

Environmental Issues Affecting the North American Railroads

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What a difference a year makes!



Executive Orders

- EO 13771: “Reducing Regulations and Controlling Regulatory Costs” (1/30/17)
 - OMB Interim Guidance (2/2/17)
 - OMB Supplemental Guidance (4/5/17)
- Manage the Costs of New Regulations
- Accordingly, for every one new regulation issued, at least two “prior regulations” must be “identified for elimination.”



EO 13777

- EO 13777, “Enforcing the Regulatory Reform Agenda” (2/24/17)
 - Each agency must designate an agency official as a Regulatory Reform Officer (RRO) to “oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law.”



EPA-HQ-OA-2017-0190 Evaluation of Existing Regulations (EO-13,777)

- On May 15, AAR filed comments to EPA's request for comment with respect to regulatory reform. The comments included the following issues:
 - A request not to change the point of obligation in the renewable fuel standards
 - As noted above a request to remove the design to burn requirement from the non-hazardous materials regulations which adversely affect boilers which currently burn creosote treated crossties
 - A request that EPA limit the scope of 40 CFR §1500 – 1508 National Environmental Protection Act permits to the project boundaries



Evaluation of Existing Regulations (cont.)

- Railroad ditches should be exempt from the Waters of the US (WOTUS) rule
- Recommended 9 changes to the Clean Water Act (CWA) §404 permit program - the changes request a reduction in the scope and stress the need to streamline the process for approval among other things
- Request an exemption or relaxation of secondary containment requirements under spill containment and countermeasure plan (SPCC) requirements for oils which are solid at ambient temperatures such as grease
- Clarify regulations so that guidance documents and litigation cannot be used to make regulations more stringent



General Permit for Stormwater Discharges from Construction Activities (CGP)

- AAR supported comments of the Federal Stormwater Association (FSA) with respect to the draft CGP submitted on May 26, 2016
- EPA's revised CGP was finalized in 2017 and included the requirements of the Construction & Development Effluent Limitation Guidelines (C&D ELG) when it was finalized in 2012
- The final version eliminated reference to the C&D – ELG turbidity limit
- The estimated cost had the turbidity limit stayed was an additional \$10,000 to \$50,000 per acre of construction



Definition of Non-Hazardous Secondary Material (NHSM)

- November 1, 2016 notice of proposed rulemaking (NPRM) for other treated railroad ties (OTRT's) (creosote-borate (C-B), copper naphthanate (CN), and CN-borate (CN-B))
- AAR filed joint comments January 3, 2017
- The NPRM would allow C-B treated crossties to be burned in cogeneration units as long as the boilers have the ability to burn fuel oil – no restriction on CN and CN-B ties
- Includes an energy recovery limit of 40% of OTRT's (i.e., 40% of annual fuel used on an input basis to the boiler)
- Railroads would be only allowed to store used OTRT's for no more than one year along the right-of-way



NHSM (cont.)

- On July 10, AAR, BNSF and UP met with Patrick Davis, EPA's Deputy Assistant Administrator – Office of Land and Emergency Management and other senior EPA officials to discuss AAR's concerns
- At their request, AAR prepared a letter to Mr. Davis summarizing our concerns with a suggestion on how it should be fixed, i.e. remove the design to burn requirement, remove the requirement to pick up ties within 1 year, and remove the requirement for boilers to limit the burning of creosote treated crossties to 40% of boiler capacity.
- The final rule is expected to be sent to the Office of Management and Budget soon
- The coalition which submitted the comments in January is in the process of setting up a meeting with EPA to jointly discuss our concerns in the late October or early November 2017 time frame
- AAR gets the impression EPA is trying to find a way to make this work for the railroads



Multi-Sector General Stormwater Permit

- AAR submitted detailed comments on EPA's proposed Multi-Sector General Stormwater Permit on December 26, 2013
 - Benchmark values were proposed which if exceeded, then the organization holding the permit would have to take action to lower their stormwater discharge with controls
 - The benchmark values EPA proposed were so low that they would be exceeded in almost all cases
- The Multi-Sector General Permit was finalized and AAR's comments were incorporated
 - The rail industry avoided benchmarks again which could very well have led to escalating costs to meet them
 - Other good news concerns minimizing enforcing benchmarks that will help when a state imposes them



California Emissions

- CA Air Resource Board (CARB) petition to US EPA for Tier 5 Locomotives - The petition was submitted in April of 2017 – AAR does not anticipate EPA acting it is any time soon
- Indirect Source Rules (ISR's) and Facility Caps – CARB held initial ISR concept meetings on August 29 and September 6 - community meetings were held in August and September with residents near railyards, seaports, warehouses about initiatives underway to reduce air pollution and health impacts from freight



California Emissions (cont.)

- Implementation of CA Sustainable Freight Action Plan (SFAP) the final SFAP was released on July 29, 2016 –the railroads and others are re-evaluating whether or not to continue participating in Competitiveness and Freight Efficiency Working Groups pending conversation with the Governor concerning ISR's
- Influence of Air Quality and Climate Legislation – the CA railroads are tracking the legislation. A new cap and trade program (AB 617 and 398) was adopted on July 7, 2017. The CA emissions team is monitoring how CARB will implement this legislation into regulations. There is a bill being considered entitled “Zero Diesel Risk by 2030.”
- Influence Scoping Plan Update – Adoption of a scoping plan has been delayed until January 2018. The plan will include new provisions from AB 398 as well as continue to consider CARB's identified strategies which will include: control measures+ cap and trade, control measures only, control measures and carbon tax, and cap and trade only. This is being closely monitored



Method Detection Limits and Procedure 608

- On August 28, 2017 EPA finally published revised method detection limits and Procedure 608
- AAR filed detailed comments on May 20, 2015
- EPA incorporated many of AAR's comments which will make the limits better to reflect the actual contaminants in the sample and make it more likely that clean up / treatment levels are established based on actual contaminant present
- This is important since the member railroads own a substantial amount of land, and as a result maintain numerous NPDES permits—federal, state, and city— stormwater permits, RCRA permits, and are involved in site cleanup projects at fixed facilities, and transportation incidents



Awards



- Amtrak, BNSF, CN, CSX, NS and UP all nominated candidates for the 2017 Chafee award
- Andrew Paul of NS was awarded the Chafee award on June 28, 2017 at a ceremony at AAR for his work on energy efficiency projects saving millions of dollars in fuel costs, as well as reducing the emissions by 36,000 metric tons
- The announcement for the Professional Award will be presented at the Railroad Environmental Conference on October 24



Legal Issues

- “Waters of the United States” (WOTUS) Rule
- On July 27, 2017 EPA published a notice of proposed rulemaking concerning the Waters of the United States
- EPA proposes to take WOTUS back to the previous version (pre 2015)
- The second step will be to issue a new rulemaking
- AAR filed comments supporting taking the rule back to its previous version and for EPA to undertake an entirely new rulemaking on August 16th
- The comments also stressed the need to exempt railroad ditches from the definition of a waters of the U.S.



BNSF Southern California International Gateway (SCIG) project

- The SCIG a proposed intermodal yard at the Port of Los Angeles (LA)
- Because land is owned by the port, they agreed to do a California Environmental Quality Act (CEQA) review of the project
- An environmental impact report (EIR) was finalized and approved
- Petitioners sued, alleging that the EIR was inadequate
- The CA Attorney General weighed in on part of petitioners
- AAR filed an amicus brief at the CA appellate court arguing that the ICC Termination Act preempts CEQA.
- The CA appellate process give the petitioner a chance to submit a response
- AAR is monitoring the case
- This has relevance for all railroads due to preemption issue.



Infrastructure Barriers - DOCKET NO. OST -2017 -0057

- A notice was published on June 8 requesting comments on infrastructure barriers
- AAR filed comments to this notice on July 25th
- FAST Act Implementation issues
 - FAST Act Streamlining the Section 106 Process
 - Section 4(f) Exemption for Historic Rail Lines
 - Expedited Environmental Review Process in 23 U.S.C. 139 for Rail Projects
 - Categorical Exclusions



Infrastructure Barriers - DOCKET NO. OST -2017 -0057 (cont.)

- NEPA and Historic Preservation
 - Improvements to Categorical Exclusions
 - Scope of NEPA Review
 - Section 106 Consultation
- DOT Internal Coordination and Interoperability



Sierra Club Lawsuit against BNSF for Illegal Discharge

- AAR filed an amicus brief with respect to the Sierra Club et.al. lawsuit against BNSF for coal dust discharge into waters of the US.
- The suit was subsequently settled out of court, with no admission of liability
- At the summary judgment stage, the Court found that materials coming out of cars directly into water constituted a violation of the Clean Water Act, though the Court deferred the question of whether a railroad could be held liable for such a violation considering ICCTA preemption



e-Manifest

- EPA held a public meeting of the e-Manifest Advisory Board on September 26-28, 2017 in Arlington, VA
- AAR submitted comments and make an oral statement at the meeting reinforcing comments already made including:
 - EPA should create a system to translate railroad electronic data interchange (EDI) messages to allow the transmission of the e-manifest to EPA
 - That the EDI system should be allowed for the signature required on the e-manifest so that a separate system is not required just to sign e-manifests - the way EPA has proposed the e-manifest system, it would require a separate dual verification system, which would require someone to not only enter a user name and password, but also a second factor authentication such as answering a pre-set question (such as what was your childhood nickname)
- Plan to get the rule finalized by December 31, 2017
- EPA's plans to implement the e-Manifest system by June 31, 2018



Railroad Sustainability Task Force (RS-TF)

- The Railroad Sustainability Task Force has been meeting bi-weekly to plan the 2017 Railroad Sustainability Symposium, which is being planned in conjunction with the Railway Tie Association annual conference in San Diego, CA on November 2-3, 2017
- General topic areas for the symposium are:
 - Stakeholder Engagement
 - Air / Greenhouse Gas Emissions
 - Supply Chain Management



Questions

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