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# Normal Operation of Railcars in Transit/Applicability of Clean Water Act Discharge Prohibition: U.S. Surface Transportation Board Institutes Declaratory Order Proceeding

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The United States Surface Transportation Board (“STB”) instituted a Declaratory Order proceeding on February 19th that will address whether 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.

The Declaratory Order proceeding is instituted in response to a November 27, 2019, petition filed by the Association of American Railroads (“AAR”).

The STB is an independent federal agency that is charged with the economic regulation of various modes of surface transportation. A key oversight responsibility involves freight rail.

The AAR had stated in its petition that a STB Declaratory Order was needed to remove uncertainty created by a federal court decision in *Sierra Club v. BNSF Railway*, No. C13-967-JCC (W.D. Wash. Oct. 25, 2016). The Court had held rail cars in transit are potentially subject to the Clean Water Act’s discharge prohibition.

The Sierra Club had alleged that operation by rail cars released coal into waterways in several locations across the State of Washington. The claim was premised on the argument that rail trains and rail cars are considered a point source under the Clean Water Act.

The release of coal dust from the cars was argued to be a point source discharge.

The railroad had argued that the claim exceeded the scope of the Clean Water Act because it included release of coal materials to land as opposed to water. The federal District Court had rejected a motion to dismiss. The case was subsequently settled.

The Court did not address the argument that this Clean Water Act requirement was preempted by 49 U.S.C. 10501(b).

A copy of the STB decision can be downloaded [here](#).