



ASSOCIATION OF  
AMERICAN RAILROADS

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May 18, 2018

**Via Electronic and First Class Mail**

The Honorable Scott Pruitt  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dear Administrator Pruitt:

The Association of American Railroads (“AAR”) is writing to request that the Environmental Protection Agency (“EPA”) seek a declaratory ruling from the Surface Transportation Board (“STB”) regarding the extent to which the ICC Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 10101 *et seq.*, preempts application of Clean Water Act Section 301, 33 U.S.C. § 1311, to discharges from rail cars in transit.

AAR is an incorporated, nonprofit trade association whose members include the nation’s major freight railroads. The rail operations of AAR’s members are subject to regulation by the STB under ICCTA. ICCTA precludes the regulation of rail operations under other state and federal statutes to avoid subjecting railroads to potentially conflicting regulatory requirements that could undermine railroads’ service obligations to customers and could be detrimental to the U.S. economy.

In October 2016, a federal district court in Seattle, ruling on cross motions for summary judgment in a case involving BNSF Railway Company (“BNSF”) and addressing a matter of first impression, held that rail cars loaded with coal and traveling adjacent to navigable waters are “point sources,” such that any coal falling directly into the water from such a train is a discharge that must have a National Pollutant Disposal Elimination System (“NPDES”) permit to avoid liability under CWA Section 301. *See Sierra Club v. BNSF Ry. Co.*, 2016 WL 6217108 (W.D. Wash. Oct. 25, 2016) (*Sierra Club*). Both BNSF and the AAR (as amicus curiae) took the position that ICCTA preempts the application of Section 301’s prohibition on unpermitted discharges to rail cars in transit. The court’s decision deferred addressing the issue of ICCTA preemption, and the parties settled before the court had any further opportunity to address ICCTA preemption.

The holding in *Sierra Club* creates significant uncertainty for AAR and its members as to their obligations under applicable federal law. To date, EPA has never required railcars in transit to hold NPDES permits. The holding in *Sierra Club* therefore has the potential to significantly expand EPA's reach under the CWA to cover activities that the agency has never regulated in the past. It also has the potential to put EPA into direct conflict with the regulation of rail transportation by a sister agency, the STB.

Specifically, the *Sierra Club* holding raises the prospect of expanding the NPDES program to rail cars in transit, which would directly impact rail transportation of a number of commodities, including coal. Trains—or even individual railcars—might be required to have NPDES permit coverage before they could transport certain commodities. A range of entities, from railroads to mines to rail car owners to rail shippers, might be required to obtain NPDES permits before they can use the rail network. The requirement to obtain NPDES permits would therefore give broad and unprecedented power to NPDES permitting authorities, including the EPA as well as many states and Indian Tribes, to determine when and under what conditions rail transportation will occur. Potentially, NPDES permitting authorities could block the movement of trains altogether, or require an expensive and time-consuming permitting process that could render interstate rail transport of some goods all but impossible. The burden on the permitting agencies to issue permits for millions of annual railcar movements of coal (and possibly other products) also would be enormous.

Congress intended that rail transportation be subject to the STB's exclusive jurisdiction under ICCTA rather than an *ad hoc* patchwork of federal, state and tribal requirements. ICCTA confers on the STB the exclusive authority to regulate rail transportation. 49 U.S.C. § 10501(b). ICCTA also sets out specific Rail Transportation Policy objectives that the STB must weigh and follow in regulating rail transportation. 49 U.S.C. § 10101. To protect the STB's exclusive jurisdiction over rail transportation, the statute expressly preempts *all* federal and state law remedies involving rail transportation. 49 U.S.C. § 10501(b) (emphasis added). It is well-settled that the ICCTA preemption provision is one of the most comprehensive preemption statutes that Congress has ever adopted.

Most states have delegated authority to administer NPDES programs, and each does so individually. In addition, NPDES permits are typically granted as pertaining to one particular receiving water. Trains frequently travel through multiple states and along many different waters during any given trip, and the various cars within a train may or may not travel the same route from origin to destination. Thus, requiring NPDES permits for rail cars would result in regulation of each car by multiple entities and multiple permits issued by the same entity for numerous individual cars. Courts and the STB have stated that one of ICCTA preemption's principal objectives is to prevent such piecemeal state and federal regulatory regimes from interfering with efficient interstate rail transportation. Application of Section 301 to discharges from in-transit trains would also conflict with the STB's regulation of the economic relationship between railroads and their shippers. In fact, the STB has already issued decisions addressing the extent to which rail carriers may impose requirements on shippers to mitigate coal dust losses from rail cars in transit. *Arkansas Electric Cooperative Corp.—Petition for Declaratory Order*,

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FD 35305 (STB served March 3, 2011); *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557, (STB served December 13, 2013).

EPA has previously sought the STB's views on the scope of preemption under ICCTA when faced with a possible conflict between the environmental laws under EPA's authority and the STB's regulation of rail transportation. *See U.S. EPA – Petition for Declaratory Order*, FD 35803 (STB served Dec. 30, 2014). AAR and BNSF urge the EPA to follow that same approach here. The STB has the authority to issue a declaratory order to provide guidance on the scope and substance of ICCTA, the statute governing rail regulation. *See* 5 U.S.C. § 554; 49 U.S.C. § 1321. The STB frequently uses declaratory orders to provide guidance on the scope of ICCTA preemption. A declaratory order from the STB concerning preemption of the NPDES program as applied to in-transit rail cars would ensure that EPA does not become embroiled in a jurisdictional dispute with a sister agency and obviate the need to develop a novel set of permitting requirements that, ultimately, should be found to be preempted.

We appreciate your consideration of this request.

Sincerely,



Alice Koethe  
*Counsel for the Association  
of American Railroads*

cc: Dave Ross, Assistant Administrator  
Dennis Lee Forsgren, Jr., Deputy Assistant Administrator