

# Normal Operation of Rail Cars in Transit/Applicability of Clean Water Act Discharge Prohibition: U.S. Surface Transportation Board Issues Decision



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The United States Surface Transportation Board (“STB”) issued a Decision on December 29th addressing a preemption issue related to the Clean Water Act. See Association of American Railroads – Petition for Declaratory Order, Docket No. FD 36369.

The STB had instituted a Declaratory Order proceeding on February 19, 2020, that indicated it would address whether 49 U.S.C. § 10501(b):

... preempts the Clean Water Act’s (CWA) discharge prohibition and National Pollution Discharge Elimination System permitting regime as applied to discharges incidental to the normal operation of rail cars in transit.

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

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

The AAR had argued in its petition that a STB Declaratory Order was needed to remove uncertainty created by a federal decision in *Sierra Club v. BNSF Railroad*, No. C13-967-JCC (W.D. Wash. Oct. 25, 2016). The Court had held railroad 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 Court rejected a motion to dismiss. The case was subsequently settled.

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

The United States Environmental Protection Agency and the states have not historically regulated rail cars in transit or required National Pollution Discharge Elimination System (“NPDES”) permits for incidental losses of commodities from rail cars.

The freight transit industry argued that requiring acquisition of NPDES permits from each state through which they move is contradictory with the STB’s exclusive jurisdiction over rail transportation. Nevertheless, environmental organizations have argued that the Clean Water Act jurisdictional elements are potentially present in some circumstances and needed to address the release of coal and other commodities during transit.

The STB’s December 29th Decision declines to issue a Declaratory Order. However, the STB states that its Decision is intended to provide guidance. It concludes that the Clean Water Act NPDES permitting program and discharge prohibition would likely be preempted by 49 U.S.C. § 10501(b) if applied to discharges incidental to the operation of rail cars in transit. In other words, it appears to be telegraphing its intent to hold as preemptive application of NPDES permitting. This appears to be based on its concern about disruption of the free flow of interstate commerce. The rationale for this conclusion was the concern it would likely:

. . . create a patchwork of differing permit requirements. Due to the structure of the NPDES permitting program as currently administered, which is based on state-specific permitting requirements, application of the permitting program to discharge incidental to the operation of rail cars in transit appears likely to result in a patchwork of differing regulations.

The STB states that the NPDES permitting program requirements (as currently administered) could not likely be harmonized with § 10501(b) and, therefore, would likely be preempted.

Note, however, that the STB did state that a nationwide uniform general NPDES permit for incidental discharges from rail cars in transit might not be prohibited. The rationale for this conclusion is its belief that uniform requirements would not create a patchwork of regulation of rail transportation. If not, STB concludes that the free flow of interstate commerce might not be disrupted.

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