

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36369

ASSOCIATION OF AMERICAN RAILROADS—PETITION FOR DECLARATORY ORDER

Decided: February 19, 2020

On November 27, 2019, the Association of American Railroads (AAR) filed a petition for declaratory order requesting that the Board find that 49 U.S.C. § 10501(b) preempts the Clean Water Act's (CWA) discharge prohibition and National Pollutant Discharge Elimination System permitting regime as applied to discharges incidental to the normal operation of rail cars in transit. In the alternative, AAR asks that the Board institute a proceeding to consider the issue. AAR states that a declaratory order is needed to resolve uncertainty created by a 2016 federal district court decision, Sierra Club v. BNSF Railway, No. C13-967-JCC (W.D. Wash. Oct. 25, 2016), in which the court held that rail cars in transit are subject to the CWA's discharge prohibition but did not rule on the question of preemption before the case settled. Replies to AAR's petition<sup>1</sup> were submitted by the Railway Supply Institute; the United States Environmental Protection Agency; the American Short Line and Regional Railroad Association; the National Mining Association; the Freight Rail Customer Alliance; the National Coal Transportation Association; and the American Farm Bureau Federation.<sup>2</sup>

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. The record presented to date regarding the issue of preemption of the CWA as applied to rail cars in transit warrants thorough consideration by the Board after the development of a complete record. Therefore, the Board will institute a declaratory order proceeding to consider AAR's petition and establish a procedural schedule for the filing of comments and replies.<sup>3</sup>

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<sup>1</sup> Replies to AAR's petition were due December 17, 2019. In the interest of a complete record, all filings to date will be accepted into the record.

<sup>2</sup> The Board also received letters from U.S. Representative Rick Crawford; U.S. Senators Kevin Cramer, Steve Daines, and John Hoeven and U.S. Representatives Kelly Armstrong and Greg Gianforte; U.S. Senators John Barrasso and Michael Enzi and U.S. Representative Liz Cheney; and U.S. Representative Dusty Johnson.

<sup>3</sup> Parties that have already replied to the petition need not refile unless they wish to supplement what they have already filed.

It is ordered:

1. A declaratory order proceeding is instituted.
2. All replies to the petition that have already been filed are accepted into the record.
3. Interested parties may submit new or supplemental comments on the petition by March 20, 2020. Replies to those comments are due by April 9, 2020.
4. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.