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BY ROBERT V. BLAIR, Clerk

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SUPERIOR COURT OF WASHINGTON FOR ADAMS COUNTY

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

THE BURLINGTON NORTHERN &
SANTA FE RAILWAY COMPANY,

Defendant.

No. 97-2-00237-4

**FIRST AMENDED
CONSENT DECREE
(BN-OTHELLO SITE)**

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1 I. INTRODUCTION

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

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

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

11 (3) Maintain a groundwater diversion system;

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

14 (5) Record and obtain a restrictive covenant for the Site.

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

17 B. The Complaint in this action is being filed simultaneously with this Decree. An
18 answer has not been filed, and there has not been a trial on any issue of fact or law in this case.
19 However, the parties wish to resolve the issues raised by Ecology's Complaint. In addition, the
20 parties agree that settlement of these matters without litigation is reasonable and in the public
21 interest and that entry of this Decree is the most appropriate means of resolving these matters.

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

24 D. By entering into this Decree, the parties do not intend to discharge nonsettling
25 parties from any liability they may have with respect to matters alleged in the Complaint. The
26

1 parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
2 sums expended under this Decree.

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

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

10 II. JURISDICTION

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

13 B. Authority is conferred upon the Washington State Attorney General by RCW
14 70.105D.040(4)(a) to agree to a settlement with any potentially liable person if, after public
15 notice and hearing, Ecology finds the proposed settlement would lead to a more expeditious
16 cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that such a settlement be
17 entered as a Consent Decree issued by a court of competent jurisdiction.

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

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

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

25 F. Defendant has agreed to undertake the actions specified in this Decree and
26 consents to the entry of this Decree under the MTCA.

1 III. PARTIES BOUND

2 This Decree shall apply to and be binding upon the signatories to this Decree (parties),
3 their successors and assigns. The undersigned representative of each party hereby certifies that
4 he or she is fully authorized to enter into this Decree and to execute and legally bind such party to
5 comply with the Decree. Defendant agrees to undertake all actions required by the terms and
6 conditions of this Decree and not to contest state jurisdiction regarding this Decree. No change
7 in ownership or corporate status shall alter the responsibility of the Defendant under this Decree.
8 Defendant shall provide a copy of this Decree to all agents, contractors and subcontractors
9 retained to perform work required by this Decree and shall ensure that all work undertaken by
10 such contractors and subcontractors will be in compliance with this Decree.

11 IV. DEFINITIONS

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

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

18 B. Parties: Refers to the Washington State Department of Ecology and The
19 Burlington Northern & Santa Fe Railway Company.

20 C. Defendant(s): Refers to the Burlington Northern & Santa Fe Railway Company.

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

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V. STATEMENT OF FACTS

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

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

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

3. BNSF purchased part of the Site from Chicago Milwaukee in 1980 and conducted refueling activities until suspending operations in 1982. BNSF currently owns the Site and uses it for grain loading.

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

5. On February 22, 1991, Ecology and BNSF entered into Agreed Order No. 91TC-E703, under which BNSF conducted a remedial investigation to determine the extent of contamination at the site. This investigation supplemented prior independent investigations performed by BNSF. The Agreed Order also required BNSF to implement an interim remedial action to reduce the risks posed by the contamination on Site. BNSF excavated and recycled approximately 10,370 cubic yards of the most contaminated soil. It also installed a groundwater diversion and drainage system to divert clean groundwater before it reaches the Site and to capture any groundwater that becomes contaminated. The captured groundwater is discharged to the city sewer system.

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

5 VII. DESIGNATED PROJECT COORDINATORS

6 The project coordinator for Ecology is:

7 Teresita Bala
8 Toxics Cleanup Program
9 Department of Ecology
4601 N. Monroe, Suite 201
Spokane, WA 99205

10
11 The project coordinator for Defendant is:

12 Rich Truax
13 ThermoRetec Corporation
1011 S.W. Klickitat Way, Suite 207
14 Seattle, WA 98134

15 Each project coordinator shall be responsible for overseeing the implementation of this
16 Decree. The Ecology project coordinator will be Ecology's designated representative at the Site.
17 To the maximum extent possible, communications between Ecology and the Defendant and all
18 documents, including reports, approvals, and other correspondence concerning the activities
19 performed pursuant to the terms and conditions of this Decree, shall be directed through the
20 project coordinators. The project coordinators may designate, in writing, working level staff
21 contacts for all or portions of the implementation of the remedial work required by this Decree.
22 The project coordinators may agree to minor modifications to the work to be performed without
23 formal amendments to this Decree. Minor modifications will be documented in writing by
24 Ecology.

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

1 VIII. PERFORMANCE

2 All work performed pursuant to this Decree shall be under the direction and supervision,
3 as necessary, of a professional engineer or hydrogeologist, or equivalent, with experience and
4 expertise in hazardous waste site investigation and cleanup. Any construction work must be
5 under the supervision of a professional engineer. Defendant shall notify Ecology in writing as to
6 the identity of such engineer(s) or hydrogeologist(s), or others, and of any contractors and
7 subcontractors to be used in carrying out the terms of this Decree, in advance of their
8 involvement at the Site.

9 IX. ACCESS

10 Ecology or any Ecology authorized representatives shall have the authority to enter and
11 freely move about all property at the Site at all reasonable times for the purposes of, inter alia:
12 inspecting records, operation logs, and contracts related to the work being performed pursuant to
13 this Decree; reviewing Defendant's progress in carrying out the terms of this Decree; conducting
14 such tests or collecting such samples as Ecology may deem necessary; using a camera, sound
15 recording, or other documentary type equipment to record work done pursuant to this Decree;
16 and verifying the data submitted to Ecology by the Defendant. All parties with access to the Site
17 pursuant to this paragraph shall comply with approved health and safety plans.

18 X. SAMPLING, DATA REPORTING, AND AVAILABILITY

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

22 If requested by Ecology, Defendant shall allow split or duplicate samples to be taken by
23 Ecology and/or its authorized representatives of any samples collected by Defendant pursuant to
24 the implementation of this Decree. Defendant shall notify Ecology seven (7) days in advance of
25 any sample collection or work activity at the Site. Ecology shall, upon request, allow split or
26 duplicate samples to be taken by Defendant or its authorized representatives of any samples

1 collected by Ecology pursuant to the implementation of this Decree, provided it does not
2 interfere with the Department's sampling. Without limitation on Ecology's rights under Section
3 IX, Ecology shall endeavor to notify Defendant prior to any sample collection activity.

4 XI. PROGRESS REPORTS

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

- 8 A. A list of on-site activities that have taken place during the reporting period;
- 9 B. Detailed description of any deviations from required tasks not otherwise
10 documented in project plans or amendment requests;
- 11 C. Description of all deviations from the schedule (Exhibit C) during the current
12 reporting period and any planned deviations in the upcoming reporting period;
- 13 D. For any deviations in schedule, a plan for recovering lost time and maintainin(
14 compliance with the schedule;
- 15 E. All raw data (including laboratory analysis) received by the Defendant during the
16 past reporting period and an identification of the source of the sample; and
- 17 F. A list of deliverables for the upcoming reporting period if different from the
18 schedule.

19 Progress reports shall be submitted monthly from the effective date of this Decree until
20 three (3) months after construction of the cleanup action is completed. Thereafter, Defendant
21 shall submit progress reports annually. If Ecology determines that the contingency plan for
22 groundwater diversion (slurry wall) referenced in the cleanup action plan is necessary, Defendant
23 shall submit monthly reports from the time Ecology makes its determination until three (3)
24 months after construction is complete. Thereafter, Defendant shall submit progress reports
25 annually.

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

5 XII. RETENTION OF RECORDS

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

13 XIII. TRANSFER OF INTEREST IN PROPERTY

14 No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest
15 held by BNSF in any portion of the Site shall be consummated without provision for continued
16 operation and maintenance of any containment system, treatment system, and monitoring system
17 installed or implemented pursuant to this Decree.

18 Prior to transfer or involuntary conveyance or relinquishment of any legal or equitable
19 interest in all or any portion of the property, and during the effective period of this Decree,
20 Defendant shall serve a copy of this Decree upon any prospective purchaser, lessee, transferee,
21 assignee, or other successor in interest of the property; and, at least thirty (30) days prior to any
22 transfer or involuntary conveyance or relinquishment, Defendant shall notify Ecology of said
23 contemplated transfer or conveyance or relinquishment.

XIV. RESOLUTION OF DISPUTES

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

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

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

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

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

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

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

1 Implementation of these dispute resolution procedures shall not provide a basis for delay
2 of any activities required in this Decree, unless Ecology agrees in writing to a schedule extension
3 or the court so orders.

4 XV. AMENDMENT OF CONSENT DECREE

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

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

15 XVI. EXTENSION OF SCHEDULE

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

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

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

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

7 or

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

10 (3) Endangerment as described in Section XVII.

11 However, neither increased costs of performance of the terms of the Decree nor changed
12 economic circumstances shall be considered circumstances beyond the reasonable control of
13 Defendant.

14 C. Ecology may extend the schedule for a period not to exceed ninety (90) days,
15 except where an extension is needed as a result of:

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

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

19 (3) Endangerment as described in Section XVI.

20 Ecology shall give Defendant written notification in a timely fashion of any extensions
21 granted pursuant to this Decree.

22 XVII. ENDANGERMENT

23 In the event Ecology determines that activities implementing or in noncompliance with
24 this Decree, or any other circumstances or activities, are creating or have the potential to create a
25 danger to the health or welfare of the people on the Site or in the surrounding area or to the
26 environment, Ecology may order Defendant to stop further implementation of this Decree for

1 such period of time as needed to abate the danger, or may petition the court for an order as
2 appropriate. During any stoppage of work under this section, the obligations of Defendant with
3 respect to the work under this Decree which is ordered to be stopped shall be suspended and the
4 time periods for performance of that work, as well as the time period for any other work
5 dependent upon the work which is stopped, shall be extended, pursuant to Section XVI of this
6 Decree, for such period of time as Ecology determines is reasonable under the circumstances.

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

22 XVIII. OTHER ACTIONS

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

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

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

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

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

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

15 XIX. INDEMNIFICATION

16 Defendant agrees to indemnify and save and hold the State of Washington, its employees,
17 and agents harmless from any and all claims or causes of action for death or injuries to persons or
18 for loss or damage to property arising from or on account of acts or omissions of Defendant, its
19 officers, employees, agents, or contractors in entering into and implementing this Decree.
20 However, the Defendant shall not indemnify the state of Washington nor save nor hold its
21 employees and agents harmless from any claims or causes of action arising out of the negligent
22 acts or omissions of the state of Washington, or the employees or agents of the state, in
23 implementing the activities pursuant to this Decree.

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1 XX. COMPLIANCE WITH APPLICABLE LAWS

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

5 B. Pursuant to RCW 70.105D.090(1), the substantive requirements of chapters
6 70.94, 70.95, 75.20, and 90.58 RCW and of any laws requiring or authorizing local government
7 permits or approvals for the remedial action under this Decree that are known to be applicable at
8 the time of entry of the Decree have been included in Exhibit B, the Cleanup Action Plan, and
9 are binding and enforceable requirements of the Decree.

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

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

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

7 XXI. REMEDIAL AND INVESTIGATIVE COSTS

8 The Defendant agrees to pay costs incurred by Ecology pursuant to this Decree. These
9 costs shall include work performed by Ecology or its contractors for or on the Site under ch.
10 70.105D RCW, both prior to and subsequent to the issuance of this Decree, for investigations,
11 remedial actions, and Decree preparation, negotiations, oversight and administration. Ecology
12 costs shall include costs of direct activities and support costs of direct activities as defined in
13 WAC 173-340-550(2). The Defendant agrees to pay the required amount within ninety (90) days
14 of receiving from Ecology an itemized statement of costs that includes a summary of costs
15 incurred, an identification of involved staff, and the amount of time spent by involved staff
16 members on the project. A general statement of work performed will be provided upon request.
17 Itemized statements shall be prepared quarterly. Failure to pay Ecology's costs within ninety (90)
18 days of receipt of the itemized statement will result in interest charges.

19 XXII. IMPLEMENTATION OF REMEDIAL ACTION

20 If Ecology determines that Defendant has failed without good cause to implement the
21 remedial action, Ecology may, after notice to Defendant, perform any or all portions of the
22 remedial action that remain incomplete. If Ecology performs all or portions of the remedial
23 action because of the Defendant's failure to comply with its obligations under this Decree,
24 Defendant shall reimburse Ecology for the costs of doing such work in accordance with
25 Section XXI, provided that Defendant is not obligated under this section to reimburse Ecology
26 for costs incurred for work inconsistent with or beyond the scope of this Decree.

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XXIII. FIVE YEAR REVIEW

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

XXIV. PUBLIC PARTICIPATION

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

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

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

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

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

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

4 XXV. DURATION OF DECREE

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

8 XXVI. CLAIMS AGAINST THE STATE

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

15 XXVII. COVENANT NOT TO SUE

16 In consideration of BNSF's compliance with the terms and conditions of this Decree, the
17 State of Washington covenants not to institute legal, equitable, or administrative actions against
18 BNSF under MTCA regarding matters within the scope of this Decree.

19 This covenant is strictly limited in its application to the Site specifically described in
20 Exhibit A and to those hazardous substances that Ecology knows to be located at the Site as of
21 the entry of this Decree. This covenant is not applicable to any other hazardous substance or area
22 and the State retains all of its authority relative to such substances and areas.

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

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

4 2. In the event new information becomes available regarding factors previously
5 unknown to Ecology, including the nature or quantity of hazardous substances at the Site, and
6 Ecology determines that these factors present a previously unknown threat to human health or the
7 environment.

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

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

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

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

17 XXVIII. CONTRIBUTION PROTECTION

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

21 XXIX. EFFECTIVE DATE

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

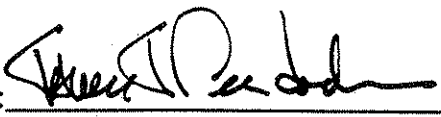
23 XXX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT


24 This Decree has been the subject of public notice and comment under RCW
25 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
26 more expeditious cleanup of hazardous substances at the Site.

1 If the court withholds or withdraws its consent to this Decree, it shall be null and void at
2 the option of any party, and the accompanying Complaint shall be dismissed without costs and
3 without prejudice. In such an event, no party shall be bound by the requirements of this Decree.
4

5 DEPARTMENT OF ECOLOGY

CHRISTINE O. GREGOIRE
Attorney General

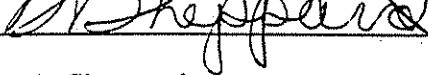
6
7 By: 
8 JIM PENDOWSKI
9 Program Manager
10 Toxics Cleanup Program

By: 
KEN LEDERMAN, WSBA # 26515
Assistant Attorney General
Attorneys for Plaintiff

11 Date: 4/04/00

Date: 4/12/00

12 THE BURLINGTON NORTHERN &
13 SANTA FE RAILWAY COMPANY

14 By: 
15 Bruce A. Sheppard
16
17 Manager Environmental Remediation

18 Date: February 1, 2000

19
20 DATED this 17 day of April, 2000.

21
22  RICHARD W. MILLER

JUDGE
Adams County Superior Court

23
24 KA16065\88022\CST\CST_P200F