corps. Wisc. Reply at 7. The only issue here is whether the engrafted state law can be harmonized.

The Board offered useful guidance on this point recently in *Clean Water Act Guidance*. Pet. at 26–28. That decision explains that state certification of a § 402 effluent limit permit for rail cars likely could not be harmonized with ICCTA.¹³ Wisconsin misreads *Clean Water Act Guidance*, a case in which the Board suggested

¹³ As noted in the Petition, and echoed by Wisconsin in its Reply, a state’s effluent standard is subject to EPA approval, hence § 402 arguably can create federal hybrids.

state certification could be harmonized, by analogizing CPKC's rail bridge to an effluent limit on a "stationary facility". Wisc. Reply at 45–46. Even assuming *arguendo* that a grout mat could constitute "effluent," the bridge here is more similar to a rail car in transit than to a rail yard. The key issue is whether the differing state regulatory requirements interfere with the "free flow of interstate commerce." *Clean Water Act Guidance* at 12–13. If Wisconsin refused to grant an effluent permit to a rail yard, the rail yard might simply need to redirect its effluent. This may have a remote effect on interstate commerce. By contrast, refusing to allow bridge repairs, as Wisconsin is doing here (by using its permitting authority to insist on its own preferred design), could halt or substantially disrupt interstate commerce. By doing so, Wisconsin is exercising unfettered power to interfere with interstate commerce, a power that conflicts with ICCTA.

C. Wisconsin's actions discriminate against rail transportation.

CPKC argued that Wisconsin's water quality certification authority also could not be harmonized with ICCTA because it is being applied unfairly and discriminates against rail transportation. Pet. at 29-31 (citing and discussing *Town of Ayer*, 5 S.T.B. at 508-09). CPKC noted, for example, that the Wisconsin regulations exempt numerous non-railroad uses from the Chapter 30 requirements, while singling out rail transportation for water quality certification requirements. Wisconsin does not contest and in fact concedes that it treats rail differently than other uses, such as highway bridges and electronics manufacturing facilities. Wisc. Reply at 47-48.

However, Wisconsin also argues that the sheer number of exceptions—15 in all—demonstrates that its conduct is not discriminatory as to rail transportation.

But the volume of the Wisconsin legislature’s “perhaps oddly specific” exemptions to its permitting law does not somehow render that law non-discriminatory. *Id.* at 47–48. On the contrary, it doubles down on the discrimination. These carve outs amount to a policy of favoring some bridge-builders over others. Builders of roads and highways—likely the single most common bridge builders in Wisconsin—need not meet Wisconsin’s certification conditions. Yet CPKC and any other railroad must. This is the essence of discrimination. Wisconsin’s brief offers no satisfactory answer to this point.

CPKC also argued that the DNR’s blanket approval of a new Regional General Permit in early 2018, at the same time it was demanding a Chapter 30 permit from CPKC and threatening enforcement action if CPKC failed to do so, demonstrates the unfair nature of Wisconsin’s permitting decision. In reply, Wisconsin argues it is “doubtful” the 2018 permit, issued mere weeks after the bridge was repaired, would have helped CPKC. *Wisc. Reply* at 49–50. But Wisconsin misses the point. CPKC discussed the 2018 permit in its Petition precisely because it revealed Wisconsin’s decision was discriminatory: at the same time Wisconsin rejected CPKC’s placement of 1,900 square feet of grout mat, Wisconsin approved the “loss” of up to three acres of navigable waters for linear infrastructure improvement. *See Rittmeyer VS Ex. 13*

at 2.¹⁴ Wisconsin also argues that the 2018 permit approval was for temporary repairs (Wisc. Reply at 49–50), but that is simply incorrect. While the permit “includes temporary” structures, including mats, the body of the permit allows the permanent “loss” of certain waters. Rittmeyer VS Ex 13 at 2.

Lastly, CPKC argued in the Petition that the elongated timeline for Wisconsin’s enforcement of Chapter 30 corroborates the discriminatory nature of Wisconsin’s actions. Pet. at 30-31. Wisconsin offers no response. Its silence is notable. More than seven years have now elapsed since CPKC made emergency repairs to the bridge in 2017. Since that time, CPKC has participated in numerous meetings (directly and through counsel), responded to numerous requests for information and explanation regarding its engineering analysis and conclusions, and has even submitted the requested Chapter 30 permit under protest. The highly unusual nature of Wisconsin’s enforcement conduct in this matter provides further evidence of discrimination.

CONCLUSION

CPKC respectfully requests that the Board declare that ICCTA preempts Wisconsin’s state permitting requirements regarding CPKC’s repairs to the Watertown Bridge.

¹⁴ The federal permit for “Category 2: Modification Linear Transportation,” allows <1 acre of water loss for each project, or <3 acres of loss for an “overall project.” *Id.* Even if CPKC’s mat had filled all 1,900 square feet (it did not), the loss would be far short of an acre (43,560 square feet).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2024, I caused a copy of the foregoing Reply to State of Wisconsin's Motion to Lift Abeyance and to State of Wisconsin's Reply to Petition for Declaratory Order and Request for Leave to File a Reply to Reply to Petition for Declaratory Order to be served by e-mail or first class mail upon all parties of record.

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