

Congress of the United States**Washington, DC 20515**

December 16, 2019

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FD_36369

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

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

The Honorable Martin J. Oberman
Board Member
Surface Transportation Board
395 E Street Southwest
Washington, D.C. 20423

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

We appreciate the important role you play in ensuring the efficient, safe, and consistent operation of our railways. Our nation's commitment to unburdened interstate commerce is enshrined in the Constitution. The importance of our nation's rail system to interstate commerce was reaffirmed by Congress's passage of the Interstate Commerce Commission Termination Act of 1995 (ICCTA). Your action is needed now to grant a petition for declaratory relief filed on November 27, 2019 regarding the rail transport of commodities like coal.¹

As you are aware, a number of federal and state laws outside of ICCTA have the potential to apply to rail-related transport and conflict with ICCTA.² Where a potential conflict occurs, the Surface Transportation Board has a critical role to play in determining if those laws interfere with ICCTA and impede effective rail transport. Under ICCTA, the Surface Transportation Board can issue declaratory orders. The petition for declaratory order filed on November 27, 2019 presents a conflict between ICCTA and a misguided application of the Clean Water Act.

As representatives of the State of Wyoming, we are troubled by an increasing trend by certain other states and actors to restrict interstate commerce through novel and unlawful interpretations of environmental laws. When this weaponization occurs, it hurts Wyoming's and its citizens' ability to engage in interstate commerce. For example, over the last few years activists have delayed a coal export terminal, natural gas terminal, and natural gas pipelines from being built.

We write to you today specifically about the threatened application of section 301 and section 402 of the Clean Water Act as a hook to regulate dust from coal cars in interstate commerce. The one lawsuit that addressed this issue settled before the court reached the question of whether ICCTA preempts the Sierra Club's and other like-minded organizations' attempted

¹ Association of American Railroads, Petition for Declaratory Order, FD 36369 (Nov. 27, 2019).

² See, e.g., U.S. Environmental Protection Agency, Petition for Declaratory Order, FD 35803 (STB served Dec. 30, 2014) (evaluating likely ICCTA preemption of potential Clean Air Act requirements).

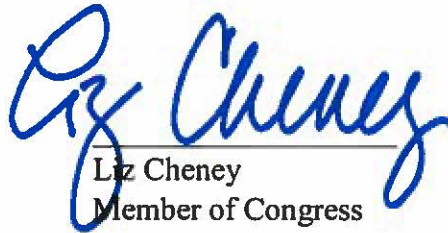
weaponization of section 301 and section 402.³ The Clean Water Act permitting demanded by the plaintiffs would impose a regulatory maze of differing Clean Water Act requirements across states divorced from ICCTA. The Surface Transportation Board has already issued orders governing coal dust so ICCTA should clearly preempt any asserted liability for regulation of coal dust releases from trains in transit under section 301 and section 402 of the Clean Water Act.

It is critical that Surface Transportation Board establish clear lines about the interrelationship between ICCTA and the Clean Water Act by resolving this issue left open by the court. The threat of further litigation under section 301 and section 402 of the Clean Water Act risks stifling the commerce of coal by rail as any violation of those sections carries strict liability and potentially hefty penalties. We ask that you open a proceeding and seriously consider the impact litigation on this issue has in the long-term for interstate commerce.

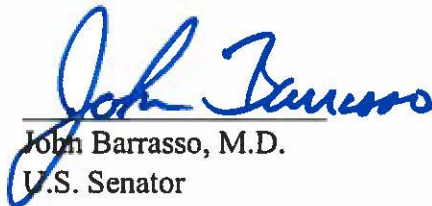
Sincerely,



Michael B. Enzi
U.S. Senator



Liz Cheney
Member of Congress



John Barrasso, M.D.
U.S. Senator

³ Order Denying Plaintiffs' and Defendant's Motions for Summary Judgement, *Sierra Club v. BNSF Ry. Co.*, No. C13-967-JCC (W.D. Wash. filed Oct. 25, 2016).