

BNSF Can't Escape Suit Over Coal Spillage From Railcars

By Lance Duroni

Law360, Chicago (January 03, 2014, 2:22 PM ET) -- A federal judge in Washington state on Thursday refused to toss a suit accusing BNSF Railway Co. of polluting the state's waterways by allowing coal to escape from railcars, saying plaintiffs led by the Sierra Club deserve a chance to flesh out their claims.

U.S. District Judge Lonny R. Suko issued an order rejecting the railway operator's argument that many of the plaintiffs' claims exceeded the scope of the Clean Water Act because they related to coal materials discharged initially onto land, rather than directly into water.

In its motion to dismiss, BNSF seized on language in the "facts" portion of the complaint concerning coal discharges "adjacent to, over, and in proximity to waters." These discharges onto land, carried into waterways by wind or precipitation, are nonpoint sources of pollution that are excluded from the relevant permitting program and can't be the basis for claims under the CWA, the company argued.

But Judge Suko noted that the lone claim in the complaint used different language, targeting coal pollutants discharged "into" Washington waterways.

"The court therefore finds it necessary to allow plaintiffs the opportunity at this early juncture to develop facts that will allow their claim(s) to either stand or fall, based on the statutory definition of a point source discharge," Judge Suko wrote. "As part of their case, plaintiffs will need to show that BNSF's railway illegally introduced pollutants into navigable waters without a permit."

Sierra Club and a handful of other environmental groups launched the instant suit in July, one month after filing a companion case in the Western District of Washington. The lawsuits followed an April intent to sue notice from the plaintiffs, which alleged that BNSF's \$37,500 per day in Clean Water Act violations over five years could add up to more than \$68 million in fines.

BNSF contends the lawsuits are meritless, and has argued in court filings that they are part of the plaintiffs' broader attack on the U.S. coal industry, designed particularly to head off planned coal export terminals in the Pacific Northwest.

The company also sought to dismiss any claims concerning waterways outside the Eastern District of Washington, where the case was filed, arguing the venue is improper. But Judge Suko noted that the plaintiffs have indicated that they intend to move the case to the Western District of Washington, where its companion suit was filed, and said that court would be better suited to decide the venue question.

The Sierra Club hailed the decision in a statement on Friday, calling it a "major victory."

"The court's decision to move the case forward is a step in the right direction to stop coal — and its toxic associates, lead, arsenic, and mercury — from further poisoning our fish, our water, and our families," said the Sierra Club's Cesia Kearns. "We take these threats seriously, and after today's court decision we hope BNSF finally will too."

A spokesperson for BNSF said Friday that the company had just received the decision and was still reviewing it.

Other environmental groups that joined Sierra Club in the suit include Columbia Riverkeeper, Puget Soundkeeper Alliance, RE Sources for Sustainable Communities and Friends of the Columbia Gorge.

In their April notice, the groups cited testimony from BNSF officials in front of the Surface Transportation Board estimating an average loss of 30 tons of coal for each of the daily trips the company makes through the state.

The environmental groups are represented by Charles M. Tebbutt and Daniel M. Galpern of the Law Offices of Charles M. Tebbutt PC, Andrea K. Rodgers Harris of the Western Environmental Law Center and Jessica Yarnall Loarie of the Sierra Club.

BNSF is represented by Lily N. Chinn, Richard S. Davis and W. Parker Moore of Beveridge & Diamond PC.

The cases are Sierra Club et al. v. BNSF Railway Co., case number 1:13-cv-00272, in the U.S. District Court for the Eastern District of Washington, and Sierra Club et al. v. BNSF Railway Co., case number 2:13-cv-00967, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Sean McLernon and Keith Goldberg. Editing by Jeremy Barker.