

## MEMORANDUM

### VIA ELECTRONIC MAIL

TO: Heather McLaughlin, Esq.

FROM: Bradley R. Hogin, Esq.

DATE: April 8, 2016

RE: Surface Transportation Board Proceedings on Petitions for Declaratory Orders

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You have asked me to briefly summarize the process that the Surface Transportation Board (“STB”) follows in considering petitions for declaratory orders.

What is a Declaratory Order? A declaratory order is a form of declaratory relief provided by a federal administrative agency in response to a petition. Under the Administrative Procedure Act (“APA”), federal agencies like the STB may institute declaratory order proceedings in order to “terminate a controversy or remove uncertainty.”<sup>1</sup>

How Are Proceedings Initiated? Any interested party may file a petition for declaratory order. The STB, however, has “significant discretion” in deciding whether to institute a declaratory order proceeding.<sup>2</sup> Upon deciding to institute a proceeding, the STB will publish a notice in the federal register. If the STB declines to institute a proceeding, it may nonetheless provide informal guidance to the petitioner.

Who Can File a Petition? Many petitions for declaratory orders are filed by rail carriers. The STB, however, regularly institutes declaratory order proceedings based on petitions filed by parties that are not rail carriers. The STB, for example, has held proceedings on petitions filed by shippers,<sup>3</sup> property owners,<sup>4</sup> cities,<sup>5</sup> environmental groups,<sup>6</sup> transload facility operators,<sup>7</sup> and city residents.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. § 554(e).

<sup>2</sup> *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106-07 (D.C. Cir. 1984).

<sup>3</sup> See, e.g., *Am. Chemistry Council, the Chlorine Inst., & the Fertilizer Institute Petition for Declaratory Order Positive Train Control*, FD 35964, 2015 WL 5845419, at \*1 (Oct. 6, 2015) [shipper] *Sherwin Alumina Co., LLC*, R 42143, 2015 WL 5711004, at \*1 (Sept. 28, 2015).

<sup>4</sup> See, e.g., *Allied Indus. Dev. Corporation Petition for Declaratory Order*, FD 35477, 2015 WL 5459098, at \*1 (Sept. 15, 2015) *Pinelawn Cemetery Petition for Declaratory Order*, FD 35468, 2015 WL 1813674, at \*1 (Apr. 20, 2015).

<sup>5</sup> See, e.g., *City of Milwaukie Petition for Declaratory Order*, FD 35625, 2013 WL 1221975, at \*1 (Mar. 20, 2013).

Is There an Opportunity for Public Participation? After instituting a declaratory order proceeding, the STB will allow interested parties an opportunity to respond to the petition. The STB will typically set forth a schedule for replies and rebuttal by the petitioner in the initial federal register notice.<sup>9</sup> The STB has not adopted any procedures that apply to declaratory order proceedings, and instead sets the schedule on a case-by-case basis.

How Long Does the Process Take? Based on my review of various STB decisions, after a petition is filed it typically takes the STB three to six months to issue a decision. I did find a few cases where the STB process took less than three months or more than six months. The substantial majority of cases that I reviewed, however, were resolved in three to six months.

Can an STB Decision be Challenged in Court? As a general rule, an STB declaratory order is considered a final action and is subject to judicial review as set forth in the APA.<sup>10</sup> And, in many cases, courts have reviewed STB declaratory orders regarding the scope of ICCTA preemption on specific facts.<sup>11</sup> It is true that, in some cases, courts have declined to review declaratory orders because there was no actual controversy presented – the matter, in other words, was not “ripe” for review.<sup>12</sup> Here, however, a court would likely consider the controversy over Valero’s facility to be ripe for review because it involves an actual controversy between Valero and project opponents over a specific planned facility.

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<sup>6</sup> See, e.g., *Friends of the Aquifer, City of Hauser, Id, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Env'tl. All., R.R. & Clearcuts Campaign*, 33966, 2001 WL 928949, at \*1 (Aug. 10, 2001).

<sup>7</sup> See, e.g., *Sea-3, Inc. Petition for Declaratory Order*, FD 35853, 2015 WL 1215490, at \*1 (Mar. 16, 2015).

<sup>8</sup> See, e.g., *Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, & Richard Kosiba* petition for Declaratory Order, FD 35652, 2014 WL 6852990, at \*1 (Dec. 4, 2014).

<sup>9</sup> See, e.g., *Canadian Pacific Railway Limited—Petition for Expedited Declaratory Order*, 81 FR 14172-02.

<sup>10</sup> 5 U.S.C. § 702.

<sup>11</sup> See, e.g., *Padgett v. Surface Transp. Bd.*, 804 F.3d 103 (1st Cir. 2015); *Grosso v. Surface Transp. Bd.*, 804 F.3d 110 (1st Cir. 2015), reh'g denied sub nom. *Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83 (1st Cir. 2016); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005).

<sup>12</sup> *Miller v. F.C.C.*, 66 F.3d 1140, 1141 (11th Cir. 1995).