

ADAMS COUNTY
FILED

NOV 10 1997

ROBERT V. BLAIR, Clerk
BY _____

SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

BURLINGTON NORTHERN RAILROAD
COMPANY,

Defendant.

No. 97 2 00237 4

CONSENT DECREE
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1 I. INTRODUCTION

2 A. In entering into this Consent Decree (Decree), the
3 mutual objective of the Washington State Department of Ecology
4 (Ecology), and Burlington Northern Railroad Company (BNRR) is to
5 provide for remedial action at a facility where there has been a
6 release or threatened release of hazardous substances. This
7 Decree requires the Defendant to undertake the following
8 remedial action(s):

9 (1) Construct, inspect and maintain an asphalt cap over
10 soil contaminated with total petroleum hydrocarbons (TPH) at the
11 western portion of the Site;

12 (2) Inspect and maintain a clean soil cap over TPH-
13 contaminated soil at the eastern portion of the Site;

14 (3) Maintain a groundwater diversion system;

15 (4) Institute a groundwater monitoring program to ensure
16 continued compliance with cleanup standards; and

17 (5) Record and obtain from an adjacent property owner
18 restrictive covenants for the Site.

19 Ecology has determined that these actions are necessary to
20 protect public health and the environment.

21 B. The Complaint in this action is being filed
22 simultaneously with this Decree. An answer has not been filed,
23 and there has not been a trial on any issue of fact or law in
24 this case. However, the parties wish to resolve the issues
25 raised by Ecology's Complaint. In addition, the parties agree
26 that settlement of these matters without litigation is

1 reasonable and in the public interest and that entry of this
2 Decree is the most appropriate means of resolving these matters.

3 C. In signing this Decree, Defendant agrees to its entry
4 and agrees to be bound by its terms.

5 D. By entering into this Decree, the parties do not
6 intend to discharge nonsettling parties from any liability they
7 may have with respect to matters alleged in the Complaint. The
8 parties retain the right to seek reimbursement, in whole or in
9 part, from any liable persons for sums expended under this
10 Decree.

11 E. This Decree shall not be construed as proof of
12 liability or responsibility for any releases of hazardous
13 substances or cost for remedial action nor an admission of any
14 facts; provided, however, that the Defendant shall not challenge
15 the jurisdiction of Ecology in any proceeding to enforce this
16 Decree.

17 F. The court is fully advised of the reasons for entry of
18 this Decree, and good cause having been shown: IT IS HEREBY
19 ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

20 II. JURISDICTION

21 A. This Court has jurisdiction over the subject matter
22 and over the parties pursuant to chapter 70.105D RCW, the Model
23 Toxics Control Act (MTCA).

24 B. Authority is conferred upon the Washington State
25 Attorney General by RCW 70.105D.040(4)(a) to agree to a
26 settlement with any potentially liable person if, after public

1 notice and hearing, Ecology finds the proposed settlement would
2 lead to a more expeditious cleanup of hazardous substances. RCW
3 70.105D.040(4)(b) requires that such a settlement be entered as
4 a Consent Decree issued by a court of competent jurisdiction.

5 C. Ecology has determined that a release or threatened
6 release of hazardous substances has occurred at the Site, which
7 requires remedial action.

8 D. Ecology has given notice to Defendant, as set forth in
9 RCW 70.105D.020(16), of Ecology's determination that the
10 Defendant is a potentially liable person for the Site and that
11 there has been a release or threatened release of hazardous
12 substances at the Site.

13 E. The actions to be taken pursuant to this Decree are
14 necessary to protect public health, welfare, and the
15 environment.

16 F. Defendant has agreed to undertake the actions
17 specified in this Decree and consents to the entry of this
18 Decree under the MTCA.

19 III. PARTIES BOUND

20 This Decree shall apply to and be binding upon the
21 signatories to this Decree (parties), their successors and
22 assigns. The undersigned representative of each party hereby
23 certifies that he or she is fully authorized to enter into this
24 Decree and to execute and legally bind such party to comply with
25 the Decree. Defendant agrees to undertake all actions required
26 by the terms and conditions of this Decree and not to contest

1 state jurisdiction regarding this Decree. No change in
2 ownership or corporate status shall alter the responsibility of
3 the Defendant under this Decree. Defendant shall provide a copy
4 of this Decree to all agents, contractors and subcontractors
5 retained to perform work required by this Decree and shall
6 ensure that all work undertaken by such contractors and
7 subcontractors will be in compliance with this Decree.

8 IV. DEFINITIONS

9 Except for as specified herein, all definitions in
10 WAC 173-340-200 apply to the terms in this Decree.

11 A. Site: The Site, referred to as the BN-Othello Site,
12 is located in the City of Othello, Adams County, Washington.
13 The Site is more particularly described in Exhibit A to this
14 Decree, which is a diagram and legal description of the Site.
15 The Site is a "facility" under RCW 70.105D.020(4).

16 B. Parties: Refers to the Washington State Department of
17 Ecology and Burlington Northern Railroad Company.

18 C. Defendant(s): Refers to Burlington Northern Railroad
19 Company.

20 D. Consent Decree or Decree: Refers to this Consent
21 Decree and each of the exhibits to the Decree. All exhibits are
22 integral and enforceable parts of this Consent Decree. The
23 terms "Consent Decree" or "Decree" shall include all exhibits to
24 the Consent Decree. In the event of a conflict between an
25 Exhibit and the Decree, the Decree shall prevail.
26

1 V. STATEMENT OF FACTS

2 Ecology makes the following findings of fact without any
3 express or implied admissions by Defendant.

4 1. The Site is part of the Othello railyard, in the
5 western part of the City of Othello, Washington. The Site is
6 bounded on the north, south, and east by commercial and
7 industrial properties. On the west, the site is adjacent to
8 private properties that lie between the Site and the Potholes
9 Canal, an irrigation canal.

10 2. The railyard was built in 1908 by the Chicago,
11 Milwaukee, St. Paul and Pacific Railroad (Chicago Milwaukee) and
12 was used as a refueling and maintenance facility for steam and
13 electric locomotives. During the transition to diesel
14 locomotives in the 1950's, the Site served primarily as a
15 refueling stop.

16 3. BNRR purchased part of the Site from Chicago Milwaukee
17 in 1980 and conducted refueling activities until suspending
18 operations in 1982. BNRR currently owns most of the Site and
19 uses it for grain loading. The Les Schwab Tire Company owns
20 part of the site.

21 4. By letter dated January 9, 1990, Ecology notified BNRR
22 of its status as a "potentially liable person" under RCW
23 70.105D.040(1)(a), after notice and opportunity for comment.

24 5. On February 22, 1991, Ecology and BNRR entered into
25 Agreed Order No. 91TC-E703, under which BNRR conducted a
26 remedial investigation to determine the extent of contamination

1 at the site. This investigation supplemented prior independent
2 investigations performed by BNRR. The Agreed Order also
3 required BNRR to implement an interim remedial action to reduce
4 the risks posed by the contamination on Site. BNRR excavated
5 and recycled approximately 10,370 cubic yards of the most
6 contaminated soil. It also installed a groundwater diversion
7 and drainage system to divert clean groundwater before it
8 reaches the Site and to capture any groundwater that becomes
9 contaminated. The captured groundwater is discharged to the
10 city sewer system.

11 6. The Agreed Order was amended, effective August 2,
12 1993. Under this amendment, BNRR completed the remedial
13 investigation to determine the extent of the contamination
14 remaining after the interim action. BNRR also prepared a
15 feasibility study examining technologies for remediation.
16 Ecology accepted the final Remedial Investigation/Feasibility
17 Study Report on August 15, 1994, after an opportunity for public
18 notice and comment.

19 7. The remedial investigations indicate that soils at the
20 Site contain petroleum hydrocarbons at concentrations in excess
21 of Method A cleanup levels established by Ecology under the
22 MTCA. Contaminated surface soils exist west of the area
23 previously excavated, and exist beneath 3 to 7 feet of clean
24 soil in the area east of the excavation.

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1 8. Groundwater monitoring performed after the interim
2 remedial action indicates that groundwater on Site is not
3 contaminated above MTCA cleanup levels.

4 VI. WORK TO BE PERFORMED

5 This Decree contains a program designed to protect public
6 health, welfare and the environment from the known release of
7 hazardous substances or contaminants at, on, or from the Site,
8 and to implement the Cleanup Action Plan (Exhibit B).

9 1. BNRR shall perform all tasks and submit to Ecology all
10 deliverables set forth in the Scope of Work and Schedule,
11 attached as Exhibit C.

12 2. The Engineering Design Report, Construction Plans and
13 Specifications, and Operations and Maintenance Plan are subject
14 to review and approval by Ecology before BNRR performs work
15 under those plans. BNRR shall incorporate Ecology's comments on
16 the drafts into the final versions of these documents. Upon
17 approval, these documents shall become integral and enforceable
18 parts of this Decree, and shall be complied with by BNRR.

19 3. Within thirty (30) days of entry of this Decree, BNRR
20 shall record with the Adams County Auditor's Office the
21 Restrictive Covenant attached to this Decree as Exhibit E and
22 provide Ecology with proof of such recording.

23 4. BNRR shall use best efforts to obtain from the Les
24 Schwab Tire Company a Restrictive Covenant for the portion of
25 the Site owned by Les Schwab that has been recorded with the
26 Adams County Auditor's Office. This Restrictive Covenant shall

1 be the same as the Restrictive Covenant attached to this Decree
2 as Exhibit E, except that Section 3 of Exhibit E need not be
3 included. Within sixty (60) days of entry of this Decree, BNRR
4 shall provide Ecology with either a copy of the recorded
5 Restrictive Covenant or with written notification that BNRR has
6 used best efforts but was unable to obtain a Restrictive
7 Covenant from Les Schwab.

8 5. In the event BNRR does not obtain a recorded
9 Restrictive Covenant pursuant to paragraph 4 above, BNRR shall
10 remediate all TPH-contaminated soil that exceeds cleanup levels
11 on the portion of the Site owned by Les Schwab Tire Company, as
12 follows:

13 a. Within ninety (90) days of entry of the Decree, BNRR
14 shall submit to Ecology a draft Focused Feasibility Study that
15 evaluates alternatives for remediation of the soil and
16 appropriate TPH cleanup levels. Any alternative that allows
17 contaminated soil above cleanup levels to remain on the Les
18 Schwab property shall not be proposed. BNRR may incorporate by
19 reference, where appropriate, pertinent portions of the existing
20 Feasibility Study completed for the Site. BNRR may propose in
21 the Focused Feasibility Study TPH cleanup levels which are
22 consistent with current agency rules and policy. During
23 preparation of the Focused Feasibility Study, BNRR shall use
24 best efforts to obtain access to the Les Schwab property for
25 purposes of conducting the remedial actions, and shall notify
26 Ecology if BNRR is unable to obtain access from Les Schwab.

1 b. Within thirty (30) days of receipt of Ecology's
2 comments on the draft Focused Feasibility Study, BNRR shall
3 submit to Ecology a final Focused Feasibility Study
4 incorporating Ecology's comments.

5 c. Ecology shall select the cleanup action for the soil,
6 and shall notify BNRR in writing. Within thirty (30) days of
7 receipt of such notice, BNRR shall submit to Ecology a draft
8 Amendment to the Cleanup Action Plan that includes a schedule
9 for completion of the work.

10 d. Within thirty (30) days of receipt of Ecology's
11 comments on the draft Amendment to the Cleanup Action Plan, BNRR
12 shall submit a final draft Amendment to the Cleanup Action Plan
13 that incorporates Ecology's comments.

14 e. Ecology shall provide public notice of the focused
15 feasibility study and the final draft Amendment to the Cleanup
16 Action Plan in accordance with chapter 173-340 WAC. If Ecology
17 determines any changes are necessary to the Amendment to the
18 Cleanup Action Plan based on public comment, it will notify
19 BNRR. Within thirty (30) days of receipt of such notification,
20 BNRR shall submit to Ecology a final Amendment to the Cleanup
21 Action Plan that incorporates any changes requested by Ecology.
22 Ecology shall notify BNRR in writing of its approval of the
23 final Amendment to the Cleanup Action Plan.

24 f. Upon approval by Ecology, the Amendment to the Cleanup
25 Action Plan shall be submitted to the Court for entry as an
26 amendment to the Consent Decree. Upon entry by the Court of the

1 amendment to the Decree, BNRR shall implement the Amendment to
2 the Cleanup Action Plan in accordance with the schedule in the
3 plan.

4 5. BNRR agrees not to perform any remedial actions outside
5 the scope of this Decree unless the parties agree to amend the
6 scope of work to cover these actions. All work conducted under
7 this Decree shall be done in accordance with ch. 173-340 WAC
8 unless otherwise provided herein.

9 VII. DESIGNATED PROJECT COORDINATORS

10 The project coordinator for Ecology is:

11 Teresita Bala
12 Toxics Cleanup Program
13 Department of Ecology
14 4601 N. Monroe, Suite 201
15 Spokane, WA 99205

16 The project coordinator for Defendant is:

17 Hans Stroo
18 Remediation Technologies, Inc.
19 1011 S.W. Klickitat Way, Suite 207
20 Seattle, WA 98134

21 Each project coordinator shall be responsible for
22 overseeing the implementation of this Decree. The Ecology
23 project coordinator will be Ecology's designated representative
24 at the Site. To the maximum extent possible, communications
25 between Ecology and the Defendant and all documents, including
26 reports, approvals, and other correspondence concerning the
activities performed pursuant to the terms and conditions of
this Decree, shall be directed through the project coordinators.
The project coordinators may designate, in writing, working

1 level staff contacts for all or portions of the implementation
2 of the remedial work required by this Decree. The project
3 coordinators may agree to minor modifications to the work to be
4 performed without formal amendments to this Decree. Minor
5 modifications will be documented in writing by Ecology.

6 Any party may change its respective project coordinator.
7 Written notification shall be given to the other parties at
8 least ten (10) calendar days prior to the change.

9 VIII. PERFORMANCE

10 All work performed pursuant to this Decree shall be under
11 the direction and supervision, as necessary, of a professional
12 engineer or hydrogeologist, or equivalent, with experience and
13 expertise in hazardous waste site investigation and cleanup.
14 Any construction work must be under the supervision of a
15 professional engineer. Defendant shall notify Ecology in
16 writing as to the identity of such engineer(s) or
17 hydrogeologist(s), or others, and of any contractors and
18 subcontractors to be used in carrying out the terms of this
19 Decree, in advance of their involvement at the Site.

20 IX. ACCESS

21 Ecology or any Ecology authorized representatives shall
22 have the authority to enter and freely move about all property
23 at the Site at all reasonable times for the purposes of, inter
24 alia: inspecting records, operation logs, and contracts related
25 to the work being performed pursuant to this Decree; reviewing
26 Defendant's progress in carrying out the terms of this Decree;

1 conducting such tests or collecting such samples as Ecology may
2 deem necessary; using a camera, sound recording, or other
3 documentary type equipment to record work done pursuant to this
4 Decree; and verifying the data submitted to Ecology by the
5 Defendant. All parties with access to the Site pursuant to this
6 paragraph shall comply with approved health and safety plans.

7 X. SAMPLING, DATA REPORTING, AND AVAILABILITY

8 With respect to the implementation of this Decree,
9 Defendant shall make the results of all sampling, laboratory
10 reports, and/or test results generated by it, or on its behalf,
11 available to Ecology and shall submit these results in
12 accordance with Section XI of this Decree.

13 If requested by Ecology, Defendant shall allow split or
14 duplicate samples to be taken by Ecology and/or its authorized
15 representatives of any samples collected by Defendant pursuant
16 to the implementation of this Decree. Defendant shall notify
17 Ecology seven (7) days in advance of any sample collection or
18 work activity at the Site. Ecology shall, upon request, allow
19 split or duplicate samples to be taken by Defendant or its
20 authorized representatives of any samples collected by Ecology
21 pursuant to the implementation of this Decree, provided it does
22 not interfere with the Department's sampling. Without
23 limitation on Ecology's rights under Section IX, Ecology shall
24 endeavor to notify Defendant prior to any sample collection
25 activity.

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XI. PROGRESS REPORTS

Defendant shall submit to Ecology written progress reports which describe the actions taken during the previous reporting period to implement the requirements of this Decree. The progress reports shall include the following:

A. A list of on-site activities that have taken place during the reporting period;

B. Detailed description of any deviations from required tasks not otherwise documented in project plans or amendment requests;

C. Description of all deviations from the schedule (Exhibit C) during the current reporting period and any planned deviations in the upcoming reporting period;

D. For any deviations in schedule, a plan for recovering lost time and maintaining compliance with the schedule;

E. All raw data (including laboratory analysis) received by the Defendant during the past reporting period and an identification of the source of the sample; and

F. A list of deliverables for the upcoming reporting period if different from the schedule.

Progress reports shall be submitted monthly from the effective date of this Decree until three (3) months after construction of the cleanup action is completed. Thereafter, Defendant shall submit progress reports annually. If Ecology determines that the contingency plan for groundwater diversion (slurry wall) referenced in the cleanup action plan is

1 necessary, Defendant shall submit monthly reports from the time
2 Ecology makes its determination until three (3) months after
3 construction is complete. Thereafter, Defendant shall submit
4 progress reports annually.

5 All progress reports shall be submitted by the tenth (10th)
6 day of the month in which they are due after the effective date
7 of this Decree. Progress reports shall be sent by facsimile and
8 first class U.S. mail. Any other documents submitted pursuant
9 to this Decree shall be sent by certified mail, return receipt
10 requested, to Ecology's project coordinator, unless otherwise
11 specified.

12 XII. RETENTION OF RECORDS

13 Defendant shall preserve, during the pendency of this
14 Decree and for ten (10) years from the date this Decree is no
15 longer in effect as provided in Section XXV, all records,
16 reports, documents, and underlying data in its possession
17 relevant to the implementation of this Decree, and shall insert
18 in contracts with project contractors and subcontractors a
19 similar record retention requirement. Upon request of Ecology,
20 Defendant shall make all non-archived records available to
21 Ecology and allow access for review. All archived records shall
22 be made available to Ecology within a reasonable period of time.

23 XIII. TRANSFER OF INTEREST IN PROPERTY

24 No voluntary conveyance or relinquishment of title,
25 easement, leasehold, or other interest held by BNRR in any
26 portion of the Site shall be consummated without provision for

1 continued operation and maintenance of any containment system,
2 treatment system, and monitoring system installed or implemented
3 pursuant to this Decree.

4 Prior to transfer or involuntary conveyance or
5 relinquishment of any legal or equitable interest in all or any
6 portion of the property, and during the effective period of this
7 Decree, Defendant shall serve a copy of this Decree upon any
8 prospective purchaser, lessee, transferee, assignee, or other
9 successor in interest of the property; and, at least thirty (30)
10 days prior to any transfer or involuntary conveyance or
11 relinquishment, Defendant shall notify Ecology of said
12 contemplated transfer or conveyance or relinquishment.

13 XIV. RESOLUTION OF DISPUTES

14 A. In the event a dispute arises as to an approval,
15 disapproval, proposed modification or other decision or action
16 by Ecology's project coordinator, the parties shall utilize the
17 dispute resolution procedure set forth below.

18 (1) Upon receipt of the Ecology project coordinator's
19 decision, the Defendant has fourteen (14) days within which to
20 notify Ecology's project coordinator of its objection to the
21 decision.

22 (2) The parties' project coordinators shall then confer in
23 an effort to resolve the dispute. If the project coordinators
24 cannot resolve the dispute within fourteen (14) days, Ecology's
25 project coordinator shall issue a written decision.

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1 (3) Defendant may then request Ecology management review
2 of the decision. This request shall be submitted in writing to
3 the Toxics Cleanup Program Manager within seven (7) days of
4 receipt of Ecology's project coordinator's decision.

5 (4) Ecology's program manager shall conduct a review of
6 the dispute and shall issue a written decision regarding the
7 dispute within thirty (30) days of the Defendant's request for
8 review. The program manager's decision shall be Ecology's final
9 decision on the disputed matter.

10 B. If Ecology's final written decision is unacceptable to
11 Defendant, Defendant has the right to submit the dispute to the
12 court for resolution. The parties agree that one judge should
13 retain jurisdiction over this case and shall, as necessary,
14 resolve any dispute arising under this Decree. In the event
15 Defendant presents an issue to the court for review, the court
16 shall review the action or decision of Ecology on the basis of
17 whether such action or decision was arbitrary and capricious and
18 render a decision based on such standard of review.

19 C. The parties agree to only utilize the dispute
20 resolution process in good faith and agree to expedite, to the
21 extent possible, the dispute resolution process whenever it is
22 used. Where either party utilizes the dispute resolution
23 process in bad faith or for purposes of delay, the other party
24 may seek sanctions.

25 Implementation of these dispute resolution procedures shall
26 not provide a basis for delay of any activities required in this

1 Decree, unless Ecology agrees in writing to a schedule extension
2 or the court so orders.

3 XV. AMENDMENT OF CONSENT DECREE

4 This Decree may only be amended by a written stipulation
5 among the parties to this Decree that is entered by the court or
6 by order of the court. Such amendment shall become effective
7 upon entry by the court. Agreement to amend shall not be
8 unreasonably withheld by any party to the Decree.

9 Defendant shall submit any request for an amendment to
10 Ecology for approval. Ecology shall indicate its approval or
11 disapproval in a timely manner after the request for amendment
12 is received. If the amendment to the Decree is substantial,
13 Ecology will provide public notice and opportunity for comment.
14 Reasons for the disapproval shall be stated in writing. If
15 Ecology does not agree to any proposed amendment, the
16 disagreement may be addressed through the dispute resolution
17 procedures described in Section XIV of this Decree.

18 XVI. EXTENSION OF SCHEDULE

19 A. An extension of schedule shall be granted only when a
20 request for an extension is submitted in a timely fashion,
21 generally at least thirty (30) days prior to expiration of the
22 deadline for which the extension is requested, and good cause
23 exists for granting the extension. All extensions shall be
24 requested in writing. The request shall specify the reason(s)
25 the extension is needed.

1 An extension shall only be granted for such period of time
2 as Ecology determines is reasonable under the circumstances. A
3 requested extension shall not be effective until approved by
4 Ecology or the court. Ecology shall act upon any written
5 request for extension in a timely fashion. It shall not be
6 necessary to formally amend this Decree pursuant to Section XV
7 when a schedule extension is granted.

8 B. The burden shall be on the Defendant to demonstrate to
9 the satisfaction of Ecology that the request for such extension
10 has been submitted in a timely fashion and that good cause
11 exists for granting the extension. Good cause includes, but is
12 not limited to, the following:

13 (1) Circumstances beyond the reasonable control and
14 despite the due diligence of Defendant, including delays caused
15 by unrelated third parties or Ecology, such as (but not limited
16 to) delays by Ecology in reviewing, approving, or modifying
17 documents submitted by Defendant; or

18 (2) Acts of God, including fire, flood, blizzard, extreme
19 temperatures, storm, or other unavoidable casualty; or

20 (3) Endangerment as described in Section XVII.

21 However, neither increased costs of performance of the
22 terms of the Decree nor changed economic circumstances shall be
23 considered circumstances beyond the reasonable control of
24 Defendant.
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1 C. Ecology may extend the schedule for a period not to
2 exceed ninety (90) days, except where an extension is needed as
3 a result of:

4 (1) Delays in the issuance of a necessary permit which was
5 applied for in a timely manner; or

6 (2) Other circumstances deemed exceptional or
7 extraordinary by Ecology; or

8 (3) Endangerment as described in Section XVI.

9 Ecology shall give Defendant written notification in a
10 timely fashion of any extensions granted pursuant to this
11 Decree.

12 XVII. ENDANGERMENT

13 In the event Ecology determines that activities
14 implementing or in noncompliance with this Decree, or any other
15 circumstances or activities, are creating or have the potential
16 to create a danger to the health or welfare of the people on the
17 Site or in the surrounding area or to the environment, Ecology
18 may order Defendant to stop further implementation of this
19 Decree for such period of time as needed to abate the danger, or
20 may petition the court for an order as appropriate. During any
21 stoppage of work under this section, the obligations of
22 Defendant with respect to the work under this Decree which is
23 ordered to be stopped shall be suspended and the time periods
24 for performance of that work, as well as the time period for any
25 other work dependent upon the work which is stopped, shall be
26 extended, pursuant to Section XVI of this Decree, for such

1 period of time as Ecology determines is reasonable under the
2 circumstances.

3 In the event Defendant determines that activities
4 undertaken in furtherance of this Decree or any other
5 circumstances or activities are creating an endangerment to the
6 people on the Site or in the surrounding area or to the
7 environment, Defendant may stop implementation of this Decree
8 for such period of time necessary for Ecology to evaluate the
9 situation and determine whether Defendant should proceed with
10 implementation of the Decree or whether the work stoppage should
11 be continued until the danger is abated. Defendant shall notify
12 Ecology's project coordinator as soon as possible, but no later
13 than twenty-four (24) hours after such stoppage of work, and
14 thereafter provide Ecology with documentation of the basis for
15 the work stoppage. If Ecology disagrees with the Defendant's
16 determination, it may order Defendant to resume implementation
17 of this Decree. If Ecology concurs with the work stoppage, the
18 Defendant's obligations shall be suspended and the time period
19 for performance of that work, as well as the time period for any
20 other work dependent upon the work which was stopped, shall be
21 extended, pursuant to Section XVI of this Decree, for such
22 period of time as Ecology determines is reasonable under the
23 circumstances. Any disagreements pursuant to this section shall
24 be resolved through the dispute resolution procedures in Section
25 XIV.

XVIII. OTHER ACTIONS

Ecology reserves its rights to institute remedial action(s) at the Site and subsequently pursue cost recovery, and Ecology reserves its rights to issue orders and/or penalties or take any other enforcement action pursuant to available statutory authority under the following circumstances:

(1) Where Defendant fails, after notice, to comply with any requirement of this Decree;

(2) In the event or upon the discovery of a release or threatened release not addressed by this Decree;

(3) Upon Ecology's determination that action beyond the terms of this Decree is necessary to abate an emergency situation which threatens public health or welfare or the environment; or

(4) Upon the occurrence or discovery of a situation beyond the scope of this Decree as to which Ecology would be empowered to perform any remedial action or to issue an order and/or penalty, or to take any other enforcement action. This Decree is limited in scope to the geographic Site described in Exhibit A and to those contaminants which Ecology knows to be at the Site when this Decree is entered.

Ecology reserves the right to take any enforcement action whatsoever, including a cost recovery action, against potentially liable persons not party to this Decree.

1 XIX. INDEMNIFICATION

2 Defendant agrees to indemnify and save and hold the State
3 of Washington, its employees, and agents harmless from any and
4 all claims or causes of action for death or injuries to persons
5 or for loss or damage to property arising from or on account of
6 acts or omissions of Defendant, its officers, employees, agents,
7 or contractors in entering into and implementing this Decree.
8 However, the Defendant shall not indemnify the state of
9 Washington nor save nor hold its employees and agents harmless
10 from any claims or causes of action arising out of the negligent
11 acts or omissions of the state of Washington, or the employees
12 or agents of the state, in implementing the activities pursuant
13 to this Decree.

14 XX. COMPLIANCE WITH APPLICABLE LAWS

15 A. All actions carried out by Defendant pursuant to this
16 Decree shall be done in accordance with all applicable federal,
17 state, and local requirements, including requirements to obtain
18 necessary permits, except as provided in paragraph B of this
19 section.

20 B. Pursuant to RCW 70.105D.090(1), the substantive
21 requirements of chapters 70.94, 70.95, 75.20, and 90.58 RCW and
22 of any laws requiring or authorizing local government permits or
23 approvals for the remedial action under this Decree that are
24 known to be applicable at the time of entry of the Decree have
25 been included in Exhibit B, the Cleanup Action Plan, and are
26 binding and enforceable requirements of the Decree.

1 Defendant has a continuing obligation to determine whether
2 additional permits or approvals addressed in RCW 70.105D.090(1)
3 would otherwise be required for the remedial action under this
4 Decree. In the event either Defendant or Ecology determines
5 that additional permits or approvals addressed in RCW
6 70.105D.090(1) would otherwise be required for the remedial
7 action under this Decree, it shall promptly notify the other
8 party of this determination. Ecology shall determine whether
9 Ecology or Defendant shall be responsible to contact the
10 appropriate state and/or local agencies. If Ecology so
11 requires, Defendant shall promptly consult with the appropriate
12 state and/or local agencies and provide Ecology with written
13 documentation from those agencies of the substantive
14 requirements those agencies believe are applicable to the
15 remedial action. Ecology shall make the final determination on
16 the additional substantive requirements that must be met by
17 Defendant and how Defendant must meet those requirements. Once
18 established by Ecology, the additional requirements shall be
19 enforceable requirements of this Decree. Defendant shall not
20 begin or continue remedial action potentially subject to the
21 additional requirements until Ecology makes its final
22 determination.

23 Ecology shall ensure that notice and opportunity to comment
24 is provided to the public and appropriate agencies prior to
25 establishing the substantive requirements under this section.
26

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

10 XXI. REMEDIAL AND INVESTIGATIVE COSTS

11 The Defendant agrees to pay costs incurred by Ecology
12 pursuant to this Decree. These costs shall include work
13 performed by Ecology or its contractors for or on the Site under
14 ch. 70.105D RCW, both prior to and subsequent to the issuance of
15 this Decree, for investigations, remedial actions, and Decree
16 preparation, negotiations, oversight and administration.
17 Ecology costs shall include costs of direct activities and
18 support costs of direct activities as defined in WAC 173-340-
19 550(2). The Defendant agrees to pay the required amount within
20 ninety (90) days of receiving from Ecology an itemized statement
21 of costs that includes a summary of costs incurred, an
22 identification of involved staff, and the amount of time spent
23 by involved staff members on the project. A general statement
24 of work performed will be provided upon request. Itemized
25 statements shall be prepared quarterly. Failure to pay
26

1 Ecology's costs within ninety (90) days of receipt of the
2 itemized statement will result in interest charges.

3 XXII. IMPLEMENTATION OF REMEDIAL ACTION

4 If Ecology determines that Defendant has failed without
5 good cause to implement the remedial action, Ecology may, after
6 notice to Defendant, perform any or all portions of the remedial
7 action that remain incomplete. If Ecology performs all or
8 portions of the remedial action because of the Defendant's
9 failure to comply with its obligations under this Decree,
10 Defendant shall reimburse Ecology for the costs of doing such
11 work in accordance with Section XXI, provided that Defendant is
12 not obligated under this section to reimburse Ecology for costs
13 incurred for work inconsistent with or beyond the scope of this
14 Decree.

15 XXIII. FIVE YEAR REVIEW

16 As remedial action, including ground water monitoring,
17 continues at the Site, the parties agree to review the progress
18 of remedial action at the Site, and to review the data
19 accumulated as a result of site monitoring as often as is
20 necessary and appropriate under the circumstances. At least
21 every five years the parties shall meet to discuss the status of
22 the Site and the need, if any, of further remedial action at the
23 Site. Ecology reserves the right to require further remedial
24 action at the Site under appropriate circumstances. This
25 provision shall remain in effect for the duration of the Decree.
26

1 XXIV. PUBLIC PARTICIPATION

2 Ecology shall maintain the responsibility for public
3 participation at the Site. However, Defendant shall cooperate
4 with Ecology and, if agreed to by Ecology, shall:

5 A. Prepare drafts of public notices and fact sheets at
6 important stages of the remedial action, such as the submission
7 of work plans and engineering design reports. Ecology will
8 finalize (including editing if necessary) and distribute such
9 fact sheets and prepare and distribute public notices of
10 Ecology's presentations and meetings;

11 B. Notify Ecology's project coordinator prior to the
12 preparation of all press releases and fact sheets, and before
13 major meetings with the interested public and local governments.
14 Likewise, Ecology shall notify Defendant prior to the issuance
15 of all press releases and fact sheets, and before major meetings
16 with the interested public and local governments;

17 C. Participate in public presentations on the progress of
18 the remedial action at the Site. Participation may be through
19 attendance at public meetings to assist in answering questions,
20 or as a presenter;

21 D. In cooperation with Ecology, arrange and/or continue
22 information repositories to be located at the Othello Public
23 Library, 101 E. Main St., Othello, Washington; and Ecology's
24 Eastern Regional Office, at 4601 North Monroe, Spokane,
25 Washington. At a minimum, copies of all public notices, fact
26 sheets, and press releases; all quality assured ground water,

1 surface water, soil sediment, and air monitoring data; remedial
2 action plans, supplemental remedial planning documents, and all
3 other similar documents relating to performance of the remedial
4 action required by this Decree shall be promptly placed in these
5 repositories.

6 XXV. DURATION OF DECREE

7 This Decree shall remain in effect and the remedial program
8 described in the Decree shall be maintained and continued until
9 the Defendant has received written notification from Ecology
10 that the requirements of this Decree have been satisfactorily
11 completed.

12 XXVI. CLAIMS AGAINST THE STATE

13 Defendant hereby agrees that it will not seek to recover
14 any costs accrued in implementing the remedial action required
15 by this Decree from the State of Washington or any of its
16 agencies; and further, that the Defendant will make no claim
17 against the State Toxics Control Account or any Local Toxics
18 Control Account for any costs incurred in implementing this
19 Decree. Except as provided above, however, Defendant expressly
20 reserves its right to seek to recover any costs incurred in
21 implementing this Decree from any other potentially liable
22 person.

23 XXVII. COVENANT NOT TO SUE

24 In consideration of BNRR's compliance with the terms and
25 conditions of this Decree, the State of Washington covenants not
26 to institute legal, equitable, or administrative actions against

1 BNRR under MTCA regarding matters within the scope of this
2 Decree.

3 This covenant is strictly limited in its application to the
4 Site specifically described in Exhibit A and to those hazardous
5 substances which Ecology knows to be located at the Site as of
6 the entry of this Decree. This covenant is not applicable to
7 any other hazardous substance or area and the State retains all
8 of its authority relative to such substances and areas.

9 A. Reopeners. In the following circumstances, the State of
10 Washington may exercise its full legal authority to address
11 releases and/or threatened releases of hazardous substances at
12 the Site notwithstanding the Covenant Not to Sue set forth
13 above:

14 1. In the event Defendant fails to comply with the terms
15 and conditions of this Consent Decree, including all exhibits,
16 and Defendant, after written notice of noncompliance, fails to
17 come into compliance;

18 2. In the event new information becomes available
19 regarding factors previously unknown to Ecology, including the
20 nature or quantity of hazardous substances at the Site, and
21 Ecology determines that these factors present a previously
22 unknown threat to human health or the environment.

23 3. In the event the results of groundwater monitoring
24 indicate that cleanup standards are being exceeded;

25 4. In the event conditions at the Site cause an
26 endangerment to human health or the environment.

1 B. Applicability. The Covenant Not to Sue set forth
2 above shall have no applicability whatsoever to:

- 3 1. Criminal liability;
- 4 2. Any Ecology action against potentially liable persons
5 not a party to this Decree;
- 6 3. Liability for damages to natural resources.

7 XXVIII. CONTRIBUTION PROTECTION

8 This Consent Decree is a settlement entered into pursuant
9 to RCW 70.105D.040(4). A party who has resolved its liability
10 to the State under RCW 70.105D.040(4) shall not be liable for
11 claims for contribution regarding matters addressed in the
12 settlement.

13 XXIX. EFFECTIVE DATE

14 This Decree is effective upon the date it is entered by the
15 court.

16 XXX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT

17 This Decree has been the subject of public notice and
18 comment under RCW 70.105D.040(4)(a). As a result of this
19 process, Ecology has found that this Decree will lead to a more
20 expeditious cleanup of hazardous substances at the Site.

21 If the court withholds or withdraws its consent to this
22 Decree, it shall be null and void at the option of any party,
23 and the accompanying Complaint shall be dismissed without costs
24 and without prejudice. In such an event, no party shall be
25 bound by the requirements of this Decree.
26

1 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

2
3 By: Mary E. Burg 11.6.97
4 MARY BURG Date
5 Program Manager
6 Toxics Cleanup Program

By: Kathryn L. Gerla 11.5.97
KATHRYN L. GERLA Date
Assistant Attorney General
WSBA #17498

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1 BURLINGTON NORTHERN
2 RAILROAD COMPANY

3 By: Mark P. Hally
4 10-4-96 Date

5 Asst Vice President
6 Environmental and
7 Hazardous Materials

DATED this 10 day of Nov, 1997

By: G. S. T. M. 10/4/96
Date

Attorney for Defendant
WSBA # 18357

8 J. RICHARD W. MILLER
9 JUDGE
10 Adams County Superior Court

OTHELLO RAILYARD
LEGAL DESCRIPTION
OTHELLO, WASHINGTON

BNRR Property

THAT PORTION OF THE NORTHEAST QUARTER OF SECTION 4, TOWNSHIP 15 NORTH, RANGE 29 EAST, W.M., ADAMS COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Commencing at the southeast corner of the Northeast Quarter of Section 4, thence northerly along the easterly line of said section a distance of 847.40 feet; thence westerly measured at a right angle a distance of 67.00 feet to THE TRUE POINT OF BEGINNING; thence continuing westerly to a line lying 200.00 feet westerly and parallel with the as-built centerline of the Chicago Milwaukee St. Paul and Pacific Railroad; thence northerly along said parallel line to the south margin of Main Street; thence easterly along said margin to the west margin of Railroad Avenue; thence southerly along said margin to the southerly margin of Larch Street, said margin also being the northerly line of Block 26 prolonged westerly; thence easterly along said margin to a line being 167.00 feet more or less, westerly and parallel with east line of said Section, said point also being the northeast corner of Lot 6, Block 26, town of Othello, Washington; thence southerly along said parallel line to the southwest corner of Lot 5 of said Block 26, thence easterly along the south line of said Lot 5 to the westerly margin of Broadway Avenue; thence southerly along said margin to the northeast corner of Lot 1 of Block 35; thence westerly along the north line of said Lot 1 to the northwest corner of said Lot 1; thence southerly along a line which lies 167.00 feet westerly of and parallel with the east line of said Section 4, to the southwest corner of Lot 5 of said Block 35, town of Othello, Washington; thence along the south line of said lot to the west margin of Broadway Avenue; said margin lying 67.00 feet westerly and perpendicular to the east line of said section; thence southerly along said margin to the TRUE POINT OF BEGINNING.

Les Schwab Property

THAT PORTION OF THE NORTHEAST QUARTER OF SECTION 4, TOWNSHIP 15 NORTH, RANGE 29 EAST, W.M., ADAMS COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

Lots 1, 2, 3, 4 and 5 of Block 35, town of Othello, Washington

A copy of Exhibit B the Cleanup Action Plan has been intentional left out of your copy as Ecology understands you already have a copy of the plan.