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Uncovered Railcars Transporting Coal/Clean Water Act: Environmental Organizations Submit Petition to U.S. Environmental Protection Agency Requesting NPDES Permit Coverage

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The Sierra Club and a number of other environmental organizations submitted to the United States Environmental Protection Agency (“EPA”) on September 26th Petition for Rulemaking (“Petition”) styled:

To Establish Nationwide National Pollutant Discharge Elimination System Permit for Uncovered Railcars Transporting Coal Pursuant to 33 U.S.C. § 1342(a)

The other environmental organizations joining in the Petition included:

- Natural Resources Defense Council
- Columbia Riverkeeper
- San Francisco Baykeeper
- Puget Soundkeeper Alliance
- Spokane Riverkeeper
- PUBLIC JUSTICE
- Yellowstone Bend Citizens Council
- New Virginia Majority
- South Baltimore Land Community Trust
- Appalachian Voices
- Southern Appalachian Mountain Stewards
- Montana Environmental Information Center
- Sunflower Alliance
- Northern Plains Resource Council
- APPALACHIAN MOUNTAIN ADVOCATES

(Collectively, “Sierra Club”)

The Petition requests pursuant to 5 U.S.C. § 553(a) that EPA engage in rulemaking to establish a nationwide Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit regulating the discharge of coal and other coal-related pollutants to navigable waters from uncovered railcars transporting coal across the United States.

Section 301 of the Clean Water Act prohibits the discharge of any pollutants to waters of the United States except in compliance with certain sections of the statute which include Section 402.

Section 402 established the NPDES permit program.

NPDES permits consist of either individual or general permits and are utilized to authorize point source discharge pollutants to waters of the United States (navigable waters).

A Clean Water Act NPDES permit must be acquired if five jurisdictional elements are present:

- a person
- adds a
- pollutant
- to navigable waters
- from a point source

The Petition takes the position that the Clean Water Act NPDES permit jurisdictional elements have been in the case of uncovered train cars carrying coal satisfied because:

1. coal and coal dust discharges from moving coal trains take place continuously throughout a train's journey due to Aeolian or wind erosion, and direct discharges result from coal car movement when crossing waterways. As a result, Petitioners have
2. coal and coal dust particles have been discovered in a variety of locations throughout the United States, from the Columbia River Gorge to the rivers and streams in Appalachia and beyond, evidencing these discharges are occurring. Based on publicly available GIS data about the locations of coal mines and the routes predominantly used by moving coal trains, these coal train discharges are
3. discharges are occurring daily along rail lines adjacent to waterways and at thousands of railway crossings throughout the United States
4. discharges cause substantial water quality and aquatic life concerns because unburned coal contains dangerous heavy metals and other pollutants known to degrade the environment.

Sierra Club further cites a decision by the United States Surface Transportation Board ("STB") in Association of American Railroads – Petition for Declaratory Order, in which it states that uncovered railcars (stated to be "rollingstock") – statutorily-defined point sources – under the Clean Water Act cannot be regulated on a state-by-state basis under the NPDES permitting program pursuant to the preemption provision of the Interstate Commerce Commission Termination Act. See Docket No. FD36369(Dec. 29, 2020).

The STB is cited for stating that if the NPDES permitting requirements were applied to uncovered railcars by individual states, that it:

. . . would likely result in a patchwork of differing regulations that cannot be harmonized with § 10501(b) and therefore would likely be preempted.

The STB is further quoted as indicating that regulation under a nationwide permit could be harmonized with the Interstate Commerce Commission Termination Act because such permit with uniform requirements would not create such a patchwork of regulation nor would it interfere with the free flow of interstate commerce.

Consequently, the Sierra Club Petition argues that EPA should develop a NPDES General Permit for such activities.

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