

## Water Pollution

### BNSF Railway Ruling Lays Track for New Water Pollution Suits

**B**NSF Railway Co. will clean up coal pollution along its tracks at five spots in Washington and fund \$1 million for other environmental work, but the conservation groups' lawsuit targeting the company could lay track for new Clean Water Act litigation targeting coal and possibly agriculture.

The Berkshire Hathaway Inc. subsidiary dodged possibly billions of dollars in penalties after it agreed March 3 to a proposed consent decree with environmental groups that will see the railway company study the feasibility of covering its rail cars to prevent coal dust from blowing into waterways. However, an October ruling from Seattle District Court Judge John C. Coughenour could prove to be the lawsuit's lasting legacy, attorneys said (*Sierra Club v. BNSF Ry.*, W.D. Wash., 13-cv-0967, *proposed consent decree 3/3/17*).

Ruling on motions for summary judgment, Coughenour found that when coal either blew or fell from the open rail cars into the water, the cars were a "discrete conveyance" under the Clean Water Act and thus constituted point sources of pollution. That finding is expected to drive similar lawsuits in the future.

"I don't think this will be the last time this will pop up," Erin Potter Sullenger, an attorney in Crowe & Dunley's Oklahoma City office who represents energy companies, told Bloomberg BNA March 3. "The strategy that the plaintiffs employed here will be used around the country for various types of products, including agricultural, soil, rocks and, of course, coal."

**Cars Could Be a Point Source** That earlier ruling is "going to have strong persuasive value" should environmental advocates pursue similar lawsuits in the future, Sullenger said.

"This broadens the idea of a discrete conveyance," Sullenger said. "The rail car rolling down the tracks; the wind blowing the coal from the car; the wind and the gravity having its effect" with the coal ending up in the water. "I think this moves Clean Water Act litigation forward as to what is or is not a discrete conveyance" and thus making rail cars more liable to be dubbed a point source under the act.

The plaintiffs—seven environmental advocacy groups led by the Sierra Club—had hoped to emerge from the proceedings with a mandate that BNSF cover its open-top coal cars. Instead they got BNSF's commit-

ment in the March 3 proposed consent decree to study the commercial and operational feasibility of covering cars. The Sierra Club has received funding from Bloomberg Philanthropies, the charitable organization founded by Michael Bloomberg, the majority owner of Bloomberg L.P., parent of Bloomberg BNA.

If the environmental groups had prevailed at trial, BNSF theoretically could have been liable for billions of dollars in penalties based on allegations of over 12 million violations from 2012 through 2015. Instead, BNSF will pay for \$1 million worth of water quality and habitat work in Washington and conduct its own cleanup of coal along the tracks at five non-aquatic locations in the state.

"I think BNSF was fortunate," Sullenger said. "They did face potentially billions of dollars of liability."

Charlie Tebbutt of Eugene, Ore., who represented the environmental groups, said Coughenour's ruling on the cars being a point source sends "an important message to the entire coal industry that they have to control their sources of pollution. If they don't, they will be held accountable."

Tebbutt agrees the environmental groups' legal strategy will be replicated. "Absolutely, more people will do it in the future. The problem is that there is a tremendous amount of coal coming off the trains. It will be easy to replicate this case against coal transporters everywhere."

**BNSF: 'Unfounded' Allegations** BNSF, which denies any violations of the clean water law, said in a March 3 email to Bloomberg BNA: "They originally sued BNSF for \$4.6 trillion, and our settlement of \$1 million, which will fund supplemental environmental projects in Washington, reflects the truth that the sweeping allegations from the plaintiffs were simply unfounded."

"BNSF has already implemented the best commercially available technology to address coal dust as upheld by the Surface Transportation Board, the federal agency with oversight over rail industry practices," BNSF spokeswoman Courtney Wallace said in the email.

"The settlement does not require a particular outcome or conclusion with respect to car covers. The study results will be driven by data and technical analysis."

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