

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

In the Matter of the Remedial Action at:)
)
Burlington Northern Santa Fe Railway Company)
Former Maintenance and Fueling Facility)
Skykomish, Washington)

AGREED ORDER
No. DE 01TCPNR-2800

TO: Burlington Northern Santa Fe Railway Company
Law Department
P.O. Box 961039
2500 Lou Menke Drive, 3rd Floor
Fort Worth, Texas 76131-2828

I.

Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of RCW 70.105D.050(l). This Order is for an interim action in accordance with WAC 173-340-430. This Order does not affect the rights and obligations of the parties under Agreed Order DE 91TC-N213 under which BNSF is conducting site investigations and certain interim remedial actions not addressed by this Order.

II.

Findings of Fact

The Department of Ecology (Ecology) makes the following Findings of Fact without adjudication or admission of any such facts by The Burlington Northern and Santa Fe Railway Company (BNSF):

1. BNSF is the current owner and operator of the Burlington Northern Skykomish Maintenance and Fueling Facility (Maintenance and Fueling Facility), formerly known as the Burlington Northern Rail Yard, located in Skykomish, Washington.
2. Great Northern Railroad owned and operated the Maintenance and Fueling Facility until 1970 when Great Northern Railroad merged with four other railroad companies to become the Burlington Northern Railroad.
3. In 1996 the Burlington Northern Railroad purchased the Atkinson, Topeka and Santa Fe Railroad and changed its corporate name to The Burlington Northern and Santa Fe Railway Company.

4. The Maintenance and Fueling Facility was used to refuel and maintain locomotives from the late 1800s until those operations were discontinued in 1974. During different periods of the 75 years of operation, coal, bunker oil, electricity and diesel fuel were used to power locomotives. "Site History: Skykomish Maintenance and Fueling Facility," Jack Berryman (July 1990).
5. From 1974 to the present, the Maintenance and Fueling Facility has been used as a base of operations for track maintenance and snow removal crews. "Site History," Jack Berryman (1990).
6. Petroleum products have been detected in the subsurface soil and groundwater at the Maintenance and Fueling Facility and the surrounding area. PCBs, lead, petroleum products and arsenic have been detected in isolated areas of the Maintenance and Fueling Facility surface soils. The presence of petroleum and PCBs was documented in the 1991 GeoEngineers, Inc. Phase I Report, Site Assessment and Remedial Evaluation, Burlington Northern Rail Yard, Skykomish, Washington, Prepared for Burlington Northern Railroad and Response to Ecology's Comments/Questions, Burlington Northern Rail Yard, Skykomish, Washington for Burlington Northern Rail Yard (July 1991). The presence of lead was documented in the Ecology and Environment, Inc. Site Hazard Assessment for Skykomish Train Yard, Skykomish, Washington (June 1991). The presence of petroleum in soils, groundwater, surface water and sediments was documented in the ThermoRetec Remedial Investigation for the Former Maintenance and Fueling Facility in Skykomish, Washington (January 1996)(RI). The RI was tentatively accepted by Ecology (subject to public comment) on March 17, 1999 as a data source and base document but does not constitute the final RI. At this time, additional investigations and a draft feasibility study are currently being developed under Agreed Order DE 91TC-N213 to characterize the nature and extent of contamination and to develop remedial alternatives.

7. Free phase petroleum product (also known as Light Non-aqueous Phase Liquid – “LNAPL”) is present on groundwater immediately up-gradient of the flood levee between the town of Skykomish and the Skykomish River, ThermoRetec “Annual Product Recovery Progress Report” (April 2000).
8. Free phase petroleum product and dissolved phase petroleum is seeping into the Skykomish River. ThermoRetec “Annual Product Recovery Progress Report” (April 2000).

III.

Ecology Determinations

1. The Burlington Northern Santa Fe Railway Company is an "owner and operator" as defined in RCW 70.105D.020(12) of a "facility" as defined in RCW 70.105D.020(4).
2. The facility or "Site" is known as the Burlington Northern Skykomish Maintenance and Fueling Facility (Maintenance and Fueling Facility). The facility or Site includes the Maintenance and Fueling Facility and adjacent properties affected by the release of hazardous substances from the Maintenance and Fueling Facility and is located in Skykomish, Washington.
3. The substances found at the facility, as described in the Findings of Fact above, are "hazardous substances" as defined in RCW 70.105D.020(7).
4. Based on the presence of these hazardous substances at the facility and all factors known to Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(20).
5. The release of petroleum free product and the dissolved phase petroleum to the Skykomish River is a threat or potential threat to human health and the environment.
6. By letter dated July 11, 1991, Ecology notified Burlington Northern Railroad of its status as a "potentially liable person" under RCW 70.105D.040 after notice and opportunity for comment.

7. On September 16, 1993, Ecology and Burlington Northern Railroad entered into Agreed Order No. 91TC-N213, under which Burlington Northern Railroad is conducting a remedial investigation, feasibility study and certain interim remedial actions to determine the extent of contamination at the site and to partially abate the potential threat to human health and the environment.
8. Pursuant to RCW 70.105D.030(l) and 70.105D.050, Ecology may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.
9. Under WAC 173-340-430(1)(a), an interim action is an action that is technically necessary to reduce a threat to human health or the environment by eliminating or substantially reducing one or more pathways (direct contact, air borne by wind and leaching into the groundwater) for exposure to a hazardous substance at a facility; or (b) an action that corrects a problem that may become substantially worse....if the action is delayed. Petroleum products continue to seep into the Skykomish River. The South Fork of the Skykomish River (and its tributary Maloney Creek), is a Class AA waterway and includes primary contact recreation (e.g. sport fishing, boating and aesthetic enjoyment). The seeps constitute an ongoing threat to human health and the environment. Additional interim action is necessary to reduce the threat and will serve to correct a problem that may become substantially worse.
10. Based on the foregoing Facts and Determinations, Ecology believes that the remedial actions required by this Order are in the public interest.

IV.

Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby agreed that BNSF shall perform the following remedial actions and that these remedial actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein. This

Order addresses the implementation of necessary interim remedial actions on selected portions of the Site. This Order does not address all contamination on the Site and does not constitute final Site cleanup. This Order does not amend or modify Agreed Order DE 91TC-N213 under which BNSF is conducting certain interim remedial actions not addressed by this Order.

1. Interim Remedial Action to reduce petroleum seeps into the Skykomish River.

BNSF shall perform an interim remedial action to reduce, with the goal of eventually eliminating, petroleum seeping into the Skykomish River. This work shall be detailed in a Basis for Design Report. A preliminary Basis for Design Report (May 1, 2001) is attached hereto as Exhibit A. The preliminary Basis for Design Report shall serve as a model for the more detailed final Basis for Design Report. The final Basis for Design Report shall be submitted to Ecology per the schedule in Exhibit A. Ecology will review and return the final Basis for Design Report within seven (7) days of receipt of the report. BNSF shall submit a revised final Basis for Design Report to Ecology within seven (7) days of receiving Ecology's comments. Once the final Basis for Design Report receives approval from Ecology, the final Basis for Design Report shall be attached hereto as Exhibit B, and become a binding and enforceable part of this Order.

The final Basis for Design Report shall be substantially consistent with the preliminary Basis for Design Report. The final Basis for Design Report shall meet all requirements contained in WAC 173-340-430, as well as any other applicable requirements contained in WAC 173-340, and shall provide sufficient information for a) the installation of a low-permeability barrier; b) the installation of a petroleum product extraction system located up-gradient of the barrier wall that includes extraction wells and a collection system; and c) a performance, confirmation and contingency plan to monitor the effectiveness and maintenance of the wall and extraction/collection system.

The final Basis for Design Report shall contain a construction schedule that outlines when deliverables must be submitted to Ecology and when work will begin.

BNSF shall submit all draft documents for conducting remedial actions to Ecology for review within the time period specified within the final Basis for Design Report Schedule. Ecology shall make best efforts to provide BNSF with written comments regarding the adequacy of draft documents within seven (7) days of receipt of the draft documents. The time allowed for BNSF to perform any obligation dependent upon Ecology's review and approval shall be extended by the number of days that Ecology is late in completing such review or approval.

2. Weekly Progress Reports - Written weekly progress reports shall be submitted to Ecology that describe the remedial actions taken by BNSF during the previous week to implement the requirements of this Order. All progress reports shall be delivered by the first business day of each week until the remedial actions set forth in Exhibit B have been constructed and routine operation and maintenance has begun. The reports shall include but not be limited to the following items:
 - a.) A list of activities that have taken place during the week;
 - b.) Detailed description of any deviations from the Order or project plans; and
 - c.) Description of all deviations from the schedule and any planned deviations in the upcoming week, and plans for recovering lost time and maintaining compliance with the schedule.

After the remedial actions set forth in Exhibit B have been constructed and routine operation and maintenance has begun, BNSF shall include a summary of monthly activity in the Monthly Progress Reports required by Section IV.2. of Agreed Order DE 91TC-N213, and weekly reports shall no longer be required under this Order.

V.

Terms and Conditions of Order

1. Definitions

Unless otherwise specified, the definitions set forth in Chapter 70.105D RCW and Chapter 173-340 WAC shall control the meanings of the terms used in this Order.

2. Public Notices

WAC 173-340-600(10)(c) requires that, at a minimum, this Order be subject to 30 days public notice prior to the effective date of this Order. Ecology shall be responsible for providing such public notice and reserves the right to modify, upon written agreement with BNSF, or withdraw this Order should public comment disclose facts or considerations that indicate to Ecology that the Order is inadequate or improper in any respect.

3. Public Participation

BNSF has assisted Ecology in preparing and/or updating a public participation plan for the Site. The Public Participation Plan (May 1, 2001) is attached hereto as Exhibit C. Ecology shall maintain the responsibility for public participation at the Site. BNSF shall help coordinate and implement public participation for the Site. Ecology shall make best efforts to provide BNSF an opportunity to review fact sheets, press releases and public notices in a timely manner before release and to evaluate BNSF's comments prior to the release of such information.

4. Remedial Action Costs

Pursuant to and as limited by WAC 173-340-550(2), BNSF agrees to pay those remedial action costs incurred by Ecology that are (1) reasonably attributable to the site, (2) related to this remedial action, and (3) incurred on or after February 1, 2001. These costs shall include work performed by Ecology or its contractors for existing document review and evaluation, site visits, investigations, order preparation, negotiations, remedial actions, oversight, and administration. Ecology costs shall include costs of direct activities (e.g., employee salary, laboratory costs, travel costs, contractor fees, and employee benefit packages); and Ecology indirect costs of direct activities. Disputes regarding costs shall be resolved pursuant to Section V.9. Dispute Resolution. BNSF agrees to pay the required amount within 90 days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, the indirect rate charged, a description of work

performed, an identification of involved staff, and the amount of time spent by involved staff members on the project or within 30 days of completion of dispute resolution involving cost recovery. Itemized statements shall be prepared quarterly. Ecology will reasonably attempt to distinguish between costs incurred under this Order and costs incurred under Agreed Order DE 91TC-N213. Failure to pay Ecology's costs according to the terms of this paragraph may result in interest charges or other enforcement action legally available to Ecology.

5. Designated Project Coordinators

The project coordinator for Ecology is:

Ms. Louise Bardy
Washington State Department of Ecology
3190 - 160th Avenue Southeast
Bellevue, Washington 98008-5452

Telephone Number (425) 649-7209

The project coordinator for BNSF is:

Mr. Bruce Sheppard
Manager, Environmental Engineering
The Burlington Northern Santa Fe Railway Company
2454 Occidental Ave. S.
Suite 1A
Seattle, WA 98134

Telephone Number (206) 625-6035

The project coordinators shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and BNSF, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinators.

Should Ecology or BNSF change project coordinators, written notification shall be provided to Ecology or BNSF at least ten (10) calendar days prior to the change.

6. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer or hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. BNSF shall notify Ecology as to the identity of such engineer(s) or hydrogeologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

7. Access

Subject to the terms and conditions set forth below, Ecology and/or Ecology authorized representatives shall have the authority to enter and freely move about the property owned by BNSF that is on or adjacent to the site as defined in the attached exhibits at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by BNSF.

Subject to Ecology's authority to take action deemed necessary to protect public health and the environment, Ecology agrees to the following terms and conditions of access to property owned by BNSF: (1) Unless there is an emergency requiring immediate access, Ecology shall notify BNSF's project manager or ThermoRetec's project environmental engineer leaving a message for both if neither is available, forty-eight (48) hours prior to conducting any activity within fifty (50) feet of a railroad track or transporting equipment or material across a railroad track; provided, however, that if a fence exists fifty (50) feet or more from a railroad track, Ecology need not notify BNSF regarding activities conducted on the non-railroad side of the fence. If BNSF objects to entry, then BNSF will identify business operations that may be effected by access and Ecology shall make a good faith effort not to unreasonably interfere with

business operations at the property. Except as provided above for activities conducted within fifty (50) feet of the railroad track, by signing this Agreed Order, BNSF agrees that this Order constitutes reasonable notice of access.

To the extent that compliance with this Order requires access to property not owned or controlled by BNSF, BNSF shall exercise its best effort to obtain signed access agreements that allow access for itself, its contractors and agents, and Ecology's authorized representatives. BNSF shall provide Ecology copies of such agreements. With respect to property that is not owned by BNSF and upon which monitoring wells, pumping wells, treatment facilities, or other response actions are to be located, BNSF will exercise its best effort to obtain access agreements that condition conveyance of title, easement, or other interest in the property upon both the advance notification of Ecology of the transfer as well as the continued operation of such wells, treatment facilities, or other response actions on the property.

Ecology shall allow split or replicate samples to be taken by BNSF during an inspection unless doing so interferes with Ecology's sampling. BNSF shall allow split or replicate samples to be taken by Ecology unless doing so interferes with BNSF's sampling and shall provide seven (7) days notice before any sampling activity.

8. Retention of Records

BNSF shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of BNSF, then BNSF agrees to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution

BNSF may request Ecology to resolve disputes which may arise during the implementation of this Order. Such request shall be in writing and directed to the

signatory of this Order. Ecology resolution of the dispute shall be binding and final.

BNSF is not relieved of any requirement of this Order during the pendency of the dispute and remains responsible for timely compliance with the terms of the order unless otherwise provided by Ecology in writing.

10 Reservation of Rights/No Settlement

This Agreed Order is not a settlement under Chapter 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against BNSF to recover remedial action costs paid to and received by Ecology under this Order. In addition, Ecology will not take additional enforcement actions against BNSF to require those remedial actions required by this Order, provided BNSF complies with this Order. Ecology reserves the right, however, to require additional remedial actions at the Site should it deem such actions necessary. This Order shall not be construed to waive BNSF's right to bring an action for contribution or to recover costs under MTCA or any other authority against any other party.

Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Burlington Northern Santa Fe Railway Company Rail Yard.

11. Endangerment

In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order BNSF to stop further implementation of this Order for such period of time as needed to abate the danger. In the event that Ecology issues such an order, and if Ecology determines it necessary to modify deadlines, Ecology may provide written notification that all deadlines under this Order are suspended and time periods extended to correspond to the delay created by the work stoppage periods of time as necessary to abate the danger,

12. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by BNSF without provision for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Prior to transfer of any legal or equitable interest BNSF may have in the Site or any portions thereof, BNSF shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, BNSF shall notify Ecology of the contemplated transfer.

13. Compliance with Other Applicable Laws

a. All actions carried out by BNSF and Ecology pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph b of this section.

b. Pursuant to RCW 70.105D.090(1), the substantive requirements of chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals for the remedial action under this Order that are known to be applicable at the time of issuance of this Order shall be included in the final Basis for Design Report, which shall be attached hereto as Exhibit B, and are binding and enforceable requirements of this Order. BNSF has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event BNSF determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, they shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or BNSF shall be responsible to contact the appropriate state and/or

local agencies. If Ecology so requires, BNSF shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by BNSF and on how BNSF must meet those requirements. Ecology shall inform BNSF in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. BNSF shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination. Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

c. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and BNSF shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

14. Revisions to the Basis for Design Reports and schedule revisions to the Basis for Design Reports or to the schedule may be granted only when a request for revision is submitted within five business days after BNSF knew or should have known of the need for the revision, and when good cause exists for granting the revision. All revisions shall be requested in writing. The request shall specify the reason(s) the revision is needed. A revision of schedule shall be granted for such period as Ecology determines is reasonable under the circumstances. A requested revision shall not be effective until approved by Ecology, which approval shall be confirmed in writing.

The burden shall be on BNSF to demonstrate to the satisfaction of Ecology that good cause exists for granting a revision. Good cause may include, but is not limited to, the following:

- A. Circumstances entirely beyond the control and which cannot be overcome by the due diligence of BNSF such as difficulty in obtaining access to property not owned or controlled by BNSF.
- B. Delays directly attributable to: changes in a permit; the need to comply with permit terms or conditions; the appeals of or the lack of a permit; and/or the need to obtain concurrence, or approval to implement the terms of this Order, provided that BNSF filed a timely application for such a permit, concurrence or approval; and
- C. Acts of God, including fire, flood, blizzard, extreme temperatures, storm, earthquake, wave or water conditions, strikes or other labor disputes, or other unavoidable casualty.

Neither increased costs of performance of the terms of this Order, nor changed economic circumstances, nor unavailability of qualified personnel to perform work required by the terms of this Order shall be considered good cause for granting a revision; provided, however, that unavailability of qualified personnel may serve as good cause for granting a schedule revision. If BNSF and Ecology cannot agree that there is good cause for granting a revision, either party may invoke dispute resolution. This Order may only be modified by mutual written agreement, except that the schedule extensions may be granted in writing by Ecology.

VI.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon BNSF's receipt of written notification from Ecology that BNSF has completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VII.

Enforcement

Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

- A. The Attorney General may bring an action to enforce this Order in a state or federal court.
- B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.
- C. In the event BNSF refuses, without sufficient cause, to comply with any term of this Order, BNSF will be liable for:
 - (1) up to three times the amount of any costs incurred by the State of Washington as a result of its refusal to comply;
 - (2) civil penalties of up to \$25,000 per day for each day BNSF refuses to comply; and
- D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under 70.105D.060 RCW.

Effective date of this Order: _____

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

By _____

By _____

Its: _____

Its: Section Supervisor, TCP

Date _____

Date _____

Exhibit A

The Burlington Northern and Santa Fe Railway Company

**Preliminary Basis for Design Report for Barrier
Skykomish, Washington
(May 1, 2001)**

Exhibit B

The Burlington Northern and Santa Fe Railway Company

**Final Basis for Design Report for Barrier
Skykomish, Washington
(to be completed)**

Exhibit C

The Burlington Northern and Santa Fe Railway Company

**Public Participation Plan
Skykomish, Washington
(May 1, 2001)**