

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

BNSF RAILWAY COMPANY

Boundary County, Idaho

Respondent.

DOCKET NO. CWA-10-2025-0185

CONSENT AGREEMENT

Proceedings Under Section 311(b)(6) of the
Clean Water Act, 33 U.S.C. § 1321(b)(6)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 311(b)(6) of the Clean Water Act (CWA), 33 U.S.C. § 1321(b)(6).

1.2. Pursuant to Section 311(b)(6)(A) of the CWA, EPA is authorized to assess a civil penalty against any owner, operator, or person in charge of an onshore facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and/or who fails or refuses to comply with any regulation issued under Section 311(j) of the CWA, 33 U.S.C. § 1321(j).

1.3. Section 311(b)(6)(B) of the CWA, 33 U.S.C. § 1321(b)(6)(B), authorizes the administrative assessment of Class II civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to the 2015 amendments to the Federal Civil Penalty Inflation Adjustment Act, 28 U.S.C. § 2461, and 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties may not exceed \$23,647 per day for each day during which the violation continues, up to a maximum penalty of \$295,564. *See also* 90 Fed. Reg. 1375 (January 8, 2025) (2025 Civil Monetary Penalty Inflation Adjustment Rule).

1.4. Pursuant to Section 311(b)(6)(A) and (b)(6)(B) of the CWA, 33 U.S.C.

§ 1321(b)(6)(A) and (B), and in accordance with Section 22.18 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and BNSF Railway Company (Respondent) agrees to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), issuance of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (Complainant).

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA together with the specific provisions of the CWA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

3.2. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person from any point source into waters of the United States except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

3.3. Section 502(12), 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to

include “any addition of any pollutant to navigable waters from any point source.”

3.4. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines a “pollutant” to include, *inter alia*, “solid waste,” sewage,” “garbage,” “chemical wastes,” and industrial waste discharged into water.

3.5. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual, corporation, partnership, [or] association”

3.6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to mean, *inter alia*, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.”

3.7. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), further prohibits the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities as the President determines may be harmful to the public health or welfare or environment of the United States.

3.8. Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), defines “discharge” to include “any spilling, leaking, pumping, pouring, emitting, emptying or dumping,” except as specifically excluded therein.

3.9. Section 311(a)(1), of the CWA, 33 U.S.C. § 1321(a)(1), defines “oil” to mean “oil of any kind or in any form,” including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.

3.10. Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6), defines “owner or operator” to include “any person owning or operating [an] onshore facility”

3.11. Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), defines “person” to include corporations.

3.12. Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), defines “onshore

facility” to mean a facility of “any kind located in, on, or under, any land within the United States, other than submerged land.”

3.13. Pursuant to Section 311(b)(4) of the CWA, 33 U.S.C. § 1321(b)(4), EPA has determined by regulation that discharges of oil in such quantities as may be harmful to the public health or welfare or environment of the United States include discharges of oil that (a) violate applicable water quality standards; or (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 40 C.F.R. § 110.3.

3.14. CWA § 502(7) defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

General Allegations

3.15. On January 1, 2020, a BNSF Railway Company freight train traveling north between Leonia and Bonner’s Ferry, Idaho was unable to avoid a rockslide that had blocked the tracks near BNSF Mile Post 1359.2. The lead locomotive (BNSF 4347) derailed and came to rest in the Kootenai River. The second locomotive (BNSF 3852) turned on its side but remained on a rocky embankment. The third locomotive (BNSF 8127) derailed but remained upright near the tracks. Several cars at the end of the train also derailed near the Katka siding near Mile Post 1357.7. An empty car containing residual ethylene glycol was significantly damaged.

3.16. On behalf of Respondent, to fulfill, in part, the requirements of the August 20, 2020, Consent Order between Respondent and the Idaho Department of Environmental Quality, Arcadis U.S., Inc. prepared the Kootenai River Diesel Release Response Report to document the derailment, diesel fuel spill, and response actions taken. According to Arcadis U.S., Inc., an estimated 3,470 gallons of diesel fuel leaked from BNSF 4347 into the Kootenai River near Katka, Idaho as a result of the derailment and the subsequent rupture of BNSF 4347’s fuel tank.

3.17. Respondent promptly reported the diesel fuel release to appropriate state and

federal agencies and implemented reasonable response measures, including boom deployment, removal of remaining diesel fuel from locomotive fuel tanks, recovery of diesel fuel from the surface of the Kootenai River, protection of Tribal and city water intakes and dock structures, and other mitigation, cleanup, and recovery measures associated with released petroleum product.

3.18. The response team observed and documented a sheen on the surface of the Kootenai River and adjoining shoreline. Surface water and shoreline sheen is visible in photographs taken in the days and weeks following the release.

3.19. The Kootenai River is home to a multitude of fish species including burbot, bull trout, and the Kootenai River white sturgeon, which is culturally significant to the Kootenai Tribe of Indians (KTOI). The Kootenai River white sturgeon is a federally listed endangered species, bull trout is a federally listed threatened species, and burbot is listed as endangered by the State of Idaho. The Kootenai River is also designated as critical habitat for the Kootenai River white sturgeon and bull trout.

3.20. The KTOI operates two fish hatcheries located downriver from site of the diesel fuel spill site: the Twin Rivers Hatchery and the Sturgeon Hatchery, located approximately 4 and 20 river miles downstream, respectively. The hatcheries were notified of the derailment, and the Kootenai River water intakes were shut down within an hour of the incident on January 1. The Twin Rivers Hatchery switched to an alternate intake on the Moyie River, and the Sturgeon Hatchery filled their reserve tanks and prepared to move fish to the Twin Rivers Hatchery.

3.21. The United States, on behalf of Complainant, entered a tolling agreement with Respondent to facilitate settlement negotiations without altering the claims and defenses available to any party. Pursuant to the tolling agreement, the period commencing on October 15, 2024, and ending on March 31, 2025, inclusive, shall not be included in computing the running of any potentially applicable statute of limitations. The parties have agreed to extend the tolling

agreement to November 21, 2025.

3.22. Respondent is a Delaware Corporation authorized to conduct business in the State of Idaho.

3.23. The Kootenai River is a tributary of and flows to the Columbia River, which empties into the Pacific Ocean.

Violations

Unauthorized Discharge in Violation of Section 301(a) of the CWA

3.24. Paragraphs 3.1 through 3.23 are realleged and incorporated herein by reference.

3.25. Respondent is a corporation and therefore a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3.26. Diesel fuel is a “pollutant” within the meaning of Section 502(6) of the CWA. 33 U.S.C. § 1362(6).

3.27. BNSF 4347 is a “point source” within the meaning of Section 502(14) of the CWA. 33 U.S.C. § 1362(14).

3.28. On at least January 1, 2020, Respondent added oil from BNSF 4347 into the Kootenai River.

3.29. The Kootenai River is a “navigable water” within the meaning of Section 502(7) of the CWA. 33 U.S.C. § 1362(7).

3.30. Respondent’s addition of oil to the Kootenai River from BNSF 4347 constitutes a “discharge of a pollutant” within the meaning of Section 502(12), 33 U.S.C. § 1362(12).

3.31. The discharge was not authorized by a permit issued by EPA or the State of Idaho pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

3.32. Respondent therefore discharged a pollutant from a point source into waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.33. Violations of Section 301(a) of the CWA are enforceable under Section 309(g) of

the CWA. 33 U.S.C. § 1319(g).

Unauthorized Discharge of Oil in Violation of Section 311(b)(3) of the CWA

3.34. Paragraphs 3.1 through 3.23 are realleged and incorporated herein by reference.

3.35. Respondent is a “person” within the meaning of Section 311(a)(7) of the CWA. 33 U.S.C. § 1321(a)(7).

3.36. At all times relevant to this Consent Agreement, Respondent was the “owner or operator,” of BNSF 4347 within the meaning of Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6).

3.37. BNSF 4347 is an “onshore facility” within the meaning of Section 311(a)(10) of the CWA. 33 U.S.C. § 1321(a)(10).

3.38. Diesel fuel is “oil” within the meaning of Section 311(a)(1) of the CWA. 33 U.S.C. § 1321(a)(1).

3.39. Oil leaking from BNSF 4347 “discharged” within the meaning of Section 311(a)(2) of the CWA. 33 U.S.C. § 1321(a)(2).

3.40. At least on January 1, 2020, Respondent discharged oil from BNSF 4347 into the Kootenai River.

3.41. The Kootenai River is a “navigable water” within the meaning of Section 502(7) of the CWA. 33 U.S.C. § 1362(7).

3.42. The oil caused a sheen on the surface of the water and adjoining shorelines and was therefore discharged in sufficient quantity as may be harmful within the meaning of Section 311(b)(3) of the CWA. 33 U.S.C. § 1321(b)(3) and 40 C.F.R. § 110.3.

3.43. Respondent therefore discharged oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities as the President determines may be harmful to the public health or welfare or environment of the United States in violation of Section 311(b)(3). 33 U.S.C. § 1321(b)(3).

3.44. Violations of Section 311(b)(3) of the CWA are enforceable under Section 311(b)(6) of the CWA. 33 U.S.C. § 1321(b)(6).

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the specific factual allegations contained in this Consent Agreement.

4.3. As required by Section 311(b)(8) of the CWA, 33 U.S.C. § 1321(b)(8), EPA has taken into account the seriousness of the alleged violations; Respondent's economic benefit of noncompliance; the degree of culpability involved; any other penalty for the same incident; any history of prior violations; the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; the economic impact of the penalty on the violator; and any other matters as justice may require. After considering all of these factors, EPA has determined that an appropriate penalty to settle this action is \$191,000 ("Assessed Penalty").

4.4. Respondent consents to the assessment of the Assessed Penalty set forth in Paragraph 4.3 and agrees to pay the total Assessed Penalty within 30 days after the date of the Final Order ratifying this Agreement is filed with the Regional Hearing Clerk ("Filing Date").

4.5. Respondent shall pay the Assessed Penalty and any interest, fees, and other charges due using any method, or combination of appropriate methods, to the "Oil Spill Liability Trust Fund", as provided on the EPA website: <https://www.epa.gov/financial/makepayment>. For additional instructions see: <https://www.epa.gov/financial/additional-instructions-making-payments-epa>. However, for any payments made after September 30, 2025, and in accordance with the March 25, 2025 Executive Order on *Modernizing Payments To and From America's Bank Account*, Respondent shall pay using one of the electronic payments methods listed on [EPA's How to Make a Payment website](#) and will not pay with a paper check.

4.6. When making a payment, Respondent shall:

4.6.1. Identify every payment with Respondent's name and the docket number of this Agreement, CWA-10-2025-0185,

4.6.2. Concurrently with any payment or within 24 hours of any payment, Respondent shall serve proof of payment electronically to the following person(s):

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
R10_RHC@epa.gov

Rick Cool, Compliance Officer
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
cool.richard@epa.gov

and

U.S. Environmental Protection Agency
Cincinnati Finance Center
Via electronic mail to:
CINWD_AcctsReceivable@epa.gov

"Proof of payment" means, as applicable, confirmation of credit card or debit card payment, or confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with the appropriate docket number and Respondent's name.

4.7. Interest, Charges, and Penalties on Late Payments. Pursuant to 33 U.S.C. § 1321(b)(6)(H), 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 40 C.F.R. § 13.11, if Respondent fails to timely pay any portion of the Assessed Penalty per this Agreement, the entire unpaid balance of the Assessed Penalty and all accrued interest shall become immediately due and owing, and

EPA is authorized to recover the following amounts.

4.7.1. Interest. Interest begins to accrue from the Filing Date. If the Assessed Penalty is paid in full within thirty (30) days, interest accrued is waived. If the Assessed Penalty is not paid in full within thirty (30) days, interest will continue to accrue until the unpaid portion of the Assessed Penalty as well as any interest, penalties, and other charges are paid in full. Interest will be assessed at prevailing rates, per 33 U.S.C. § 1321(b)(6)(H). The rate of interest is the IRS “large corporate” underpayment rate.

4.7.2. Handling Charges. The United States’ enforcement expenses including, but not limited to, attorneys’ fees and costs of collection proceedings.

4.7.3. Late Payment Penalty. A twenty percent (20%) quarterly non-payment penalty.

4.8. Late Penalty Actions. In addition to the amounts described in the prior Paragraph, if Respondent fails to timely pay any portion of the Assessed Penalty, interest, or other charges and penalties per this Consent Agreement, EPA may take additional actions. Such actions EPA may take include, but are not limited to, the following.

4.8.1. Refer the debt to a credit reporting agency or a collection agency, per 40 C.F.R. §§ 13.13 and 13.14.

4.8.2. Collect the debt by administrative offset (i.e., the withholding of money payable by the United States government to, or held by the United States government for, a person to satisfy the debt the person owes the United States government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, per 40 C.F.R. Part 13, Subparts C and H.

4.8.3. Suspend or revoke Respondent’s licenses or other privileges, or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, per 40 C.F.R. § 13.17.

4.8.4. Request that the Attorney General bring a civil action in the appropriate district court to recover the full remaining balance of the Assessed Penalty, in addition to interest and the amounts described above, pursuant to 33 U.S.C. § 1321(b)(6)(H). In any such action, the validity, amount, and appropriateness of the Assessed Penalty shall not be subject to review.

4.9. Allocation of Payments. Pursuant to 31 C.F.R. § 901.9(f) and 40 C.F.R. § 13.11(d), a partial payment of debt will be applied first to outstanding handling charges, second to late penalty charges, third to accrued interest, and last to the principal that is the outstanding Assessed Penalty amount.

4.10. Tax Treatment of Penalties. Penalties, interest, and other charges paid pursuant to this Agreement shall not be deductible for purposes of federal taxes.

4.11. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, EPA is required to send to the Internal Revenue Service (“IRS”) annually, a completed IRS Form 1098-F (“Fines, Penalties, and Other Amounts”) with respect to any court order or settlement agreement (including administrative settlements), that require a payor to pay an aggregate amount that EPA reasonably believes will be equal to, or in excess of, \$50,000 for the payor’s violation of any law or the investigation or inquiry into the payor’s potential violation of any law, including amounts paid for “restitution or remediation of property” or to come “into compliance with the law.” EPA is further required to furnish a written statement, which provides the same information provided to the IRS, to each payor (i.e., a copy of IRS Form 1098-F). Failure to comply with providing IRS Form W-9 or Tax Identification Number (“TIN”), as described below, may subject Respondent to a penalty, per 26 U.S.C. § 6723, 26 U.S.C. § 6724(d)(3), and 26 C.F.R. § 301.6723-1. In order to provide EPA with sufficient information to enable it to fulfill these obligations, EPA herein requires, and Respondent herein agrees, that:

4.11.1. Respondent shall complete an IRS Form W-9 (“Request for Taxpayer Identification Number and Certification”), which is available at <https://www.irs.gov/pub/irs-pdf/fw9.pdf>.

4.11.2. Respondent shall therein certify that its completed IRS Form W-9 includes Respondent’s correct TIN or that Respondent has applied and is waiting for issuance of a TIN;

4.11.3. Respondent shall email its completed Form W-9 to EPA’s Cincinnati Finance Center at henderson.jessica@epa.gov within 30 days after the Final Order ratifying this Agreement is filed, and EPA recommends encrypting IRS Form W-9 email correspondence; and

4.11.4. In the event that Respondent has certified in its completed IRS Form W-9 that it does not yet have a TIN but has applied for a TIN, Respondent shall provide EPA’s Cincinnati Finance Center with Respondent’s TIN, via email, within five (5) days of Respondent’s receipt of a TIN issued by the IRS.

4.12. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.13. The undersigned representative of Respondent also certifies that, as of the date of Respondent’s signature of this Consent Agreement, Respondent has corrected the violation(s) alleged in Part III above.

4.14. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.15. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.16. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.17. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

FOR RESPONDENT:

John Lovenburg
Vice President Environment & Sustainability
BNSF Railway Company

FOR COMPLAINANT:

Edward J. Kowalski
Director
Enforcement and Compliance Assurance Division
EPA Region 10