

HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PUGET SOUNDKEEPER ALLIANCE,)	
)	No. 2:09-CV-01087-JCC
Plaintiff,)	
)	CONSENT DECREE
v.)	
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	
_____)	

WHEREAS, Plaintiff Puget Soundkeeper Alliance filed a Complaint on July 30, 2009 and a First Amended Complaint on August 10, 2010 against Defendant BNSF Railway Company alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251-1387, relating to discharges of stormwater associated with industrial activity from a facility or facilities owned and operated by Defendant located in Seattle, Washington, seeking declaratory and injunctive relief, civil penalties and attorneys fees and costs (the "Litigation"); and

WHEREAS Defendant denied the relevant allegations of the Complaint and Amended Complaint; and

1 WHEREAS, effective November 3, 2009, and in reliance on an engineer's report,
2 Defendant terminated its coverage under former National Pollutant Discharge Elimination
3 System Permit No. SO3-001528. Defendant contends that the termination was made under the
4 mistaken belief that storm water from its vehicle maintenance shop discharged to the sanitary
5 sewer rather than the surface waters of the United States; and
6

7 WHEREAS, upon learning of its error, Defendant subsequently reapplied for permit
8 coverage and notified Plaintiff, the Washington Department of Ecology, King County, and the
9 City of Seattle, and informed the Court by way of its January 28, 2011 Notice to the Court
10 Correcting Factual Record. The Washington Department of Ecology subsequently granted
11 Defendant's request for permit coverage; and
12

13 WHEREAS, the Court issued its Order ruling on Plaintiff's First Motion for Partial
14 Summary Judgment and Plaintiff's Second Motion for Partial Summary Judgment on August 19,
15 2011, and both parties retain the right to appeal that decision; and
16

17 WHEREAS, absent settlement, Plaintiff would seek to prove at trial additional violations
18 by Defendant of sections 301(a) and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) and
19 1342, and that significant civil penalties and injunctive relief should be imposed against
20 Defendant, and Defendant denies such liabilities and the appropriateness of such remedies; and
21

22 WHEREAS, Defendant contends that Plaintiff has failed to comply with mandatory pre-
23 suit and post-filing notice obligations as set forth at 33 U.S.C. § 1365 such that Plaintiff cannot
24 maintain this action, and Plaintiff denies such allegations; and
25

26 WHEREAS, since the Complaint was filed, Defendant has undertaken the following
27 actions related to the control of stormwater pollution at the facility or facilities that are the
28 subject of the Litigation: acquired authorization for discharges of stormwater associated with
29

1 industrial activity under National Pollutant Discharge Elimination System Permit No. WAR-
2 125074, developed and implemented a stormwater pollution prevention plan, covered dumpsters,
3 evaluated the longhouse roof for potential to contribute zinc to stormwater discharges, cleaned
4 the car shop roof to reduce or eliminate zinc contribution to stormwater discharges, coated the
5 car shop roof to reduce or eliminate zinc contribution to stormwater discharges, installed overflow
6 protectors and automatic shutoff valves on the above-ground Storage Tanks north of the car
7 shop, changed out track mat in the Direct-to-Locomotive (DTL) fueling area, contained sheet
8 flow in the DTL area and rerouted via special catch basin and downstream plug valve that can be
9 used to contain spills, stenciled catch basins with “No Dumping – Drains to Sound,” hired a
10 contractor to conduct expanded monthly sweeping, surveyed and cleaned conveyance lines and
11 catch basins throughout the facility, placed filters in catch basins near the car shop and in other
12 areas, installed netting to prevent erosion from certain hillsides, secured confirmation from DTL
13 fueling company of compliance with mobile fueling required practices (e.g., block, cover, or
14 plug storm drains when fueling), prepared and implemented a Spill Prevention and Emergency
15 Cleanup Plan (SPECPlan), maintained a spill log, conducted employee trainings, and fulfilled
16 sampling, recordkeeping, and inspection requirements; and

17
18 WHEREAS, Plaintiff does not dispute that Defendant has acted in good faith in its
19 efforts to comply with the law and its permit obligations and in connection with this Litigation;
20 and

21
22 WHEREAS, counsel and representatives for the parties to this action have engaged in
23 discussions relating to the potential settlement of this Litigation, which discussions have
24 included an assessment of the facts surrounding the alleged violations and defenses; and

25
26 WHEREAS, Plaintiff and Defendant agree that settlement of these matters is in the best

1 interest of the parties and the public, and that entry of this Consent Decree without additional
2 litigation or appeal is the most appropriate means of resolving this action; and

3 WHEREAS, Plaintiff and Defendant, by their authorized counsel, consent to the entry of
4 this Consent Decree in order to avoid the risks of further litigation and to resolve the controversy
5 between them;

6
7 NOW THEREFORE, without trial or appeal of any issue of fact or law, and without
8 admission by the Defendant of the facts or violations alleged in the Complaint and the First
9 Amended Complaint, and upon consent of the parties, and upon consideration of the mutual
10 promises herein contained, it is hereby
11

12 ORDERED, ADJUDGED AND DECREED as follows:

13 1. This Court has jurisdiction over the parties and the subject matter of this action.

14 2. The undersigned representative for each party certifies that he or she is fully
15 authorized by the party or parties whom he or she represents to enter into the terms and
16 conditions of this Consent Decree and to legally bind the party or parties and their successors in
17 interest to it.
18

19 3. This Consent Decree shall apply to, and be binding upon, the parties, and upon
20 the successors and assigns of the parties.
21

22 4. Any injunctive relief ordered in this Consent Decree shall apply to Defendant's
23 operation of its Balmer Yard and the roof drains of the Interbay Longhouse subject to National
24 Pollutant Discharge Elimination System Permit No. WAR-125074, which are generally depicted
25 in the figure included as Appendix A hereto.
26

27 5. For purposes of this Consent Decree, the terms "Balmer Yard," "Interbay
28 Longhouse," and "Interbay Yard" refer to those areas of Defendant's facility or facilities

1 depicted in Appendix A.

2 6. This Consent Decree constitutes a full and complete settlement of, and Plaintiff
3 releases, discharges, and forever gives up, the claims, demands, actions, and causes of action
4 alleged in the Complaint and First Amended Complaint and/or asserted under the Clean Water
5 Act, 33 U.S.C. §§ 1251-1387, and/or the claims, demands, actions, and causes of action asserted
6 in the Litigation and/or that could have been asserted in the Litigation under the Clean Water Act
7 that arise from Defendant's acts or failure to act at or near, and/or Defendant's operations at, the
8 Balmer Yard and/or the Interbay Facility, whether wholly or in part in the past, up through and
9 including the date of entry of this Consent Decree, except as provided for in sub-paragraph 8.c of
10 this Consent Decree.
11

12
13 7. This Consent Decree shall not constitute evidence in any proceeding, an
14 admission or adjudication with respect to any allegation of the Complaint or First Amended
15 Complaint, any fact or conclusion of law with respect to any matter alleged in or arising out of
16 the Complaint or First Amended Complaint, or the admission or evidence of any wrongdoing or
17 misconduct on the part of the Defendant or its successor.
18

19 8. In full and complete satisfaction of the claims, demands, actions, and causes of
20 action asserted in the Litigation including in the Complaint and First Amended Complaint, or
21 that could have been asserted in the Litigation, Defendant agrees to abide by and be subject to
22 the following terms and conditions:
23

24 a. Defendant shall comply fully with all conditions of its National Pollutant
25 Discharge Elimination System Permit No. WAR-125074 and any successor, modified, or
26 replacement permit authorizing discharges of stormwater associated with industrial activity from
27 the Balmer Yard (the "NPDES permit");
28

1 b. Upon entry of this Consent Decree by the Court, Defendant shall forward
2 copies to Plaintiff of all updates, modifications, or other revisions to the stormwater pollution
3 prevention plan (“SWPPP”) that Defendant has prepared for the facility or facilities that are
4 subject to the NPDES permit. All such copies shall be forwarded to Plaintiff within thirty (30)
5 days of the update, modification, or revision. The requirements of this sub-paragraph 8.b of the
6 Consent Decree shall terminate on December 31, 2013;

8 c. Defendant has filed an appeal with the Washington Pollution Control
9 Hearings Board, PCHB No. 11-152, concerning the requirements of the NPDES permit.
10 Defendant shall not oppose any request to intervene in PCHB No. 11-152 made by Plaintiff, and
11 neither Plaintiff nor Defendant shall initiate an appeal to a higher tribunal or court of any final
12 and complete settlement resolving PCHB No. 11-152 or final determination made by the
13 Pollution Control Hearings Board in that matter. Nothing in this Consent Decree shall in any
14 way limit the claims, defenses, or arguments that either Plaintiff or Defendant may raise in
15 PCHB No. 11-152, and Plaintiff and Defendant reserve the right to raise any claims, defenses, or
16 arguments each may have in that matter.

19 9. As valuable consideration for the settlement agreement embodied by this Consent
20 Decree, Defendant shall within thirty (30) days of entry of this Consent Decree by the Court,
21 make a payment in the amount of one million five hundred thousand dollars (\$1,500,000) to The
22 Rose Foundation for Communities and the Environment for projects to improve the water quality
23 of Puget Sound. Such payment shall be made by check payable and mailed to The Rose
24 Foundation for Communities and the Environment, Attention: Tim Little, 6008 College Avenue,
25 Suite 10, Oakland, California 94618, and shall bear the notation “Puget Soundkeeper Alliance v.
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1 BNSF Railway Co., Clean Water Act Settlement,” with a copy provided to Plaintiff at the time
2 payment is made.

3 10. Within thirty (30) days of entry of this Consent Decree by the Court, Defendant
4 shall pay Plaintiff’s actual litigation fees, expenses, and costs (including reasonable attorney and
5 expert witness fees) incurred in the Litigation in the amount of one million dollars (\$1,000,000)
6 by check payable and mailed to Smith & Lowney, PLLC, 2317 East John St., Seattle, WA
7 98112, attn: Knoll Lowney. Plaintiff’s counsel has represented and certified under oath that it
8 has actually incurred such fees, expenses and costs in this Litigation, and that such fees,
9 expenses, and costs are just, proper, fully and accurately documented, and appropriate under the
10 law. Defendant’s decision to settle and to make the payments set forth in paragraphs 9 and 10 is
11 in reliance upon counsel’s representation and certification. Defendant’s payment shall be in full
12 and complete satisfaction of any claims Plaintiff has or may have, either legal or equitable, and
13 of any kind or nature whatsoever, for fees, expenses, and costs incurred in the Litigation.
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17 11. In consideration of the mutual promises set forth in this Consent Decree, Plaintiff
18 agrees that the press release that Defendant received from Plaintiff on December 21, 2011, but
19 did not approve, will be its only press release issued about this Litigation and Consent Decree.
20

21 12. The Court shall retain jurisdiction over this matter and allow this case to be
22 reopened without filing fee for the purpose of enabling the parties to apply to the Court for any
23 further order that may be necessary to construe, carry out, enforce compliance and/or resolve any
24 dispute regarding the terms or conditions of this Consent Decree until termination of the Consent
25 Decree per paragraph 14. In the event of a dispute regarding implementation of, or compliance
26 with, this Consent Decree, the parties shall first attempt to informally resolve the dispute through
27 meetings between the parties by serving written notice of request for resolution to the parties and
28

1 their counsel of record. If no resolution is reached within thirty (30) days from the date that the
2 notice of dispute is served, the parties may resolve the dispute by filing motions with the Court.
3 The provisions of section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), regarding awards
4 of costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or
5 substantially prevailing party, shall apply to any proceedings seeking to enforce the terms and
6 conditions of this Consent Decree.
7

8 13. The parties recognize that no consent judgment can be entered in a Clean Water
9 Act suit in which the United States is not a party prior to forty-five (45) days following the
10 receipt of a copy of the proposed consent judgment by the United States Attorney General and
11 the Administrator of the United States Environmental Protection Agency pursuant to section
12 505(c)(3) of the Clean Water Act, 33 U.S.C. § 1365(c)(3). Therefore, upon the signing of this
13 Consent Decree by the parties, Plaintiff shall serve copies of it upon the Administrator of the
14 United States Environmental Protection Agency and the United States Attorney General.
15

16 14. This Consent Decree shall take effect on the date it is entered by the Court. This
17 Consent Decree shall terminate on December 31, 2013 or upon fulfillment of Defendant's
18 obligations under paragraphs 8.c, 9 and 10, whichever occurs later.
19

20 15. This Consent Decree may be modified only upon the written consent of the
21 parties and the approval of the Court.
22

23 16. If for any reason the Court should decline to approve this Consent Decree in the
24 form presented, the parties agree to continue negotiations in good faith in an attempt to cure any
25 objection raised by the Court to entry of this Consent Decree. If the parties cannot cure the
26 Court's objection, then the settlement embodied herein shall be voidable at the sole discretion of
27 either party.
28

1 17. All notifications or copies required by this Consent Decree shall be directed to the
2 individuals at the addresses specified below by United States Mail or Overnight Courier unless
3 the individuals or their successors provide written notification of a change to the other party:

4 As to Plaintiff:

5 Chris Wilke
6 Executive Director and Puget Soundkeeper
7 Puget Soundkeeper Alliance
8 5305 Shilshole Ave. N.W., Suite 150
9 Seattle, WA 98107

10 And:

11 Brian A. Knutsen
12 Smith & Lowney, PLLC
13 2317 E. John St.
14 Seattle, WA 98112

15 As to Defendant:

16 David Seep
17 BNSF Railway Company
18 Director of Environmental Operations
19 2600 Lou Menk Drive, OOB-2
20 Forth Worth, TX 76131-2800

21 And:

22 Dava Kaitala
23 BNSF Railway Company
24 Senior General Attorney
25 2500 Lou Menk Drive, AOB-3
26 Fort Worth, TX 76131-2828

27 And:

28 John Bjorkman
29 K&L Gates LLP
 925 Fourth Ave., Suite 2900
 Seattle, WA 98104-1158

Dated and entered this ____ day of _____, 2012

JOHN C. COUGHENOUR
UNITED STATES DISTRICT JUDGE

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PUGET SOUNDKEEPER ALLIANCE

Signature: 

Title: Executive Director and Puget Soundkeeper

Dated: December 21, 2011

BNSF RAILWAY COMPANY

Signature: _____

Title: _____

Dated: _____

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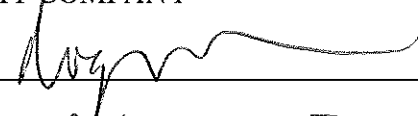
PUGET SOUNDKEEPER ALLIANCE

Signature: _____

Title: Executive Director and Puget Soundkeeper

Dated: _____

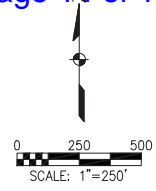
BNSF RAILWAY COMPANY

Signature: 

Title: EVP - Law and Secretary

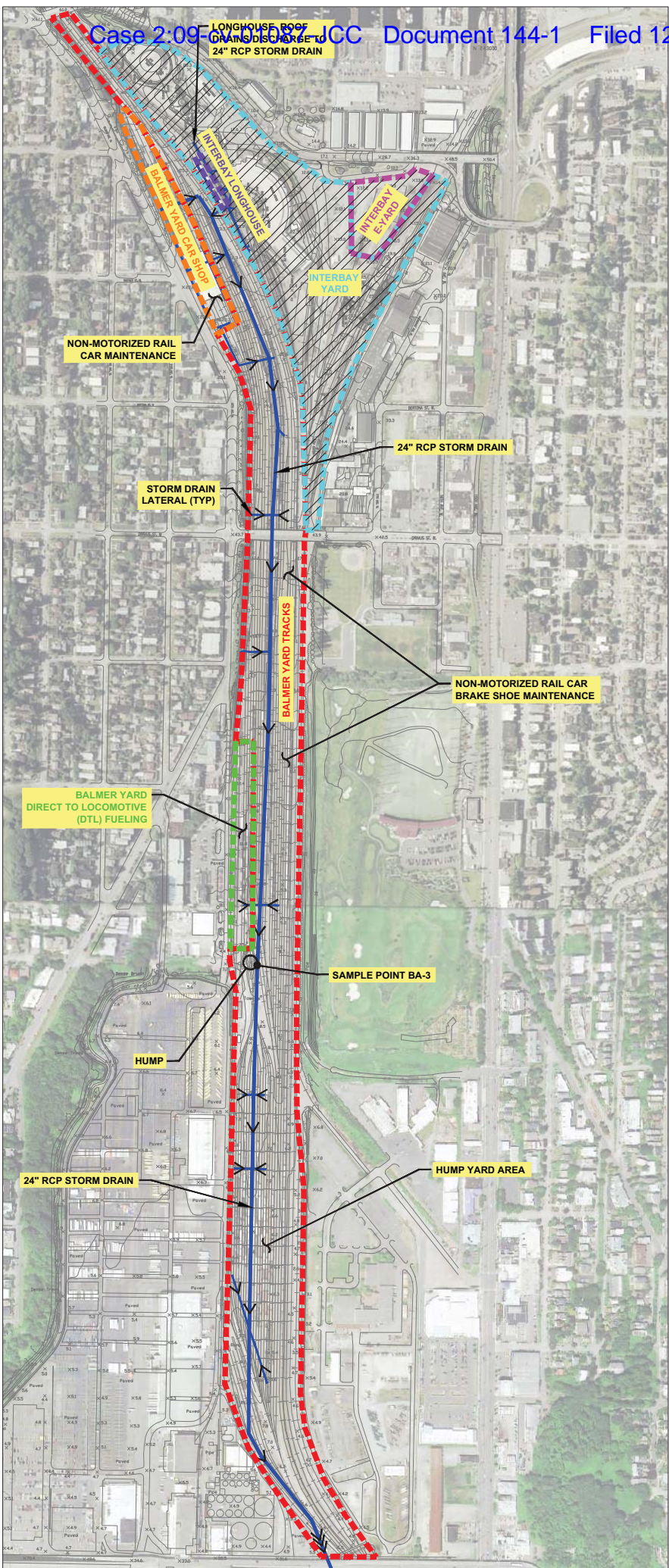
Dated: 12/21/11

APPENDIX A



LEGEND & ESTIMATED DATA

- ▬▬▬▬ Balmer Yard Car Shop
Area = 3.4 AC
- ▬▬▬▬ Balmer Yard DTL Fueling
Area = 2.7 AC
- ▬▬▬▬ Balmer Yard Tracks
Area = 54.1 AC
- ▬▬▬▬ Interbay Longhouse
Area = 0.3 AC
- ▬▬▬▬ Interbay Yard
- ▬▬▬▬ Interbay E-Yard
- Area Not Covered Under Permit



Kennedy/Jenks Consultants

BNSF RAILWAY COMPANY
SEATTLE, WA

BALMER YARD

DECEMBER 2011

FIGURE 1