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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

BNSF Railway Company,

Defendant.

NO. _____

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

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I.

INTRODUCTION

1
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, the
15 Parties agree that settlement of these matters without litigation is reasonable and in the public
16 interest, and that entry of this Decree is the most appropriate means of resolving these matters.

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

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

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

1 Court over the subject matter and the Parties, except as provided in Sections II.A (Jurisdiction),
2 XIX.D (Covenant Not to Sue), and XXVI (Implementation of Remedial Action).

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

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

6 **II. JURISDICTION**

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

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

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

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

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

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

3 G. This Decree has been subject to public notice and comment. In addition, a
4 public hearing was held on [insert date].

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

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

11 III. PARTIES BOUND

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

21 IV. DEFINITIONS

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

24 A. Site: The Site is referred to as the BNSF Former Maintenance and Fueling
25 Facility or the BNSF Skykomish Site. The Site is generally located in the Town of Skykomish,
26

1 Washington. The Site is generally depicted in the Site Diagram, Exhibit A. The Site
2 constitutes a Facility under RCW 70.105D.020(4).

3 B. Railyard facility property: Refers to the real property that is depicted with
4 particularity in the Site Diagram, Exhibit A, which is owned and operated by BNSF for
5 mainline and other railroad operations, and which has regulatory significance for cleanup. The
6 railyard facility property is not to be confused with any separate parcels of property BNSF may
7 own in Skykomish, nor with the regulatory definition for a cleanup “facility” or “site.”

8 C. Parties: Refers to Plaintiff, State of Washington, Department of Ecology
9 (Ecology) and the Office of the Attorney General, and Defendant, BNSF Railway Company
10 (BNSF).

11 D. Consent Decree or Decree: Refers to this Consent Decree and each of the
12 exhibits to this Decree. All exhibits are integral and enforceable parts of this Consent Decree.
13 The terms "Consent Decree" or "Decree" shall include all exhibits to this Consent Decree.

14 **V. FINDINGS OF FACTS**

15 Ecology makes the following findings of fact without any express or implied
16 admissions of such facts by BNSF.

17 A. BNSF is the current owner and operator of approximately 30 acres of real
18 property located south of and adjacent to Railroad Avenue in Skykomish, Washington
19 (referred to generally as “the railyard facility property” as depicted in Exhibit A and described
20 in Section IV.B.). BNSF owned and operated a maintenance and refueling facility on this
21 property that was at various times referred to as “the BNSF Skykomish Former Maintenance
22 and Fueling Facility,” “the Burlington Northern Rail Yard” or “the Burlington Northern
23 Railway Company Former Maintenance and Fueling Facility.”

24 B. Great Northern Railroad owned and operated the railyard facility property until
25 1970 when Great Northern Railroad merged with four other railroad companies to become the
26 Burlington Northern Railroad.

1 C. In 1996 The Burlington Northern Railroad merged with The Atchison, Topeka
2 and Santa Fe Railway and changed its corporate name to The Burlington Northern and Santa
3 Fe Railway Company.

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

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

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

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

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

21 I. In 1991, Ecology initiated discussions with BNSF and entered into Agreed
22 Order No. 91TC-N213 for a Remedial Investigation and Feasibility Study (RI/FS) in 1993.
23 Under this Order, BNSF submitted a draft RI to Ecology in 1996, a draft FS in 1999, and a
24 Supplemental RI in 2002 due to data gaps in the earlier version and amendments to the MTCA
25 regulations adopted by Ecology in 2001. In 2004 and 2005, Ecology conducted further
26 sampling of soils, sediments, surface and ground water to fill additional data gaps. Further

1 investigation work was then conducted by BNSF during preparation of a final draft FS. Taken
2 together, these studies provided Ecology sufficient information to develop a final cleanup plan
3 for the Site. BNSF's final draft feasibility study was submitted on March 15, 2005 and
4 accepted as final by Ecology on August 11, 2005, as it contained information adequate to
5 develop a cleanup action plan for the Site.

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

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

22 L. Free petroleum product and petroleum dissolved in groundwater have seeped
23 into the South Fork of the Skykomish River and caused adverse impacts in sediment benthic
24 organisms living in the Skykomish River.

25 M. BNSF has performed a number of interim actions over the last ten years, under
26 multiple agreed orders with Ecology. First, under Agreed Order DE 91TC-N213 and

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

12 N. In May of 2006, BNSF and Ecology signed Agreed Order No. DE 3279. In the
13 2006 Agreed Order, Ecology deemed as satisfied the requirements of Agreed Order No. DE
14 91TC-N213 and Agreed Order No. DE 01TCPNR-2800 except payment of then-outstanding
15 oversight costs, incorporated by reference certain outstanding obligations from the prior orders,
16 and also incorporated another more extensive interim action. Under the 2006 Agreed Order,
17 BNSF removed the underground barrier wall and oil recovery wells and excavated
18 contaminated river sediments and contaminated soil in the river bank and flood levee and
19 under several upland residences. Five residences were temporarily relocated during river,
20 levee and upland area excavation in 2006, and were all replaced afterwards. Over 100,000 tons
21 of contaminated material was shipped off-site by BNSF for disposal at a landfill, and over
22 30,000 gallons of liquid petroleum product was recovered and sent offsite for recycling.

23 VI. WORK TO BE PERFORMED

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

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

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

6 a. June 30, 2007: All work completed, including infrastructure
7 replacement; all construction equipment demobilized (except equipment to be
8 used in further cleanup work);

9 b. July 31, 2007: Submit draft As-built Report to Ecology for all
10 work completed between January 1, 2007 and June 30, 2007;

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

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

16 4. Comply with substantive requirements and permit requirements such as
17 habitat mitigation;

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

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

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

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

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

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

16 E. BNSF agrees not to perform any remedial actions outside the scope of this
17 Decree unless the Parties agree to modify the CAP (including, as necessary, the schedule
18 contained within the CAP), Exhibit B, to cover these actions. Notwithstanding the foregoing,
19 and with advance notice to Ecology, BNSF may excavate contamination in conjunction with
20 railroad operations not related to cleanup, including but not limited to utility work and track
21 maintenance, and may either properly dispose of the contamination offsite pursuant to all
22 applicable state and federal law, or may choose to manage the contamination on BNSF's
23 railyard facility property provided such actions do not interfere with the cleanup action
24 required by this Decree, absent amendment thereto. All work conducted by BNSF under this
25 Decree shall be done in accordance with Chapter 173-340 WAC unless otherwise provided
26 herein.

VII. DESIGNATED PROJECT COORDINATORS

The remedial project coordinator for Ecology is:

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

The NRD project coordinator for Ecology is:

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

The project coordinator for BNSF is:

Bruce Sheppard
BNSF Railway Company
2454 Occidental Avenue South
Suite 1A
Seattle, WA 98134
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 contacts for all or portions of the implementation of the work to be performed required by this Decree.

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

VIII. PERFORMANCE

1
2 All geologic and hydrogeologic work performed pursuant to this Decree shall be under
3 the supervision and direction of a geologist licensed in the State of Washington or under the
4 direct supervision of an engineer registered in the State of Washington, except as otherwise
5 provided for by Chapters 18.220 and 18.43 RCW.

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

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

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

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

IX. ACCESS

21 Ecology or any Ecology authorized representative shall have full authority to enter and
22 freely move about all property at the Site that BNSF either owns, controls, or has access rights
23 to at all reasonable times for the purposes of, *inter alia*: inspecting records, operation logs, and
24 contracts related to the work being performed pursuant to this Decree; reviewing BNSF's
25 progress in carrying out the terms of this Decree; conducting such tests or collecting such
26 samples as Ecology may deem necessary; using a camera, sound recording, or other

1 documentary type equipment to record work done pursuant to this Decree; and verifying the
2 data submitted to Ecology by BNSF. BNSF shall make all reasonable efforts to secure access
3 rights for those properties within the Site not owned or controlled by BNSF where remedial
4 activities or investigations will be performed pursuant to this Decree. BNSF shall follow the
5 Guidelines for Temporary Relocation, attached as Exhibit G, in relocating residents. In
6 conjunction with public meetings held under Section XXVIII (Public Participation), Ecology
7 and BNSF will outline for the community what community members can expect with regard to
8 access needed on individual properties, including how access agreements will be negotiated
9 and any services available to property owners during the process. Ecology or any Ecology
10 authorized representative shall give reasonable notice before entering any Site property owned
11 or controlled by BNSF unless an emergency prevents such notice. All Parties who access the
12 Site pursuant to this Section shall comply with any applicable Health and Safety Plan(s). All
13 Parties who access BNSF's railyard property will be required to complete BNSF's Contractor
14 Safety Training Program (www.contractororientation.com), unless they are personally escorted
15 by someone who has completed the Program. Ecology employees and their representatives
16 shall not be required to sign any liability release or waiver as a condition of Site property
17 access.

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

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

25 If requested by Ecology, BNSF shall allow Ecology and/or its authorized representative
26 to take split or duplicate samples of any samples collected by BNSF pursuant to the

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

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

11 **XI. PROGRESS REPORTS**

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

- 15 A. A list of on-site activities that have taken place during the reporting period;
- 16 B. Detailed description of any deviations from required tasks not otherwise
17 documented in project plans or amendment requests;
- 18 C. Description of all deviations from the CAP and schedule contained therein,
19 Exhibit B, during the reporting period and any planned deviations in the upcoming month;
- 20 D. For any deviations in schedule, a plan for recovering lost time and maintaining
21 compliance with the schedule;
- 22 E. All raw data (including laboratory analyses) received by BNSF during the
23 reporting period and an identification of the source of the sample, unless Ecology agrees that
24 submitting raw data is not necessary at that time; and
- 25 F. A list of deliverables for the upcoming reporting period if different from the
26 schedule.

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

5 Progress Reports shall be submitted by E-Mail to Ecology's project coordinator. After
6 Ecology has approved Construction Completion Reports required for all phases of the final
7 cleanup action required by Section VI (Work to be Performed), BNSF shall submit Progress
8 Reports on a quarterly basis within thirty days after the end of the reporting period, or as
9 required by the Compliance Monitoring Plan.

10 XII. RETENTION OF RECORDS

11 During the pendency of this Decree, and for ten (10) years from the date this Decree is
12 no longer in effect as provided in Section XXIX (Duration of Decree), BNSF shall preserve all
13 records, reports, documents, and underlying data in its possession relevant to the
14 implementation of this Decree and shall insert a similar record retention requirement into all
15 contracts with project contractors and subcontractors. Upon request of Ecology, BNSF shall
16 make all records available to Ecology and allow access for review within a reasonable time.
17 Nothing in this Order is intended by BNSF to waive any right it may have under applicable law
18 to limit disclosure of documents protected by the attorney work-product and/or attorney-client
19 privilege. If BNSF withholds any requested records based on an assertion of privilege, it shall
20 provide Ecology with a privilege log specifying the records withheld and the applicable
21 privilege. No actual data collected on Site pursuant to this Decree shall be considered
22 privileged.

23 XIII. TRANSFER OF INTEREST IN PROPERTY

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

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

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

9 **XIV. RESOLUTION OF DISPUTES**

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

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

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

21 3. BNSF may then request Ecology management review of the decision.
22 This request shall be submitted in writing to the Manager of the Land and Aquatics
23 Cleanup Section (Section Manager) at Ecology's Headquarters Office within seven (7)
24 days of receipt of Ecology's project coordinator's written decision.
25
26

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

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

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

13 B. If Ecology's final written decision is unacceptable to BNSF, BNSF has the right
14 to submit the dispute to the Court for resolution. The Parties agree that one judge should retain
15 jurisdiction over this case and shall, as necessary, resolve any dispute arising under this
16 Decree. In the event BNSF presents an issue to the Court for review, the Court shall review
17 the action or decision of Ecology on the basis of whether such action or decision was arbitrary
18 and capricious and render a decision based on such standard of review. BNSF additionally
19 reserves the right to challenge any Ecology decision not to grant a schedule extension under
20 Section XVI.B.4 or D.2 (Extension of Schedule), or to apply land use restrictions on BNSF's
21 railyard facility property under Section XXI (Land Use Restrictions), as being preempted by
22 federal law; BNSF agrees the Court shall have jurisdiction to hear the controversy.

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

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

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

7 **XV. AMENDMENT OF DECREE**

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

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

16 BNSF shall submit a written request for amendment to Ecology for approval. Ecology
17 shall indicate its approval or disapproval in writing and in a timely manner after the written
18 request for amendment is received. If the amendment to the Decree is a substantial change,
19 Ecology will provide public notice and opportunity for comment. Reasons for the disapproval
20 of a proposed amendment to the Decree shall be stated in writing. If Ecology does not agree to
21 a proposed amendment, the disagreement may be addressed through the dispute resolution
22 procedures described in Section XIV (Resolution of Disputes).

23 **XVI. EXTENSION OF SCHEDULE**

24 A. An extension of schedule shall be granted only when a request for an extension
25 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the
26

1 deadline for which the extension is requested, and good cause exists for granting the extension.

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

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

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

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

21 However, neither increased costs of performance of the terms of this Decree nor
22 changed economic circumstances shall be considered circumstances beyond the reasonable
23 control of BNSF.

24 C. Ecology shall act upon any written request for extension in a timely fashion.
25 Ecology shall give BNSF written notification of any extensions granted pursuant to this
26 Decree. A requested extension shall not be effective until approved by Ecology or, if required,

1 by the Court. Unless the extension is a substantial change, it shall not be necessary to amend
2 this Decree pursuant to Section XV (Amendment of Decree) when a schedule extension is
3 granted.

4 D. An extension shall only be granted for such period of time as Ecology
5 determines is reasonable under the circumstances. Ecology may grant schedule extensions
6 exceeding ninety (90) days only as a result of:

7 1. Delays in the issuance of a necessary permit which was applied for in a
8 timely manner;

9 2. Other circumstances deemed exceptional or extraordinary by Ecology,
10 including circumstances arising under subsection B.4 above;

11 3. Acts of God, including fire, flood, blizzard, extreme temperatures,
12 storm, or other unavoidable casualty; or

13 4. Endangerment as described in Section XVII (Endangerment).

14 **XVII. ENDANGERMENT**

15 In the event Ecology determines that any activity being performed at the Site is creating
16 or has the potential to create a danger to human health or the environment, Ecology may direct
17 BNSF to cease such activities for such period of time as it deems necessary to abate the danger.
18 BNSF shall immediately comply with such direction.

19 In the event BNSF determines that any activity being performed at the Site is creating
20 or has the potential to create a danger to human health or the environment, BNSF may cease
21 such activities. BNSF shall notify Ecology's project coordinator as soon as possible, but no
22 later than twenty-four (24) hours after making such determination or ceasing such activities.
23 Upon Ecology's direction, BNSF shall provide Ecology with documentation of the basis for
24 the determination or cessation of such activities. If Ecology disagrees with BNSF's cessation
25 of activities, it may direct BNSF to resume such activities.
26

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

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

9 **XVIII. NATURAL RESOURCE DAMAGES**

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

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

22 C. Skykomish Aquatic Habitat Restoration: Within 90 days of the effective date of
23 this Decree, BNSF shall pay Ecology the sum of Two Million Five Hundred Thousand and
24 00/100 Dollars (\$2,500,000.00) to be used exclusively for funding projects that restore,
25 enhance, or protect fish and aquatic habitat in the Skykomish or Snohomish River Watersheds.
26 Although this Decree is entered pursuant to MTCA, Ecology shall administer disbursements on

1 | behalf of the state in consultation with the federal Oil Pollution Act Trustees: The Tulalip
2 | Tribes of Washington, the United States Department of Interior (Fish and Wildlife Service),
3 | the United States Department of Agriculture (Forest Service), and the United States
4 | Department of Commerce (National Oceanic and Atmospheric Administration). Ecology shall
5 | work with the Trustees to establish such decision-making procedures regarding expenditures of
6 | funds as they deem appropriate. Projects may include those identified in the Snohomish River
7 | Basin Plan or the Shared Strategy for Salmon Recovery.

8 | D. Skykomish Water Quality Protection: Within 90 days of the effective date of
9 | this Decree, BNSF shall pay Ecology the sum of One Million Five Hundred Thousand and
10 | 00/100 Dollars (\$1,500,000) to be used exclusively for implementing the Town's *Wastewater*
11 | *Facility Plan* dated June 2007. Of this amount, Seven Hundred Thousand and 00/100 cents
12 | (\$700,000.00) is dedicated for capital costs of implementing Phase II of the Plan; and Eight
13 | Hundred Thousand and 00/100 Dollars (\$800,000.00) is dedicated for operation and
14 | maintenance of the Town's wastewater system pursuant to the Plan. Implementation of the
15 | Plan will enhance, restore and protect water quality by converting the Town from individual
16 | septic systems to community sewers with a single wastewater treatment plant. If the Town
17 | does not implement the Plan, the funds will be transferred to the Skykomish Recreational and
18 | Terrestrial Restoration effort.

19 | E. Skykomish Recreational and Terrestrial Restoration: Within 90 days of the
20 | effective date of this Decree, BNSF shall pay Ecology the sum of One Million Five Hundred
21 | Thousand and 00/100 Dollars (\$1,500,000.00), as adjusted below, to be used exclusively to
22 | fund projects in and around the Town of Skykomish for enhancing, restoring or protecting
23 | terrestrial and waterfowl habitat, and compensating for lost recreational opportunities.
24 | Ecology shall administer disbursements on behalf of the state in consultation with the Town.
25 | The Town of Skykomish may propose to Ecology projects to be funded. Before approving any
26 |

1 | proposal, Ecology shall determine that the proposal appropriately either restores injuries to
2 | natural resources or compensates for injuries to natural resources or lost services.

3 | 1. Of these funds, a credit of Three-Hundred and Fifty Thousand and
4 | 00/100 dollars (\$350,000) is granted to BNSF for levee improvements already
5 | implemented as part of the 2006 interim action.

6 | 2. Of these funds, Fifty Thousand and 00/100 Dollars (\$50,000.00) must be
7 | directly expended by BNSF to fully resolve the turbidity exceedances that occurred in
8 | 2006, as prescribed below.

9 | 3. Of these funds, Fifty Thousand and 00/100 Dollars (\$50,000) will be
10 | directly expended by BNSF as in-kind services for the benefit of the Town of
11 | Skykomish, to compensate for injuries to natural resources or lost services. Within one
12 | year of the effective date of this Decree, BNSF shall submit to Ecology a joint letter
13 | from BNSF and the Town of Skykomish on the expenditure of these funds. Ecology
14 | shall determine whether the proposal appropriately compensates for injuries to natural
15 | resources or lost services. Should this letter not be submitted within this timeframe, or
16 | the proposal does not appropriately compensate for injuries to natural resources or lost
17 | services, these funds shall be submitted to Ecology within thirty days in accordance
18 | with Section XVIII.E.

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

24 | G. Turbidity Mitigation Plan: Within one year of the effective date of this Decree,
25 | BNSF shall, in consultation with Ecology, design and implement projects identified in the
26 |

1 Turbidity Mitigation Plan dated November 2006 with a value of Fifty Thousand and 00/100
2 Dollars (\$50,000.00).

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

13 **XIX. COVENANT NOT TO SUE**

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

18 This Decree covers only the Site specifically identified in the Site Diagram, Exhibit A,
19 and those hazardous substances that Ecology knows are located at the Site as of the date of
20 entry of this Decree. This Decree does not cover any other hazardous substance or area.
21 Ecology retains all of its authority relative to any substance or area not covered by this Decree.

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

- 23 1. Criminal liability; and
24 2. Any Ecology action, including cost recovery, against PLPs not a
25 party to this Decree.
26

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

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

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

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

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

19 4. Upon Ecology's determination that additional remedial actions
20 are necessary to achieve cleanup standards within the reasonable restoration
21 time frame set forth in the CAP.

22 This reservation is intended to be consistent with Ecology's authority under MTCA.

23 C. Ecology further reserves the right to require additional restoration and/or
24 compensation for NRD injuries pursuant to Chapters 70.105D and 90.48 RCW, if BNSF fails
25 to implement the requirements of Section XVIII (Natural Resource Damages) or upon the
26 availability of new information regarding factors previously unknown to Ecology, including

1 the nature or quantity of hazardous substances at the Site, which affects the extent of natural
2 resource damages at the Site.

3 D. Except in the case of an emergency, prior to instituting legal or administrative
4 action against BNSF pursuant to this Section, Ecology shall provide BNSF with fifteen (15)
5 calendar days notice of such action.

6 E. In the event Ecology seeks to reopen the decree under this Section, BNSF
7 reserves its right to challenge the imposition of different or additional cleanup actions as being
8 preempted by federal law. However, if a reopening event occurs, BNSF and Ecology agree to
9 first explore in good faith whether different or additional actions that the Parties agree would
10 not be subject to preemption could be implemented to address the reopening event. Both
11 Parties then reserve their right to all claims and defenses if good faith efforts to agree to
12 different or additional actions do not result in agreement between the Parties. Nevertheless,
13 BNSF agrees the Court shall have jurisdiction to decide the controversy.

14 **XX. CONTRIBUTION PROTECTION**

15 With regard to claims for contribution against BNSF, the Parties agree that BNSF is
16 entitled to protection against claims for contribution for matters addressed in this Decree as
17 provided by RCW 70.105D.040(4)(d).

18 **XXI. LAND USE RESTRICTIONS**

19 BNSF shall record a restrictive covenant on BNSF's railyard facility property if
20 contamination remains on such property following implementation of the cleanup action, as
21 specified in the CAP, Exhibit B. The restrictive covenant shall be enforceable by Ecology and
22 restrict future uses of the property and otherwise meet regulatory requirements, and must be
23 approved by Ecology before being recorded. BNSF will record the restrictive covenant with
24 the office of the King County Auditor within ten (10) days of the completion of all phases of
25 the cleanup action. BNSF shall provide Ecology with a copy of the recorded restrictive
26 covenant within thirty (30) days of the recording date. Restrictions placed on BNSF's railyard

1 facility property in the restrictive covenant will be tailored and may be amended after
2 recording so as not to interfere with railroad operations.

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

12 In addition, and in lieu of requiring restrictive covenants on any properties that will not
13 have contamination remaining above concentrations protective of direct contact following
14 cleanup, permit and/or zoning overlays are to be implemented to ensure the appropriate
15 management of contaminated soils in the impacted area during cleanup, plus appropriate
16 restrictions on groundwater withdrawal both during and after cleanup, as applicable and as
17 outlined in the CAP, Exhibit B. BNSF and Ecology agree to work cooperatively with local
18 jurisdictions as necessary to develop and implement such overlays.

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

22 **XXII. FINANCIAL ASSURANCES**

23 Pursuant to WAC 173-340-440(11), BNSF shall maintain sufficient and adequate
24 financial assurance mechanisms to cover all costs associated with all work remaining to be
25 completed under this Decree, including but not limited to the operation and maintenance of the
26

1 remedial action at the Site, such as institutional controls, compliance monitoring, and
2 corrective measures, as follows:

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

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

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

15 2. Changes in cost estimates, within thirty (30) days of issuance of
16 Ecology's written approval of a minor modification or the Court's entry of a formal
17 amendment to the work to be performed under this Decree pursuant to Section XV
18 (Amendment of Decree), when the modification or amendment results in an increase to
19 the cost or expected duration of the remedial action. Any adjustments for inflation
20 since the most recent preceding anniversary date shall be made concurrent with
21 adjustments for changes in cost estimates. Ecology's approval of a modification or the
22 Court's entry of a formal amendment, will revise the anniversary date established under
23 this Section to become the date of issuance of such revision or entry of formal
24 amendment.

25 C. BNSF shall notify Ecology's project coordinator by certified mail of the
26 commencement of a voluntary or involuntary bankruptcy proceeding that names BNSF as

1 debtor, within ten (10) days after commencement of the proceeding. A guarantor of a
2 corporate guarantee must make such a notification if he is named as debtor as required under
3 the terms of the corporate guarantee.

4 **XXIII. INDEMNIFICATION**

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

13 **XXIV. COMPLIANCE WITH APPLICABLE LAWS**

14 A. All actions carried out by BNSF pursuant to this Decree shall be done in
15 accordance with all applicable federal, state, and local requirements, including requirements to
16 obtain necessary permits, except as provided in RCW 70.105D.090. The permits or other
17 federal, state or local requirements that the agency has determined are applicable and that are
18 known at the time of entry of this Decree have been identified in Exhibit D.

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

25 BNSF has a continuing obligation to determine whether additional permits or approvals
26 addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under

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

20 | C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the
21 | exemption from complying with the procedural requirements of the laws referenced in RCW
22 | 70.105D.090(1) would result in the loss of approval from a federal agency that is necessary for
23 | the State to administer any federal law, the exemption shall not apply and BNSF shall comply
24 | with both the procedural and substantive requirements of the laws referenced in RCW
25 | 70.105D.090(1), including any requirements to obtain permits.
26 |

XXV. REMEDIAL ACTION COSTS

1
2 Except as provided in Section XIV.E (Resolution of Disputes), BNSF shall pay to
3 Ecology costs incurred by Ecology pursuant to this Decree and consistent with WAC 173-340-
4 550(2). These costs shall include work performed by Ecology or its contractors for, or on, the
5 Site under Chapter 70.105D RCW, including remedial actions and Decree preparation,
6 negotiation, oversight and administration. These costs shall include work performed both prior
7 to and subsequent to the entry of this Decree, including any outstanding costs associated with
8 Agreed Order No. DE 3279. Ecology's costs shall include costs of direct activities and support
9 costs of direct activities as defined in WAC 173-340-550(2). BNSF shall pay the required
10 amount within ninety (90) days of receiving from Ecology an itemized statement of costs that
11 includes a summary of costs incurred, an identification of involved staff, and the amount of
12 time spent by involved staff members on the project. A general description of work performed
13 will be provided upon request. Itemized statements shall be prepared quarterly. Pursuant to
14 WAC 173-340-550(4), failure to pay Ecology's costs within ninety (90) days of receipt of the
15 itemized statement of costs will result in interest charges at the rate of twelve percent (12%)
16 per annum, compounded monthly.

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

XXVI. IMPLEMENTATION OF REMEDIAL ACTION

19
20 If Ecology determines that BNSF has failed without good cause to implement the
21 remedial action, in whole or in part, Ecology may, after notice to BNSF, perform any or all
22 portions of the remedial action that remain incomplete. If Ecology performs all or portions of
23 the remedial action because of BNSF's failure to comply with its obligations under this Decree,
24 BNSF shall reimburse Ecology for the costs of doing such work in accordance with Section
25 XXV (Remedial Action Costs), provided that BNSF is not obligated under this Section to
26 reimburse Ecology for costs incurred for work inconsistent with or beyond the scope of this

1 Decree. BNSF and Ecology agree to first meet and confer to informally resolve any dispute
2 about performance of the remedial action, before Ecology exercises its option under this
3 Section. If the Parties cannot agree to a resolution, BNSF reserves its right to seek an
4 injunction from the Court to prevent Ecology from performing any cleanup actions on BNSF's
5 railyard facility property that would be preempted under federal law. BNSF agrees the Court
6 shall have jurisdiction to decide the controversy

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

11 **XXVII. PERIODIC REVIEW**

12 As remedial action, including groundwater monitoring, continues at the Site, the Parties
13 agree to review the progress of remedial action at the Site, and to review the data accumulated
14 as a result of monitoring the Site as often as is necessary and appropriate under the
15 circumstances. At least every five (5) years after the initiation of cleanup action at the Site the
16 Parties shall meet to discuss the status of the Site and the need, if any, for further remedial
17 action at the Site. At least ninety (90) days prior to each periodic review, BNSF shall submit a
18 report to Ecology that documents whether human health and the environment are being
19 protected based on the factors set forth in WAC 173-340-420(4). Ecology reserves the right to
20 require further remedial action at the Site under appropriate circumstances consistent with the
21 terms of this Decree. This provision shall remain in effect for the duration of this Decree, and
22 may remain in effect beyond the completion of the cleanup action consistent with WAC 173-
23 340-420(7).

XXVIII. PUBLIC PARTICIPATION

1
2 The Public Participation Plan for this remedial action is attached as Exhibit F. Ecology
3 shall maintain the responsibility for public participation at the Site. However, BNSF shall
4 cooperate with Ecology to implement the public participation plan, and shall:

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

10 B. Notify Ecology's project coordinator prior to any of the following if and to the
11 extent they concern the remedial action required by this Decree: the issuance of all press
12 releases; distribution of fact sheets; performance of other planned outreach activities; and
13 major meetings with the interested public and/or local governments. Likewise, Ecology shall
14 notify BNSF prior to the issuance of all press releases and fact sheets, and before major
15 meetings with the interested public and local governments if and to the extent they concern the
16 remedial action required by this Decree. For all press releases, fact sheets, meetings, and other
17 planned outreach efforts by BNSF that do not receive prior Ecology approval, BNSF shall
18 clearly indicate to its audience that the press release, fact sheet, meeting, or other outreach
19 effort was not sponsored or endorsed by Ecology. This section does not apply to
20 communications by BNSF that are required or conducted pursuant to law(s) or regulations
21 other than MTCA or the MTCA Cleanup Regulation, Chapter 173-340 WAC, or
22 communications by BNSF with investors or insurance carriers.

23 C. When requested by Ecology, participate in public presentations on the progress
24 of the remedial action at the Site. Participation may be through attendance at public meetings
25 to assist in answering questions, or as a presenter.
26

1 D. When requested by Ecology, arrange and/or continue information repositories at
2 the following locations:

- 3 1. Skykomish Library
4 100 Fifth Street
5 Skykomish, WA 98288
6 (360) 677-2660
- 7 2. Ecology's Northwest Regional Office
8 3190 160th Avenue SE
9 Bellevue, WA 98008
10 (425) 649-7000

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

15 **XXIX. DURATION OF DECREE**

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

22 **XXX. CLAIMS AGAINST THE STATE**

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

XXXI. COMMUNITY WASTE WATER SYSTEM

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

XXXII. EFFECTIVE DATE

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

XXXIII. WITHDRAWAL OF CONSENT

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

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

**ROBERT M. McKENNA,
ATTORNEY GENERAL**

James Pendowski
Program Manager
Toxics Cleanup Program
(360) 407-7177

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

Date: _____

Date: _____

BNSF RAILWAY COMPANY

[Name of signatory]
[Title of signatory]
[Telephone]

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Date: _____

ENTERED this ____ day of _____ 20____.

JUDGE
King County Superior Court