

Message

From: Michael K. Henry [mhenry@alpinegroup.com]
Sent: 9/12/2017 6:38:08 PM
To: Forsgren, Lee [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a055d7329d5b470fbaa9920ce1b68a7d-Forsgren, D]
CC: Penman, Crystal [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=93662678a6fd4d4695c3df22cd95935a-Penman, Crystal]
Subject: Re: Meeting Request

Following is some background in advance of tomorrow's meeting.

Mike

Congress intended that rail transportation be subject to the STB's exclusive jurisdiction under ICCTA. 49 U.S.C. §10501(b). To protect the STB's exclusive jurisdiction over rail transportation, the statute expressly preempts all federal and state law remedies involving rail transportation.

Section 301 of the Clean Water Act (CWA) prohibits any "point source" from discharging pollutants into navigable waters without an NPDES permit. The NPDES program predominately regulates stationary point sources, and EPA has never interpreted the CWA to require rail cars in transit to hold NPDES permits.

A recent summary judgment decision of a federal court in Washington State held that railcars traveling adjacent to navigable water are "point sources," such that any coal falling *directly* into the water from a moving coal train is a discharge that must be authorized by a National Pollution Discharge 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). While both BNSF Railway Company and the Association of American Railroads (as amicus curiae) argued that ICCTA preempted application of the CWA under the circumstances of the case, the court deferred addressing the issue of ICCTA preemption in its summary judgment ruling. The parties subsequently settled the case, leaving the question of ICCTA preemption unresolved.

The *Sierra Club* holding raises the prospect of substantially expanding the NPDES program and putting the EPA, Tribes and states with delegated CWA authority into the position of regulating for the first time the nationwide rail transportation of a number of commodities, including coal. If permitting were required, EPA, Tribes, and/or delegated states would need to develop such permits, which do not currently exist, establish regulatory requirements, and determine which entities in the commodity chain—railroads, shippers, car owners, or a combination of them—would be required to obtain permits, comply with permit conditions, and be subject to enforcement.

It is well-settled that ICCTA's preemption provision is one of the most comprehensive preemption statutes that Congress has ever adopted and is intended to concentrate regulatory authority over interstate rail transportation in the STB. Requiring permits issued by multiple other entities—EPA, Tribes, and states— as a precondition to transporting commodities by rail would challenge and potentially usurp the STB's exclusive regulatory authority over rail transportation. The resulting patchwork of potentially conflicting regulatory requirements and permit terms would undermine the STB's exclusive jurisdiction over the national rail transportation network.

On Sep 12, 2017, at 1:53 PM, Forsgren, Lee <Forsgren.Lee@epa.gov> wrote:

Worst case scenario I will be 10 minutes late.

From: Michael K. Henry [mailto:mhenry@alpinegroup.com]
Sent: Tuesday, September 12, 2017 1:22 PM
To: Forsgren, Lee <Forsgren.Lee@epa.gov>
Cc: Penman, Crystal <Penman.Crystal@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>
Subject: Re: Meeting Request

Good deal. Several folks flew in, so fingers crossed!

On Sep 12, 2017, at 1:01 PM, Forsgren, Lee <Forsgren.Lee@epa.gov> wrote:

I think we are good Mike. There is an outside chance I will get pulled off for Hurricane Irma/Harvey response.

Lee

Sent from my iPhone

On Sep 12, 2017, at 12:39 PM, Michael K. Henry <mhenry@alpinegroup.com> wrote:

Lee and Crystal-

I just wanted to reconfirm tomorrow's 9a meeting. Any suggestions on how best to enter?

Attending tomorrow will be:

Alice Koethe, AAR, Counsel- Environmental and Hazmat

Tim Strafford, AAR, Associate General Counsel

Brooke Gaede, BNSF, General Attorney

Justin Wormmeester, BNSF, Federal Government Affairs

Michael Henry, Alpine Group - representing BNSF

Anyone in addition to Lee in attendance on your end?

Thanks again for making time!!

Mike

On Aug 28, 2017, at 5:13 PM, Forsgren, Lee
<Forsgren.Lee@epa.gov> wrote:

Michael,
Absolutely we can meet. Crystal Penman who handles my schedule will find a time for you all to come in. I am traveling a fair amount so she will have to find a time that works (for example I know I am not available on the 18th and 29th for certain.

On a separate issue we need to find some time for you, that reprobate friend of yours from Baton Rouge, and I to grab a drink and talk about life before too long.

Thanks,
Lee

D. Lee Forsgren

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From: Michael K. Henry
[<mailto:mhenry@alpinegroup.com>]
Sent: Monday, August 28, 2017 5:04 PM
To: Forsgren, Lee <Forsgren.Lee@epa.gov>
Subject: Meeting Request

Lee-

Hope you are well! I'm sure missing an August break - I imagine not much down time for you!!

I'm writing to see if I can bring our client (BNSF) and AAR in to see you? They would like to pick your brain on a jurisdictional matter with respect to coal dust discharge on a railroad. We are available 9/11, 9/13, 9/18, 9/22, 9/25, 9/28, and afternoon of 9/29. Any chance one of those days work for you?

Thanks!

Mike