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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

NO. **07 - 2 - 33 6 7 2 - 9 SEA**

CONSENT DECREE RE: BNSF
FORMER MAINTENANCE AND
FUELING FACILITY, SKYKOMISH,
WASHINGTON

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1 **I. INTRODUCTION**

2 A. The mutual objective of the State of Washington, Department of Ecology
3 (Ecology) and BNSF Railway Company (BNSF) under this Decree is to provide for remedial
4 action and Natural Resource Damages (NRD) restoration and compensation at a facility (Site)
5 where there has been a release or threatened release of hazardous substances. This Decree
6 requires BNSF to conduct a final cleanup of the Site that is the subject of this Decree, by
7 implementing the Cleanup Action Plan (CAP) attached as Exhibit B, according to the schedule
8 and other requirements identified in this Decree and all exhibits thereto, and to implement
9 NRD restoration and compensation as set forth herein.

10 Ecology has determined that these actions are necessary to protect human health and
11 the environment.

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

18 C. By signing this Decree, the Parties agree to its entry and agree to be bound by
19 its terms.

20 D. By entering into this Decree, the Parties do not intend to discharge non-settling
21 parties from any liability they may have with respect to matters alleged in the Complaint. The
22 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for
23 sums expended under this Decree.

24 E. This Decree shall not be construed as proof of liability or responsibility for any
25 releases of hazardous substances or cost for remedial action or NRD injuries, nor an admission
26 of any facts or conclusions of law; provided, however, that BNSF shall not challenge the

1 authority of the Attorney General and Ecology to enforce this Decree, or the jurisdiction of the
2 Court over the subject matter and the Parties, except as provided in Sections II.A (Jurisdiction),
3 XIX.D (Covenant Not to Sue), and XXVI (Implementation of Remedial Action).

4 F. The Court is fully advised of the reasons for entry of this Decree, and good
5 cause having been shown:

6 Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

7 II. JURISDICTION

8 A. This Court has jurisdiction over the subject matter and over the Parties pursuant
9 to the Model Toxics Control Act (MTCA), Chapter 70.105D RCW, the Water Pollution
10 Control Act (WPCA), Chapter 90.48 RCW, and the Oil and Hazardous Substance Spill
11 Prevention and Response Act, Chapter 90.56 RCW. However, BNSF reserves the right to
12 challenge the application of state law as being preempted by federal law, in the particular
13 context and as prescribed in Sections XIV.B (Resolution of Disputes), XIX.D (Covenant Not
14 to Sue), and XXVI (Implementation of Remedial Action) only.

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

20 C. Authority is conferred upon Ecology by Chapters 90.48, 90.56 and 70.105D
21 RCW, as the lead state trustee for natural resource damage assessment and restoration, to
22 negotiate with any PLP to perform restoration and enhancement projects as compensation for
23 NRD injuries resulting from the release of hazardous substances.

24 D. Ecology has determined that a release or threatened release of hazardous
25 substances has occurred at the Site that is the subject of this Decree, including a discharge of
26 oil into the waters of the state resulting in NRD injuries.

1 E. Ecology has given notice to BNSF of Ecology's determination that BNSF is a
2 PLP for the Site, as required by RCW 70.105D.020(16) and WAC 173-340-500.

3 F. The actions to be taken pursuant to this Decree are necessary to protect public
4 health and the environment and to restore natural resources and/or compensate for their injury.

5 G. This Decree has been subject to public notice and comment. In addition, public
6 hearings were held on July 10, 2007 in Skykomish, Washington, and on July 12, 2007 in
7 Bellevue, Washington.

8 H. Ecology finds that this Decree will lead to a more expeditious cleanup of
9 hazardous substances at the Site in compliance with the cleanup standards established under
10 RCW 70.105D.030(2)(e) and Chapter 173-340 WAC, and more expeditious restoration of
11 natural resources.

12 I. BNSF has agreed to undertake the actions specified in this Decree and consents
13 to the entry of this Decree under MTCA and the WPCA.

14 **III. PARTIES BOUND**

15 This Decree shall apply to and be binding upon the Parties to this Decree, their
16 successors and assigns. The undersigned representative of each party hereby certifies that he
17 or she is fully authorized to enter into this Decree and to execute and legally bind such party to
18 comply with this Decree. BNSF agrees to undertake all actions required by the terms and
19 conditions of this Decree. No change in ownership or corporate status shall alter BNSF's
20 responsibility under this Decree. BNSF shall provide a copy of this Decree to all agents,
21 contractors, and subcontractors retained to perform work required by this Decree, and shall
22 ensure that all work undertaken by such agents, contractors, and subcontractors complies with
23 this Decree.

24 **IV. DEFINITIONS**

25 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and
26 WAC 173-340-200 shall control the meanings of the terms in this Decree.

1 B. Great Northern Railroad owned and operated the railyard facility property until
2 1970 when Great Northern Railroad merged with four other railroad companies to become the
3 Burlington Northern Railroad.

4 C. In 1996 The Burlington Northern Railroad merged with The Atchison, Topeka
5 and Santa Fe Railway and changed its corporate name to The Burlington Northern and Santa
6 Fe Railway Company.

7 D. In 2005, The Burlington Northern and Santa Fe Railway Company changed its
8 corporate name to BNSF Railway Company (hereinafter BNSF).

9 E. The railyard facility property was used to refuel and maintain locomotives from
10 the late 1800s until those operations were discontinued in 1974. During different periods of
11 the 75 years of operation, coal, bunker oil, electricity and diesel fuel were used to power
12 locomotives. *See Final Feasibility Study, Former Maintenance and Fueling Facility,*
13 *Skykomish Washington, The RETEC Group, March 15, 2005 (Feasibility Study).*

14 F. From 1974 to the present, the railyard facility property has been used as a base
15 of operations for track maintenance and snow removal crews, among other things. *See id.*

16 G. Historic railyard operations resulted in discharges of petroleum products on and
17 near the railyard facility property. Petroleum discharges to the Skykomish River and Maloney
18 Creek were first documented in the 1920's.

19 H. Ecology's Toxics Cleanup Program became aware of the petroleum
20 contamination in 1989 when MTCA was enacted. Ecology listed the Site on the Hazardous
21 Sites List in 1991. The Site was assessed using the Washington Ranking Method pursuant to
22 WAC 173-340-330(2). It was found to be among the sites in Washington State with the
23 highest level of concern and assigned a rank of 1, with a high priority for further investigation.

24 I. In 1991, Ecology initiated discussions with BNSF and entered into Agreed
25 Order No. 91TC-N213 for a Remedial Investigation and Feasibility Study (RI/FS) in 1993.
26 Under this Order, BNSF submitted a draft RI to Ecology in 1996, a draft FS in 1999, and a

1 Supplemental RI in 2002 due to data gaps in the earlier version and amendments to the MTCA
2 regulations adopted by Ecology in 2001. In 2004 and 2005, Ecology conducted further
3 sampling of soils, sediments, surface and ground water to fill additional data gaps. Further
4 investigation work was then conducted by BNSF during preparation of a final draft FS. Taken
5 together, these studies provided Ecology sufficient information to develop a final cleanup plan
6 for the Site. BNSF's final draft feasibility study was submitted on March 15, 2005 and
7 accepted as final by Ecology on August 11, 2005, as it contained information adequate to
8 develop a cleanup action plan for the Site.

9 J. Investigations found petroleum contamination in the soil, sediments, surface
10 water, and groundwater at the Site. PCBs, lead, and arsenic were found in isolated areas of
11 surface soils at the Site. Dioxins/furans were found in the former Maloney Creek Channel
12 sediments by supplemental investigation sampling done by Ecology in 2004 and 2005.
13 Volatile organics were also detected in air at the Site. The nature and extent of petroleum and
14 petroleum products, lead, arsenic, and PCBs is documented in reports prepared by BNSF's
15 contractors, including: *Remedial Investigation for the Former Maintenance and Fueling*
16 *Facility in Skykomish, Washington*, The RETEC Group, January 1996 (Remedial
17 Investigation); *Supplemental Remedial Investigation Volumes 1 and 2, BNSF Former*
18 *Maintenance and Fueling Facility, Skykomish, Washington*, The RETEC Group, July 2002
19 (Supplemental Remedial Investigation); and, *Final Feasibility Study, Former Maintenance and*
20 *Fueling Facility, Skykomish, Washington*, The RETEC Group, March 15, 2005 (Feasibility
21 Study).

22 K. Free petroleum product (also known as Light Non-aqueous Phase Liquid or
23 "LNAPL" as defined in WAC 173-340-200 under the term "NAPL") is present in soil and in
24 groundwater across most of the Site. Dissolved petroleum product is present in groundwater.

25 L. Free petroleum product and petroleum dissolved in groundwater have seeped
26

1 into the South Fork of the Skykomish River and caused adverse impacts in sediment benthic
2 organisms living in the Skykomish River.

3 M. BNSF has performed a number of interim actions over the last ten years, under
4 multiple agreed orders with Ecology. First, under Agreed Order DE 91TC-N213 and
5 beginning in 1995, BNSF installed passive oil recovery wells along the South Fork of the
6 Skykomish River to collect free product. Second, under Agreed Order DE 91TC-N213 and
7 beginning in 1996, a dust suppressant (Soil-Sement[®]) has been applied annually to rail yard
8 soils to minimize wind-blown soil that might contain lead and arsenic. Third, and also in 1996,
9 absorbent booms were installed and maintained along the South Fork of the Skykomish River
10 to capture some of the petroleum seeping into the River. Fourth, in 2001, BNSF installed an
11 underground barrier wall and additional passive oil recovery wells to try to eliminate or reduce
12 petroleum seeping into the River. The underground barrier and additional wells were installed
13 under Agreed Order DE 01TCPNR-2800 and an enhanced boom configuration and
14 maintenance plan was implemented in 2002 as part of this action. However, the barrier wall,
15 passive recovery wells and booms were not effective in eliminating the seeps.

16 N. In May of 2006, BNSF and Ecology signed Agreed Order No. DE 3279. In the
17 2006 Agreed Order, Ecology deemed as satisfied the requirements of Agreed Order No. DE
18 91TC-N213 and Agreed Order No. DE 01TCPNR-2800 except payment of then-outstanding
19 oversight costs, incorporated by reference certain outstanding obligations from the prior orders,
20 and also incorporated another more extensive interim action. Under the 2006 Agreed Order,
21 BNSF removed the underground barrier wall and oil recovery wells and excavated
22 contaminated river sediments and contaminated soil in the river bank and flood levee and
23 under several upland residences. Five residences were temporarily relocated during river,
24 levee and upland area excavation in 2006, and were all replaced afterwards. Over 100,000 tons
25 of contaminated material was shipped off-site by BNSF for disposal at a landfill, and over
26 30,000 gallons of liquid petroleum product was recovered and sent offsite for recycling.

1 **VI. WORK TO BE PERFORMED**

2 This Decree contains a program designed to protect human health and the environment
3 and to restore natural resources from the known release, or threatened release, of hazardous
4 substances or contaminants at, on, or from the Site.

5 A. The Parties intend for all obligations under Agreed Order No. DE 3279 which
6 remain outstanding as of the Effective Date of this Decree, to be incorporated by reference into
7 this Decree. Accordingly, BNSF shall:

8 1. Meet the following outstanding obligations from Exhibit E
9 (Construction Schedule) of Agreed Order No. DE 3279:

10 a. March 31, 2008: All work completed, including
11 infrastructure replacement; all construction equipment demobilized (except
12 equipment to be used in further cleanup work);

13 b. March 31, 2008: Submit Final As-built Report to Ecology
14 for all work completed between January 1, 2007 and March 31, 2008;

15 2. Continue dust suppression activities at BNSF's railyard facility property
16 until soil with lead and arsenic contamination is removed pursuant to the CAP, Exhibit
17 B;

18 3. Maintain absorbent booms as necessary to address oil seeps at the Fifth
19 Street bridge abutment in the Skykomish River;

20 4. Comply with substantive requirements and permit requirements such as
21 habitat mitigation;

22 5. Restore private and public properties consistent with the *Engineering*
23 *Design Report – Levee Zone Interim Action for Cleanup* dated May 3, 2006;

24 6. Conduct groundwater monitoring consistent with the *Groundwater*
25 *Monitoring Plan* dated May 12, 2005 (GW Plan), including any amendments thereto
26 that are approved by Ecology.

1 The Parties intend that the above list include any and all outstanding obligations under
2 Agreed Order No. DE 3279. The Parties agree to incorporate any inadvertently omitted
3 obligations into future work plans pursuant to this Decree. The Parties agree that Agreed Order
4 No. DE 3279 no longer has any force or effect.

5 B. BNSF will also conduct a final cleanup action at the Site by implementing the
6 CAP, Exhibit B. The cleanup action is to take place in phases according to the schedule
7 presented in Section 6.2 (Schedule) of the CAP, Exhibit B, and all other requirements of this
8 Decree.

9 C. BNSF shall conduct those actions required by Section XVIII (Natural Resource
10 Damages) in order to fully restore natural resources damaged by the release at the Site and/or
11 fully compensate for their loss.

12 D. In order to implement the CAP, BNSF will prepare and submit for Ecology's
13 review and approval all documents necessary to conduct the final cleanup action, in multiple
14 phases, such as engineering design reports, compliance monitoring plans, operations and
15 maintenance plans, as-built reports, and periodic review reports. Any such deliverable, once
16 approved by Ecology, becomes an integral and enforceable part of this Decree. The List of
17 Deliverables and Schedule, attached as Exhibit C, details those deliverables that have been
18 identified at the time of entry of this Decree, plus the schedule by which they must be
19 submitted.

20 E. BNSF agrees not to perform any remedial actions outside the scope of this
21 Decree unless the Parties agree to modify the CAP (including, as necessary, the schedule
22 contained within the CAP), Exhibit B, to cover these actions. Notwithstanding the foregoing,
23 and with advance notice to Ecology, BNSF may excavate contamination in conjunction with
24 railroad operations not related to cleanup, including but not limited to utility work and track
25 maintenance, and may either properly dispose of the contamination offsite pursuant to all
26 applicable state and federal law, or may choose to manage the contamination on BNSF's

1 railyard facility property provided such actions do not interfere with the cleanup action
2 required by this Decree, absent amendment thereto. All work conducted by BNSF under this
3 Decree shall be done in accordance with Chapter 173-340 WAC unless otherwise provided
4 herein.

5 **VII. DESIGNATED PROJECT COORDINATORS**

6 The remedial project coordinator for Ecology is:

7 Louise Bardy
8 Washington State Department of Ecology
9 3190 160th Avenue Southeast
10 Bellevue, WA 98008-5452
11 Telephone: (425) 649-7209
12 E-Mail: lbar461@ecy.wa.gov

13 The NRD project coordinator for Ecology is:

14 Michelle Wilcox
15 Washington State Department of Ecology
16 300 Desmond Drive SE
17 Olympia, WA 98504-7600
18 Telephone: (360) 407-7466
19 E-Mail: micw461@ecy.wa.gov

20 The project coordinator for BNSF is:

21 Bruce Sheppard
22 BNSF Railway Company
23 2454 Occidental Avenue South
24 Suite 1A
25 Seattle, WA 98134
26 Telephone: (206) 625-6035
E-Mail: bruce.sheppard@bnsf.com

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

1 contacts for all or portions of the implementation of the work to be performed required by this
2 Decree.

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

5 VIII. PERFORMANCE

6 All geologic and hydrogeologic work performed pursuant to this Decree shall be under
7 the supervision and direction of a geologist licensed in the State of Washington or under the
8 direct supervision of an engineer registered in the State of Washington, except as otherwise
9 provided for by Chapters 18.220 and 18.43 RCW.

10 All engineering work performed pursuant to this Decree shall be under the direct
11 supervision of a professional engineer registered in the State of Washington, except as
12 otherwise provided for by RCW 18.43.130.

13 All construction work performed pursuant to this Decree shall be under the direct
14 supervision of a professional engineer or a qualified technician under the direct supervision of
15 a professional engineer. The professional engineer must be registered in the State of
16 Washington, except as otherwise provided for by RCW 18.43.130.

17 Any documents submitted containing geologic, hydrologic or engineering work shall be
18 under the seal of an appropriately licensed professional as required by Chapter 18.220 RCW or
19 RCW 18.43.130.

20 BNSF shall notify Ecology in writing of the identity of any engineer(s) and
21 geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms
22 of this Decree, in advance of their involvement at the Site. BNSF has notified Ecology that
23 The RETEC Group, Wilder Construction Company, Test America and EnviroIssues may be
24 used by BNSF in carrying out the terms of this Decree.

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IX. ACCESS

Ecology or any Ecology authorized representative shall have full authority to enter and freely move about all property at the Site that BNSF either owns, controls, or has access rights to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Decree; reviewing BNSF's progress in carrying out the terms of this Decree; conducting such tests or collecting such samples as Ecology may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Decree; and verifying the data submitted to Ecology by BNSF. BNSF shall make all reasonable efforts to secure access rights for those properties within the Site not owned or controlled by BNSF where remedial activities or investigations will be performed pursuant to this Decree. BNSF shall follow the Guidelines for Temporary Relocation, attached as Exhibit G, in relocating residents. In conjunction with public meetings held under Section XXVIII (Public Participation), Ecology and BNSF will outline for the community what community members can expect with regard to access needed on individual properties, including how access agreements will be negotiated and any services available to property owners during the process. Ecology or any Ecology authorized representative shall give reasonable notice before entering any Site property owned or controlled by BNSF unless an emergency prevents such notice. All Parties who access the Site pursuant to this Section shall comply with any applicable Health and Safety Plan(s). All Parties who access BNSF's railyard property will be required to complete BNSF's Contractor Safety Training Program (www.contractororientation.com), unless they are personally escorted by someone who has completed the Program. Ecology employees and their representatives shall not be required to sign any liability release or waiver as a condition of Site property access.

1 **X. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

2 With respect to the implementation of this Decree, BNSF shall make the results of all
3 sampling, laboratory reports, and/or test results generated by it or on its behalf available to
4 Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology
5 in both printed and electronic formats in accordance with Section XI (Progress Reports),
6 Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any
7 subsequent procedures specified by Ecology for data submittal.

8 If requested by Ecology, BNSF shall allow Ecology and/or its authorized representative
9 to take split or duplicate samples of any samples collected by BNSF pursuant to the
10 implementation of this Decree. BNSF shall notify Ecology seven (7) days in advance of any
11 sample collection or work activity at the Site. Ecology shall, upon request, allow BNSF and/or
12 its authorized representative to take split or duplicate samples of any samples collected by
13 Ecology pursuant to the implementation of this Decree, provided that doing so does not
14 interfere with Ecology's sampling. Without limitation on Ecology's rights under Section IX
15 (Access), Ecology shall notify BNSF prior to any sample collection activity unless an
16 emergency prevents such notice.

17 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be
18 conducted by a laboratory accredited under Chapter 173-50 WAC for the specific analyses to
19 be conducted, unless otherwise approved by Ecology.

20 **XI. PROGRESS REPORTS**

21 BNSF shall submit to Ecology written monthly Progress Reports that describe the
22 actions taken during the previous month to implement the requirements of this Decree. The
23 Progress Reports shall include the following:

- 24 A. A list of on-site activities that have taken place during the reporting period;
25 B. Detailed description of any deviations from required tasks not otherwise
26 documented in project plans or amendment requests;

1 C. Description of all deviations from the CAP and schedule contained therein,
2 Exhibit B, during the reporting period and any planned deviations in the upcoming month;

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

5 E. All raw data (including laboratory analyses) received by BNSF during the
6 reporting period and an identification of the source of the sample, unless Ecology agrees that
7 submitting raw data is not necessary at that time; and

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

10 Monthly Progress Reports shall be shall be delivered on or before the 15th day after the
11 end of the reporting period. During periods of construction activity weekly Progress Reports
12 shall be submitted in lieu of monthly reports, as appropriate to the level of project activity, and
13 will be delivered on or before the third business day after the end of the reporting period.

14 Progress Reports shall be submitted by e-mail to Ecology's project coordinator. After
15 Ecology has approved Construction Completion Reports required for all phases of the final
16 cleanup action required by Section VI (Work to be Performed), BNSF shall submit Progress
17 Reports on a quarterly basis within thirty days after the end of the reporting period, or as
18 required by the Compliance Monitoring Plan.

19 XII. RETENTION OF RECORDS

20 During the pendency of this Decree, and for ten (10) years from the date this Decree is
21 no longer in effect as provided in Section XXIX (Duration of Decree), BNSF shall preserve all
22 records, reports, documents, and underlying data in its possession relevant to the
23 implementation of this Decree and shall insert a similar record retention requirement into all
24 contracts with project contractors and subcontractors. Upon request of Ecology, BNSF shall
25 make all records available to Ecology and allow access for review within a reasonable time.
26 Nothing in this Order is intended by BNSF to waive any right it may have under applicable law

1 to limit disclosure of documents protected by the attorney work-product and/or attorney-client
2 privilege. If BNSF withholds any requested records based on an assertion of privilege, it shall
3 provide Ecology with a privilege log specifying the records withheld and the applicable
4 privilege. No actual data collected on Site pursuant to this Decree shall be considered
5 privileged.

6 **XIII. TRANSFER OF INTEREST IN PROPERTY**

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

11 Prior to BNSF's transfer of any interest in all or any portion of the Site, and during the
12 effective period of this Decree, BNSF shall provide a copy of this Decree to any prospective
13 purchaser, lessee, transferee, assignee, or other successor in said interest; and, at least thirty
14 (30) days prior to any transfer, BNSF shall notify Ecology of said transfer. Upon transfer of
15 any interest, BNSF shall restrict uses and activities to those consistent with this Consent
16 Decree and notify all transferees of the restrictions on the use of the property.

17 **XIV. RESOLUTION OF DISPUTES**

18 A. In the event a dispute arises as to an approval, disapproval, proposed change, or
19 other decision or action by Ecology's project coordinator, or an itemized billing statement
20 under Section XXV (Remedial Action Costs), the Parties shall utilize the dispute resolution
21 procedure set forth below.

22 1. Upon receipt of Ecology's project coordinator's written decision, or the
23 itemized billing statement, BNSF has fourteen (14) days within which to notify
24 Ecology's project coordinator in writing of its objection to the decision or itemized
25 statement.
26

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

4 3. BNSF may then request Ecology management review of the decision.
5 This request shall be submitted in writing to the Manager of the Land and Aquatics
6 Cleanup Section (Section Manager) at Ecology's Headquarters Office within seven (7)
7 days of receipt of Ecology's project coordinator's written decision.

8 4. The Section Manager shall conduct a review of the dispute and shall
9 endeavor to issue a written decision regarding the dispute within thirty (30) days of
10 BNSF's request for review.

11 5. If BNSF finds the Section Manager's decision unacceptable, BNSF may
12 then request final management review of the decision. This request shall be submitted
13 in writing to the Toxics Cleanup Program Manager within seven (7) days of receipt of
14 the Section Manager's decision.

15 6. Ecology's Toxics Cleanup Program Manager shall conduct a review of
16 the dispute and shall endeavor to issue a written decision regarding the dispute within
17 thirty (30) days of BNSF's request for review of the Regional Section Manager's
18 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final
19 decision on the disputed matter.

20 B. If Ecology's final written decision is unacceptable to BNSF, BNSF has the right
21 to submit the dispute to the Court for resolution. The Parties agree that one judge should retain
22 jurisdiction over this case and shall, as necessary, resolve any dispute arising under this
23 Decree. In the event BNSF presents an issue to the Court for review, the Court shall review
24 the action or decision of Ecology on the basis of whether such action or decision was arbitrary
25 and capricious and render a decision based on such standard of review. BNSF additionally
26 reserves the right to challenge any Ecology decision not to grant a schedule extension under

1 Section XVI.B.4 or D.2 (Extension of Schedule), or to apply land use restrictions on BNSF's
2 railyard facility property under Section XXI (Land Use Restrictions), as being preempted by
3 federal law; BNSF agrees the Court shall have jurisdiction to hear the controversy.

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

8 D. Implementation of these dispute resolution procedures shall not provide a basis
9 for delay of any activities required in this Decree, unless Ecology agrees in writing to a
10 schedule extension or the Court so orders.

11 E. In the event BNSF prevails in any dispute resolution process, Ecology hereby
12 waives the right to recover any penalties or any costs incurred by or on behalf of Ecology
13 during such dispute resolution process and concerning the issue in dispute.

14 **XV. AMENDMENT OF DECREE**

15 The project coordinators may agree to minor changes to the work to be performed
16 without formally amending this Decree. Minor changes will be documented in writing by
17 Ecology and BNSF.

18 Substantial changes to the work to be performed shall require formal amendment of this
19 Decree. This Decree may only be formally amended by a written stipulation among the Parties
20 that is entered by the Court, or by order of the Court. Such amendment shall become effective
21 upon entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld
22 by any party.

23 BNSF shall submit a written request for amendment to Ecology for approval. Ecology
24 shall indicate its approval or disapproval in writing and in a timely manner after the written
25 request for amendment is received. If the amendment to the Decree is a substantial change,
26 Ecology will provide public notice and opportunity for comment. Reasons for the disapproval

1 of a proposed amendment to the Decree shall be stated in writing. If Ecology does not agree to
2 a proposed amendment, the disagreement may be addressed through the dispute resolution
3 procedures described in Section XIV (Resolution of Disputes).

4 **XVI. EXTENSION OF SCHEDULE**

5 A. An extension of schedule shall be granted only when a request for an extension
6 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
7 deadline for which the extension is requested, and good cause exists for granting the extension.

8 All extensions shall be requested in writing. The request shall specify:

- 9 1. The deadline that is sought to be extended;
- 10 2. The length of the extension sought;
- 11 3. The reason(s) for the extension; and
- 12 4. Any related deadline or schedule that would be affected if the extension
13 were granted.

14 B. The burden shall be on BNSF to demonstrate to the satisfaction of Ecology that
15 the request for such extension has been submitted in a timely fashion and that good cause
16 exists for granting the extension. Good cause may include, but may not be limited to:

- 17 1. Circumstances beyond the reasonable control and despite the due
18 diligence of BNSF including delays caused by unrelated third parties or Ecology, such
19 as (but not limited to) delays by Ecology in reviewing, approving, or modifying
20 documents submitted by BNSF;
- 21 2. Acts of God, including fire, flood, blizzard, extreme temperatures,
22 storm, or other unavoidable casualty;
- 23 3. Endangerment as described in Section XVII (Endangerment); or
- 24 4. Unanticipated circumstances that would cause scheduled cleanup
25 actions, if not rescheduled, to unduly restrict mainline operations or to unreasonably
26 burden interstate commerce.

1 such activities. BNSF shall notify Ecology's project coordinator as soon as possible, but no
2 later than twenty-four (24) hours after making such determination or ceasing such activities.
3 Upon Ecology's direction, BNSF shall provide Ecology with documentation of the basis for
4 the determination or cessation of such activities. If Ecology disagrees with BNSF's cessation
5 of activities, it may direct BNSF to resume such activities.

6 If Ecology concurs with or orders a work stoppage pursuant to this Section, BNSF's
7 obligations with respect to the ceased activities shall be suspended until Ecology determines
8 the danger is abated, and the time for performance of such activities, as well as the time for any
9 other work dependent upon such activities, shall be extended, in accordance with Section XVI
10 (Extension of Schedule), for such period of time as Ecology determines is reasonable under the
11 circumstances.

12 Nothing in this Decree shall limit the authority of Ecology, its employees, agents, or
13 contractors to take or require appropriate action in the event of an emergency.

14 **XVIII. NATURAL RESOURCE DAMAGES**

15 A. In addition to implementing the final cleanup remedy for the Site, the CAP,
16 Exhibit B, is designed to restore groundwater and the resources and services it supports, in the
17 Town of Skykomish. This will help restore natural resources and reduce future damages to
18 resources at the Site. BNSF has also restored natural resources and reduced future damages at
19 the Site by cleaning up and enhancing the River bed, bank and levee, completed as an interim
20 action in 2006. This Section requires additional actions be taken to restore and/or compensate
21 fully for the Natural Resource Damage (NRD) injuries at the Site.

22 B. All funds paid by BNSF to Ecology pursuant to this Section shall be used
23 exclusively for projects and under budgets approved by Ecology to ensure that such projects
24 provide restoration and compensation for NRD injuries. Ecology shall administer
25 disbursements on behalf of the state in consultation with BNSF and other entities identified
26 below.

1 C. Skykomish Aquatic Habitat Restoration: Within 90 days of the effective date of
2 this Decree, BNSF shall pay Ecology the sum of Two Million Five Hundred Thousand and
3 00/100 Dollars (\$2,500,000.00) to be used exclusively for funding projects that restore,
4 enhance, or protect fish and aquatic habitat in the Skykomish or Snohomish River Watersheds.
5 Although this Decree is entered pursuant to MTCA, Ecology shall administer disbursements on
6 behalf of the state in consultation with the federal Oil Pollution Act Trustees: The Tulalip
7 Tribes of Washington, the United States Department of Interior (Fish and Wildlife Service),
8 the United States Department of Agriculture (Forest Service), and the United States
9 Department of Commerce (National Oceanic and Atmospheric Administration). Ecology shall
10 work with the Trustees to establish such decision-making procedures regarding expenditures of
11 funds as they deem appropriate. Projects may include those identified in the Snohomish River
12 Basin Plan or the Shared Strategy for Salmon Recovery.

13 D. Skykomish Water Quality Protection: Within 90 days of the effective date of
14 this Decree, BNSF shall pay Ecology the sum of One Million Five Hundred Thousand and
15 00/100 Dollars (\$1,500,000.00) to be used exclusively for implementing the Town's
16 *Wastewater Facility Plan* dated June 2007. Of this amount, Seven Hundred Thousand and
17 00/100 cents (\$700,000.00) is dedicated for capital costs of implementing Phase II of the Plan;
18 and Eight Hundred Thousand and 00/100 Dollars (\$800,000.00) is dedicated for operation and
19 maintenance of the Town's wastewater system pursuant to the Plan. Implementation of the
20 Plan will enhance, restore and protect water quality by converting the Town from individual
21 septic systems to community sewers with a single wastewater treatment plant. Any remainder
22 of funds can be used to implement other portions of the Town's *Wastewater Facility Plan*
23 dated June 2007. If the Town does not implement the Plan or expend all the funds, the funds
24 or any remainder will be transferred to the Skykomish Recreational and Terrestrial Restoration
25 effort.
26

1 E. Skykomish Recreational and Terrestrial Restoration: Within ninety (90) days of
2 the effective date of this Decree, BNSF shall pay Ecology the sum of One Million Five
3 Hundred Thousand and 00/100 Dollars (\$1,500,000.00), as adjusted below, to be used
4 exclusively to fund projects in and around the Town of Skykomish for enhancing, restoring or
5 protecting terrestrial and waterfowl habitat, and compensating for lost recreational
6 opportunities. Ecology shall administer disbursements on behalf of the state in consultation
7 with the Town. The Town of Skykomish may propose to Ecology projects to be funded.
8 Before approving any proposal, Ecology shall determine that the proposal appropriately either
9 restores injuries to natural resources or compensates for injuries to natural resources or lost
10 services.

11 1. Of these funds, a credit of Three-Hundred and Fifty Thousand and
12 00/100 dollars (\$350,000.00) is granted to BNSF for levee improvements already
13 implemented as part of the 2006 interim action.

14 2. Of these funds, Fifty Thousand and 00/100 Dollars (\$50,000.00) must be
15 directly expended by BNSF to fully resolve the turbidity exceedances that occurred in
16 2006, as prescribed below.

17 3. Of these funds, Fifty Thousand and 00/100 Dollars (\$50,000.00) will be
18 directly expended by BNSF as in-kind services for the benefit of the Town of
19 Skykomish, to compensate for injuries to natural resources or lost services. Within one
20 year of the effective date of this Decree, BNSF shall submit to Ecology a joint letter
21 from BNSF and the Town of Skykomish on the expenditure of these funds. Ecology
22 shall determine whether the proposal appropriately compensates for injuries to natural
23 resources or lost services. Should this letter not be submitted within this timeframe, or
24 the proposal does not appropriately compensate for injuries to natural resources or lost
25 services, these funds shall be submitted to Ecology within thirty days in accordance
26 with Section XVIII.E.

1 F. Ecology intends to enter into a separate Interagency Agreement (IAA) with the
2 Town of Skykomish that will set forth how the Water Quality Protection and Skykomish
3 Recreational and Terrestrial Restoration funds shall be used and maintained. The subjects to be
4 addressed in the IAA, include, but are not limited to, specifying the terms and conditions under
5 which funds will be transferred to the Town of Skykomish.

6 G. Turbidity Mitigation Plan: Within one year of the effective date of this Decree,
7 BNSF shall, in consultation with Ecology, design and implement projects identified in the
8 Turbidity Mitigation Plan dated November 2006 with a value of Fifty Thousand and 00/100
9 Dollars (\$50,000.00).

10 H. Release of Claims: In consideration of BNSF's compliance with the terms and
11 conditions of this Section and this Decree, the State of Washington, through the Department of
12 Ecology and the Attorney General, hereby releases all claims against BNSF relating to NRD
13 injuries resulting from the release or threatened release of hazardous substances covered by
14 this Decree, including but not limited to claims under Chapter 70.105D RCW, Chapter 90.48
15 RCW, Chapter 90.56 RCW, federal law and the common law relating to NRD injuries
16 occurring on or off the Site that result from the release or threatened release of hazardous
17 substances covered by this Decree, the discharge of oil to waters of the state covered by this
18 Decree, and turbidity conditions experienced during remedial activities in 2006. Nothing in
19 this section compromises claim(s) by any federal agency or Native American tribe.

20 **XIX. COVENANT NOT TO SUE**

21 A. Covenant Not to Sue: In consideration of BNSF's compliance with the terms
22 and conditions of this Decree, Ecology covenants not to institute legal or administrative actions
23 against BNSF regarding the release or threatened release of hazardous substances covered by
24 this Decree.

25 This Decree covers only the Site specifically identified in the Site Diagram, Exhibit A,
26 and those hazardous substances that Ecology knows are located at the Site as of the date of

1 entry of this Decree. This Decree does not cover any other hazardous substance or area.
2 Ecology retains all of its authority relative to any substance or area not covered by this Decree.

3 This Covenant Not to Sue shall have no applicability whatsoever to:

- 4 1. Criminal liability; and
- 5 2. Any Ecology action, including cost recovery, against PLPs not a
6 party to this Decree.

7 If factors not known at the time of entry of the settlement agreement are discovered and
8 present a previously unknown threat to human health or the environment, the Court shall
9 amend this Covenant Not to Sue.

10 B. Reopeners: Ecology specifically reserves the right to institute legal or
11 administrative action against BNSF to require it to perform additional remedial actions
12 at the Site and to pursue appropriate cost recovery, pursuant to RCW 70.105D.050,
13 under the following circumstances:

14 1. Upon BNSF's failure to meet the requirements of this Decree,
15 including, but not limited to, failure of the remedial action to meet the cleanup
16 standards identified in the CAP, Exhibit B;

17 2. Upon Ecology's determination that remedial action beyond the
18 terms of this Decree is necessary to abate an imminent and substantial
19 endangerment to human health or the environment;

20 3. Upon the availability of new information regarding factors
21 previously unknown to Ecology, including the nature or quantity of hazardous
22 substances at the Site, and Ecology's determination, in light of this information,
23 that further remedial action is necessary at the Site to protect human health or
24 the environment; or

1 **XXI. LAND USE RESTRICTIONS**

2 BNSF shall record a restrictive covenant on BNSF's railyard facility property if
3 contamination remains on such property following implementation of the cleanup action, as
4 specified in the CAP, Exhibit B. The restrictive covenant shall be enforceable by Ecology and
5 restrict future uses of the property and otherwise meet regulatory requirements, and must be
6 approved by Ecology before being recorded. BNSF will record the restrictive covenant with
7 the office of the King County Auditor within ten (10) days of the completion of all phases of
8 the cleanup action. BNSF shall provide Ecology with a copy of the recorded restrictive
9 covenant within thirty (30) days of the recording date. Restrictions placed on BNSF's railyard
10 facility property in the restrictive covenant will be tailored and may be amended after
11 recording so as not to interfere with railroad operations.

12 Restrictive covenants will also be required for those properties other than BNSF's
13 railyard facility property, if contamination above concentrations protective of direct contact
14 remains on such properties following implementation of the cleanup action, as outlined in the
15 CAP, Exhibit B. Where required, a restrictive covenant shall restrict future uses of the
16 property in question and otherwise meet regulatory requirements, and must be approved by
17 Ecology before being recorded or amended. BNSF will ensure that such restrictive covenants
18 are recorded for those properties in conjunction with the implementation of the cleanup and
19 will provide Ecology with a copy of any such recorded restrictive covenants within thirty (30)
20 days of the recording date.

21 In addition, and in lieu of requiring restrictive covenants on any properties that will not
22 have contamination remaining above concentrations protective of direct contact following
23 cleanup, permit and/or zoning overlays are to be implemented to ensure the appropriate
24 management of contaminated soils in the impacted area during cleanup, plus appropriate
25 restrictions on groundwater withdrawal both during and after cleanup, as applicable and as
26

1 outlined in the CAP, Exhibit B. BNSF and Ecology agree to work cooperatively with local
2 jurisdictions as necessary to develop and implement such overlays.

3 A model restrictive covenant is attached as Exhibit H. This model restrictive covenant
4 will be tailored appropriately for each property in question and be subject to Ecology approval
5 prior to being recorded.

6 XXII. FINANCIAL ASSURANCES

7 Pursuant to WAC 173-340-440(11), BNSF shall maintain sufficient and adequate
8 financial assurance mechanisms to cover all costs associated with all work remaining to be
9 completed under this Decree, including but not limited to the operation and maintenance of the
10 remedial action at the Site, such as institutional controls, compliance monitoring, and
11 corrective measures, as follows:

12 A. Within sixty (60) days of the effective date of this Decree, BNSF shall submit to
13 Ecology for review and approval an estimate of the costs that it will incur in carrying out the
14 terms of this Decree, including operation and maintenance, and compliance monitoring.
15 Within sixty (60) days after Ecology approves the aforementioned cost estimate, BNSF shall
16 provide proof of financial assurances sufficient to cover all such costs in a form acceptable to
17 Ecology.

18 B. BNSF shall adjust the financial assurance coverage and provide Ecology's
19 project coordinator with documentation of the updated financial assurance for:

20 1. Inflation, annually, within thirty (30) days of the anniversary date of the
21 entry of this Decree; or if applicable, the modified anniversary date established in
22 accordance with this Section, or if applicable, ninety (90) days after the close of
23 BNSF's fiscal year if the financial test or corporate guarantee is used; and

24 2. Changes in cost estimates, within thirty (30) days of issuance of
25 Ecology's written approval of a minor modification or the Court's entry of a formal
26 amendment to the work to be performed under this Decree pursuant to Section XV

1 (Amendment of Decree), when the modification or amendment results in an increase to
2 the cost or expected duration of the remedial action. Any adjustments for inflation
3 since the most recent preceding anniversary date shall be made concurrent with
4 adjustments for changes in cost estimates. Ecology's approval of a modification or the
5 Court's entry of a formal amendment, will revise the anniversary date established under
6 this Section to become the date of issuance of such revision or entry of formal
7 amendment.

8 C. BNSF shall notify Ecology's project coordinator by certified mail of the
9 commencement of a voluntary or involuntary bankruptcy proceeding that names BNSF as
10 debtor, within ten (10) days after commencement of the proceeding. A guarantor of a
11 corporate guarantee must make such a notification if he is named as debtor as required under
12 the terms of the corporate guarantee.

13 **XXIII. INDEMNIFICATION**

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

22 **XXIV. COMPLIANCE WITH APPLICABLE LAWS**

23 A. All actions carried out by BNSF pursuant to this Decree shall be done in
24 accordance with all applicable federal, state, and local requirements, including requirements to
25 obtain necessary permits, except as provided in RCW 70.105D.090. The permits or other
26

1 federal, state or local requirements that the agency has determined are applicable and that are
2 known at the time of entry of this Decree have been identified in Exhibit D.

3 B. Pursuant to RCW 70.105D.090(1), BNSF is exempt from the procedural
4 requirements of Chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW and of any laws
5 requiring or authorizing local government permits or approvals. However, BNSF shall comply
6 with the applicable substantive requirements of such permits or approvals. The exempt permits
7 or approvals and the applicable substantive requirements of those permits or approvals, as they
8 are known at the time of entry of this Decree, have been identified in Exhibit E.

9 BNSF has a continuing obligation to determine whether additional permits or approvals
10 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under
11 this Decree. BNSF will evaluate and identify on a yearly basis any additional and applicable
12 substantive requirements, as part of fulfilling its obligation to develop and submit phased
13 EDRs in advance of work for each upcoming year. Ecology agrees to meet with BNSF at least
14 annually to help facilitate this process. In the event either Ecology or BNSF determines that
15 additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be
16 required for any phase of the work required by this Decree, it shall promptly notify the other
17 party of this determination. BNSF and Ecology shall then jointly consult with such agencies
18 and obtain written documentation from those agencies of the substantive requirements those
19 agencies believe are applicable to the remedial action(s) in question. Ecology shall make the
20 final determination on the additional substantive requirements that are applicable to the work
21 and on how BNSF must meet those requirements. Ecology will approve these requirements in
22 its approval of each phased EDR, as applicable, or will otherwise inform BNSF in writing of
23 these requirements. Once established by Ecology, the additional requirements shall be
24 enforceable requirements of this Decree. Unless such additional requirements substantially
25 change the scope of work for the cleanup required by this Decree, however, the establishment
26 of such requirements will be considered minor modifications to the Decree, and will not

1 require formal amendment with public comment. BNSF shall not begin or continue the
2 remedial action potentially subject to the additional requirements until Ecology makes its final
3 determination.

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

10 **XXV. REMEDIAL ACTION COSTS**

11 Except as provided in Section XIV.E (Resolution of Disputes), BNSF shall pay to
12 Ecology costs incurred by Ecology pursuant to this Decree and consistent with WAC 173-340-
13 550(2). These costs shall include work performed by Ecology or its contractors for, or on, the
14 Site under Chapter 70.105D RCW, including remedial actions and Decree preparation,
15 negotiation, oversight and administration. These costs shall include work performed both prior
16 to and subsequent to the entry of this Decree, including any outstanding costs associated with
17 Agreed Order No. DE 3279. Ecology's costs shall include costs of direct activities and support
18 costs of direct activities as defined in WAC 173-340-550(2). BNSF shall pay the required
19 amount within ninety (90) days of receiving from Ecology an itemized statement of costs that
20 includes a summary of costs incurred, an identification of involved staff, and the amount of
21 time spent by involved staff members on the project. A general description of work performed
22 will be provided upon request. Itemized statements shall be prepared quarterly. Pursuant to
23 WAC 173-340-550(4), failure to pay Ecology's costs within ninety (90) days of receipt of the
24 itemized statement of costs will result in interest charges at the rate of twelve percent (12%)
25 per annum, compounded monthly.

1 Pursuant to RCW 70.105D.055, Ecology has authority to recover unreimbursed
2 remedial action costs by filing a lien against real property subject to the remedial actions.

3 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

4 If Ecology determines that BNSF has failed without good cause to implement the
5 remedial action, in whole or in part, Ecology may, after notice to BNSF, perform any or all
6 portions of the remedial action that remain incomplete. If Ecology performs all or portions of
7 the remedial action because of BNSF's failure to comply with its obligations under this
8 Decree, BNSF shall reimburse Ecology for the costs of doing such work in accordance with
9 Section XXV (Remedial Action Costs), provided that BNSF is not obligated under this Section
10 to reimburse Ecology for costs incurred for work inconsistent with or beyond the scope of this
11 Decree. BNSF and Ecology agree to first meet and confer to informally resolve any dispute
12 about performance of the remedial action, before Ecology exercises its option under this
13 Section. If the Parties cannot agree to a resolution, BNSF reserves its right to seek an
14 injunction from the Court to prevent Ecology from performing any cleanup actions on BNSF's
15 railyard facility property that would be preempted under federal law. BNSF agrees the Court
16 shall have jurisdiction to decide the controversy.

17 Except where necessary to abate an emergency situation, BNSF shall not perform any
18 remedial actions at the Site outside those remedial actions required by this Decree, unless
19 Ecology concurs, in writing, with such additional remedial actions pursuant to Section XV
20 (Amendment of Decree).

21 **XXVII. PERIODIC REVIEW**

22 As remedial action, including groundwater monitoring, continues at the Site, the Parties
23 agree to review the progress of remedial action at the Site, and to review the data accumulated
24 as a result of monitoring the Site as often as is necessary and appropriate under the
25 circumstances. At least every five (5) years after the initiation of cleanup action at the Site the
26 Parties shall meet to discuss the status of the Site and the need, if any, for further remedial

1 action at the Site. At least ninety (90) days prior to each periodic review, BNSF shall submit a
2 report to Ecology that documents whether human health and the environment are being
3 protected based on the factors set forth in WAC 173-340-420(4). Ecology reserves the right to
4 require further remedial action at the Site under appropriate circumstances consistent with the
5 terms of this Decree. This provision shall remain in effect for the duration of this Decree, and
6 may remain in effect beyond the completion of the cleanup action consistent with WAC 173-
7 340-420(7).

8 **XXVIII. PUBLIC PARTICIPATION**

9 The Public Participation Plan for this remedial action is attached as Exhibit F. Ecology
10 shall maintain the responsibility for public participation at the Site. However, BNSF shall
11 cooperate with Ecology to implement the public participation plan, and shall:

12 A. If agreed to by Ecology, develop appropriate mailing list, prepare drafts of
13 public notices and fact sheets at important stages of the remedial action, such as the submission
14 of work plans, remedial investigation/feasibility study reports, cleanup action plans, and
15 engineering design reports. As appropriate, Ecology will edit, finalize, and distribute such fact
16 sheets and prepare and distribute public notices of Ecology's presentations and meetings.

17 B. Notify Ecology's project coordinator prior to any of the following if and to the
18 extent they concern the remedial action required by this Decree: the issuance of all press
19 releases; distribution of fact sheets; performance of other planned outreach activities; and
20 major meetings with the interested public and/or local governments. Likewise, Ecology shall
21 notify BNSF prior to the issuance of all press releases and fact sheets, and before major
22 meetings with the interested public and local governments if and to the extent they concern the
23 remedial action required by this Decree. For all press releases, fact sheets, meetings, and other
24 planned outreach efforts by BNSF that do not receive prior Ecology approval, BNSF shall
25 clearly indicate to its audience that the press release, fact sheet, meeting, or other outreach
26 effort was not sponsored or endorsed by Ecology. This section does not apply to

1 | communications by BNSF that are required or conducted pursuant to law(s) or regulations
2 | other than MTCA or the MTCA Cleanup Regulation, Chapter 173-340 WAC, or
3 | communications by BNSF with investors or insurance carriers.

4 | C. When requested by Ecology, participate in public presentations on the progress
5 | of the remedial action at the Site. Participation may be through attendance at public meetings
6 | to assist in answering questions, or as a presenter.

7 | D. When requested by Ecology, arrange and/or continue information repositories at
8 | the following locations:

- 9 | 1. Skykomish Library
10 | 100 Fifth Street
11 | Skykomish, WA 98288
12 | (360) 677-2660
- 13 | 2. Ecology's Northwest Regional Office
14 | 3190 160th Avenue SE
15 | Bellevue, WA 98008
16 | (425) 649-7000

17 | At a minimum, copies of all public notices, fact sheets, and press releases; all quality assured
18 | monitoring data; remedial actions plans and reports, supplemental remedial planning
19 | documents, and all other similar documents relating to performance of the remedial action
20 | required by this Decree shall be promptly placed in these repositories.

21 | **XXIX. DURATION OF DECREE**

22 | The remedial program required pursuant to this Decree shall be maintained and
23 | continued until BNSF has received written notification from Ecology that the requirements of
24 | this Decree have been satisfactorily completed. This Decree shall remain in effect until
25 | dismissed by the Court. When dismissed, Section XIX (Covenant Not to Sue) and Section XX
26 | (Contribution Protection) shall survive, in addition to any other sections that explicitly extend
beyond the duration of the decree (*e.g.* Section XXVII, Periodic Review).

1 **XXX. CLAIMS AGAINST THE STATE**

2 BNSF hereby agrees that it will not seek to recover any costs accrued in implementing
3 the remedial action required by this Decree from the State of Washington or any of its
4 agencies; and further, that BNSF will make no claim against the State Toxics Control Account
5 or any local Toxics Control Account for any costs incurred in implementing this Decree.
6 Except as provided above, however, BNSF expressly reserves its right to seek to recover any
7 costs incurred in implementing this Decree from any other PLP. This Section does not limit or
8 address funding that may be provided under Chapter 173-322 WAC.

9 **XXXI. COMMUNITY WASTE WATER SYSTEM**

10 Ecology is pursuing funding for a permanent wastewater treatment system for the Town
11 of Skykomish. Consequently, subject to legislative appropriation, Ecology will provide
12 funding assistance for a community wastewater system for the Town, consistent with the
13 Town's *Wastewater Facility Plan* dated June 2007.

14 **XXXII. EFFECTIVE DATE**

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

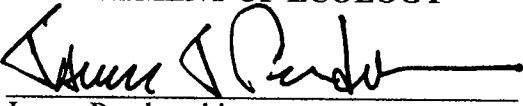
16 **XXXIII. WITHDRAWAL OF CONSENT**

17 If the Court withholds or withdraws its consent to this Decree, it shall be null and void
18 at the option of any party and the accompanying Complaint shall be dismissed without costs
19 and without prejudice. In such an event, no party shall be bound by the requirements of this
20 Decree.

21 //
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24 //
25 //
26 //

1 STATE OF WASHINGTON
2 DEPARTMENT OF ECOLOGY

ROBERT M. MCKENNA,
ATTORNEY GENERAL

3 



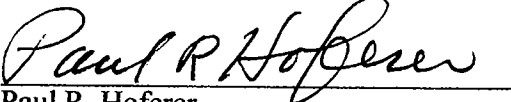
4 James Pendowski
5 Program Manager
6 Toxics Cleanup Program
7 (360) 407-7177

Kristie E. Carevich, WSBA No. 28018
Assistant Attorney General
(360) 586-6762

8 Date: 10/10/07

Date: OCTOBER 18, 2007

9 BNSF RAILWAY COMPANY

10 

11 Paul R. Hoferer
12 Vice President and General Counsel

13 Date: October 15, 2007

14 **OCT 19 2007**

15 ENTERED this _____ day of _____ 20____.

16 **CARLOS Y. VELATEGUI**

17 JUDGE
18 King County Superior Court