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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SIERRA CLUB, a California nonprofit corporation;
PUGET SOUNDKEEPER ALLIANCE, a Washington nonprofit corporation; RE SOURCES FOR SUSTAINABLE COMMUNITIES, a Washington nonprofit corporation; COLUMBIA RIVERKEEPER, a Washington nonprofit corporation; FRIENDS OF THE COLUMBIA GORGE, INC., dba FRIENDS OF THE COLUMBIA GORGE, an Oregon nonprofit corporation; SPOKANE RIVERKEEPER; NATURAL RESOURCES DEFENSE COUNCIL, a New York nonprofit corporation,

Plaintiffs,

vs.

BNSF RAILWAY COMPANY, a Delaware corporation,

Defendant.

NO. 1:13-cv-00272-LRS

ORDER RE DEFENDANT'S MOTION TO DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss, ECF No. 23, filed on October 7, 2013 and argued on December 12, 2013 in Yakima, Washington. Defendant BNSF has moved for an order dismissing with
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1 prejudice portions of Plaintiff's Complaint (ECF No. 1) pursuant to
2 Fed.R.Civ.P. 12(b)(3) and 12(b)(6).

3 **I. INTRODUCTION**

4 This is an action by seven environmental groups—Sierra Club and
5 others ("Plaintiffs")—against the BNSF Railway Company ("BNSF"
6 or "Defendant") for violations of the Clean Water Act ("CWA") by
7 operating rail lines in the State of Washington which are used for
8 transporting coal. Plaintiffs allege that rail trains and rail cars
9 ("rolling stock") are considered point sources under the CWA.
10 Plaintiffs allege point sources include each and every train and rail
11 car transporting coal.

12 Defendant asserts that: 1) all claims based on alleged discharges
13 outside the Eastern District of Washington should be dismissed; 2)
14 Plaintiffs' allegations which focus on purported discharges "adjacent
15 to, over, and in proximity to" waters exceed the scope of the CWA
16 because they include release of coal materials to land, not water; and
17 3) Plaintiffs' claims premised on (a) nonpoint source pollution
18 associated with unconfined storm water runoff and diffuse wind and (b)
19 unregulated storm water discharges from trains and rail cars should be
20 dismissed. At the hearing, Defendant clarified that the alleged
21 discharge of coal pollutants "into waters" was not the subject of its
22 motion.

23 **II. BACKGROUND**

24 **A. The Clean Water Act**

25 Congress enacted the CWA in 1972 "to restore and maintain the
26 chemical, physical, and biological integrity of the Nation's waters."
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1 Consistent with this purpose, the CWA prohibits "the discharge of any
2 pollutant by any person" to navigable waters "except in compliance"
3 with other provisions of the CWA, including the National Pollution
4 Discharge Elimination System ("NPDES") permitting requirements
5 (codified at 33 U.S.C. § 1342). The NPDES "requires dischargers to
6 obtain permits that place limits on the type and quantity of
7 pollutants that can be released into the Nation's waters." The phrase
8 "discharge of any pollutant" is "defined broadly" to mean "any
9 addition of any pollutant to navigable waters from any point source."
10 "Pollutant" is defined "to include not only traditional contaminates
11 but also solids such as dredged soil, . . . rock, sand, [and] cellar
12 dirt." The term "navigable waters" means "the waters of the United
13 States, including territorial seas." The combined effect of these
14 provisions is that "[t]he CWA prohibits the discharge of any pollutant
15 from a point source into navigable waters of the United States without
16 an NPDES permit."

17 The Environmental Protection Agency ("EPA") is the regulatory
18 authority tasked with administering the NPDES permitting system for
19 each state. However, EPA may delegate its permitting authority to
20 individual states, after which state officials have primary
21 responsibility, with EPA oversight, for reviewing and approving NPDES
22 permits. EPA delegated its permitting authority to the State of
23 Washington. Washington administers its program through the Washington
24 Department of Ecology ("WADOE").

25 **B. BNSF Railway Company**

26 BNSF is a Class I railroad and a common carrier that transports
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1 intermodal freight and bulk cargo throughout the United States and
2 into Canada. As a common carrier, BNSF must "provide the
3 transportation of service on reasonable request" and cannot refuse to
4 transport any item, including coal, when such a reasonable request is
5 made. 49 U.S.C. § 11101(a). BNSF also is subject to significant
6 restrictions and oversight by the Surface Transportation Board ("STB")
7 as a common carrier, including approval of any requirements BNSF might
8 wish to impose on the transport of its customers' freight. 49 U.S.C. §
9 10501(a)-(b); *Bhd. of Maint. of Way Employes Div. v. Burlington*
10 *Northern Santa Fe Ry. Co.*, 596 F.3d 1217, 1220 (10th Cir. 2010) (STB
11 "imposes a comprehensive scheme of regulation on rail carriers").
12 Plaintiffs have alleged that the majority of coal transported by BNSF
13 comes from the Powder River Basin ("PRB"), a geologic region located
14 in southeast Montana and northeast Wyoming known for its coal
15 deposits. ECF No. 1, ¶ 33.

16 **C. Relevant Alleged Discharge Events**

17 Under the "Facts" portion of Plaintiffs' Complaint, the following
18 paragraphs describe the alleged discharge events Plaintiffs complain
19 of:

20 53. Defendants have discharged, are discharging, and will
21 continue to discharge coal pollutants into waters of the
22 U.S. by each and every one of the defendants' trains and
rail cars that carry coal.

23 54. Each and every train and each and every rail
24 car discharges coal pollutants to waters of the
25 United States when traveling adjacent to, over,
and in proximity to waters of the United States.

26 55. Defendants discharge coal pollutants into
27 waters of the U.S. in the State of Washington
through holes in the bottoms and sides of the rail
cars and by spillage or ejection from the open

1 tops of the rail cars and trains.

2 56. Defendants discharge coal pollutants during
3 the transportation of the coal in both normal and
4 abnormal operating conditions, and upon loading
and unloading coal.

5 Complaint, ECF No. 1, at 15.

6 In the sole Count in Plaintiffs' Complaint, however, the
7 discharge of pollutants (without a NPDES permit) into waters of the
8 United States is alleged. **Count 1** reads:

9 68. All waterways named herein are waters of the
United States protected by the CWA.

10 69. Defendants did not have and do not retain a
11 NPDES Permit authorizing their discharges of coal
pollutants into such waterways.

12 70. Defendants have discharged coal pollutants
13 from the operation of rail cars and trains into,
14 at least, the listed waterways from April 2008
15 (and for many years prior to 2008) to present.
Such operations and discharges are continuing and
are likely to continue into the future.

16 71. Each such coal discharge from each rail car
17 and train into each separate waterway on each
18 separate day constitutes a separate violation of
the CWA.

19 **III. LEGAL STANDARDS**

20 To survive a motion to dismiss under Fed.R.Civ.P. Rule 12(b)(6),
21 a complaint "must contain sufficient factual matter, accepted as true,
22 to 'state a claim to relief that is plausible on its face.'" *Ashcroft*
23 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In considering
24 such a motion, a court must accept all factual allegations in a
25 complaint as true, but need not accept as true any legal conclusions.
26 *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

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1 Federal Rule of Civil Procedure 12(b)(3) provides that a
2 complaint may be dismissed for "improper venue." When deciding a
3 motion to dismiss under Rule 12(b)(3), unlike a Rule 12(b)(6) motion,
4 the Court need not accept the pleadings as true and may consider facts
5 outside the pleadings. See *R.A. Argueta v. Banco Mexicano, S.A.*, 87
6 F.3d 320, 324 (9th Cir.1996). Once a defendant raises an objection to
7 venue, the plaintiff bears the burden of establishing that the
8 selected venue is proper. *Rio Properties, Inc. v. Rio Intern.*
9 *Interlink*, 284 F.3d 1007, 1019 (9th Cir.2002). Plaintiff need only
10 make a prima facie showing of proper venue to avoid the defendant's
11 motion to dismiss. *Id.*

12 **IV. ANALYSIS**

13 The parties, for the most part, do not dispute that coal is a
14 "pollutant," that the Columbia River, and all other waters listed in
15 paragraph 62 of the Complaint¹ constitute navigable "waters," or that
16 the coal cars from which coal and coal dust falls directly into the
17 navigable waters are "point sources."² Plaintiffs argue that the only
18 prerequisite to establishing a point source discharge is the ability
19 to trace the pollutant back to a single, identifiable source, i.e. the
20 coal cars. Defendant, however, asserts that the real question is
21 whether the pollution reaches the water through a confined, discrete
22 conveyance. Case law clearly establishes that "point sources are not
23 distinguished by the kind of pollution they create or by the activity
24

25 ¹Complaint, ECF No. 1, at 17.

26 ²Defendant BNSF does dispute that trains and rail cars at issue
27 here *independently* qualify as "point sources" under the CWA and
reserves the right to challenge that at a later time.

1 causing the pollution, but rather by whether the pollution reaches the
2 water through a confined, discrete conveyance." *Trustees for Alaska*
3 *v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

4 The Clean Water Act's definition of a "point source" provides
5 that a "point source" is

6 *any discernible, confined and discrete conveyance,*
7 *including but not limited to any pipe, ditch,*
8 *channel, tunnel, conduit, well, discrete fissure,*
9 *container, rolling stock, concentrated animal*
10 *feeding operation, or vessel or other floating*
11 *craft, from which pollutants are or may be*
12 *discharged. This term does not include return*
13 *flows from irrigated agriculture.*

14 33 U.S.C. s 1362(14) [emphasis added].

15 The law is also clear that a plaintiff seeking to establish a
16 point source discharge, even in the context of airborne pollution,
17 must prove more than that the pollutant originated from an
18 identifiable source. Regardless of where the pollution originates, a
19 plaintiff must prove that "the pollut[ant] reache[d] the water through
20 a confined, discrete conveyance." *U.S. v. Earth Sciences*, 599 F.2d
21 368, 373 (10th Cir. 1979).

22 For example, the Ninth Circuit in *Sierra Club v. Abston Contr.*
23 *Co., Inc.*, 620 F.2d 41, 45 (1980) held that gravity flow, resulting in
24 a discharge into a navigable body of water, may be part of a point
25 source discharge if the miner at least initially collected or
26 channeled the water and other materials. A point source of pollution
27 may also be present where miners design spoil piles from discarded
28 overburden such that, during periods of precipitation, erosion of
spoil pile walls results in discharges into a navigable body of water
by means of ditches, gullies and similar conveyances, even if the

1 miners have done nothing beyond the mere collection of rock and other
2 materials. The ultimate question is whether pollutants were discharged
3 from "discernible, confined, and discrete conveyance(s)" either by
4 gravitational or nongravitational means. Nothing in the Act relieves
5 miners from liability simply because the operators did not actually
6 construct those conveyances, so long as they are reasonably likely to
7 be the means by which pollutants are ultimately deposited into a
8 navigable body of water. Conveyances of pollution formed either as a
9 result of natural erosion or by material means, and which constitute a
10 component of a mine drainage system, may fit the statutory definition
11 and thereby subject the operators to liability under the Act.

12 But in *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143,
13 1153 (9th Cir.2010), the Ninth Circuit held that waste rock pits were
14 not point sources within the meaning of the CWA because water seepage
15 from the pits containing waste rock that eventually made its way to
16 surface waters was "not collected or channeled."

17 In *Concerned Area Residents for Environment v. Southview Farm*, 34
18 F.3d 114 (2nd Cir.1994), a suit arising out of the liquid manure
19 spreading operations of a large dairy farm in western New York,
20 plaintiffs argued that the manure spreading operations were a "point
21 source" from which pollutants were discharged into a nearby river.
22 The liquid manure was spread by tanker trucks over fields, after which
23 some manure flowed into a swale (a low place in a tract of land) on
24 the property. From the swale, the manure flowed through a pipe, which
25 led to a ditch, which led to a stream that fed into the river.
26 Defendants argued that the manure-spreading facilities were not "point
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1 sources" because the pollutants naturally flowed to the swale and
2 reached the river "in too diffuse a manner to create a point source
3 discharge." *Id.* at 118. The Second Circuit found in favor of
4 plaintiffs concluding that even if the flow from fields into the swale
5 could be characterized as diffuse runoff, the pollutant was thereafter
6 collected in the swale and sufficiently channeled to constitute
7 discharge from a point source. *Id.* at 118-19. The court
8 alternatively found that the tanker trucks themselves were point
9 sources because they were used to collect the manure and discharge it
10 onto the fields, after which it directly flowed, via the swale, pipe
11 and stream, into the river. *Id.*

12 In *Cordiano v. Metacon Gun Club*, 575 F.3d 199 (2nd Cir.2009), the
13 Second Circuit rejected the argument that "windblown pollutants from
14 any identifiable source, whether channeled or not, are subject to the
15 CWA permit requirement." *Id.* at 224. In *Cordiano*, a shooting range
16 was sued for discharging lead munitions into bordering wetlands
17 without a permit. Plaintiffs argued that the berm into which bullets
18 were fired was a point source because the wind carried lead dust from
19 the berm to the wetlands. *Id.* at 224-25. The court rejected
20 plaintiffs' argument stating that the berm simply cannot be described
21 as a "discernible, confined and discrete conveyance" with respect to
22 lead that is carried by the wind, some portion of which may happen to
23 land on nearby wetlands. *Id.*

24 In a handful of cases that address pesticide spraying, the courts
25 found that pesticides channeled through a spraying apparatus on a
26 truck or plane, when sprayed **directly over water**, met the statutory
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1 definition of a point source discharge. See *League of Wilderness*
2 *Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d
3 1181 (9th Cir.2002); *Peconic Baykeeper, Inc. v. Suffolk County*, 600
4 F.3d 180 (2nd Cir.2010); and *No Spray Coalition, Inc. v. City of New*
5 *York*, 2005 WL 1354041 (S.D.N.Y. June 8, 2005) (unpublished).

6 Based on the parties' respective positions at the hearing, the
7 issue appears to be whether coal from rail cars that falls onto land,
8 rather than directly into the waters, offends the Clean Water Act.
9 Defendant's main contention is that because Plaintiffs do not allege
10 the existence of any point source besides rail cars and trains, their
11 allegations of discharges to waterbodies "adjacent to" or "in
12 proximity to" BNSF's tracks (including all allegations of discharges
13 to land or the tracks themselves) fail to state a claim under 33
14 U.S.C. §§ 1251-1387, commonly known as the Clean Water Act, and must
15 be dismissed.

16 Essentially, Defendant BNSF takes issue with language recited in
17 the "Facts" portion of Plaintiffs' Complaint (**adjacent to, over, and**
18 **in proximity to waters**), however, Plaintiffs' sole claim alleges
19 "discharged coal pollutants from the operation of rail cars and trains
20 **into**, at least, the listed waterways ...". The Court therefore finds
21 it necessary to allow Plaintiffs the opportunity at this early
22 juncture to develop facts that will allow their claim(s) to either
23 stand or fall, based on the statutory definition of a point source
24 discharge. As part of their case, Plaintiffs will need to show that
25 BNSF's railway illegally introduced pollutants into navigable waters
26 without a permit.

1 While not contesting venue in the Eastern District of Washington
2 for alleged sources of pollution arising in this district, BNSF takes
3 issue with any claim in this court involving pollution sources arising
4 elsewhere, citing 33 U.S.C. § 1365(c)(1) which provides:

5 (1) Any action respecting a violation by a discharge source
6 of an effluent standard or limitation or an order respecting
7 such standard or limitation may be brought under this
section only in the judicial district in which such source
is located.

8 Plaintiffs note that the relatively few cases dealing with the
9 issue of venue do not involve pollution claims where the source of
10 pollution comes from one mobile source (i.e., rolling stock) traveling
11 over and through numerous jurisdictions. The absence of definitive
12 case law cited by either Plaintiffs or BNSF combined with the
13 suggestion for transfer found in the companion case of *Sierra Club, et*
14 *al., v. BNSF Railway Company, et al.*, case number 2:13-cv-00967-JCC
15 pending in the Western District of Washington implies that this issue
16 should be decided by the court which may end up hearing the two cases,
17 judicial economy and avoidance of conflicting holdings would be served
18 by such an arrangement. Having the foregoing in mind, BNSF's motion
19 to dismiss (ECF No. 23) on venue grounds is DENIED, without prejudice.

20 As noted in the pleadings, BNSF suggests that Plaintiffs are
21 attempting to regulate storm water which is otherwise not subject to
22 regulation under the facts of this case. However, Plaintiffs assert
23 that their suit is brought solely under the Clean Water Act and the
24 case law developed in support thereof. The state of the record
25 precludes a finding in favor of BNSF on this issue at the present
26 time.

1 **V. CONCLUSION**

2 Defendant BNSF Railway Company's Motion to Dismiss Pursuant to
3 FRCP 12(B)(3) and 12(B)(6) is DENIED.

4 **IT IS SO ORDERED.** The District Court Executive is directed to
5 enter this Order.

6 **DATED** this 2nd day of January, 2014.

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8 ***s/Lonny R. Suko***

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10 LONNY R. SUKO
11 SENIOR UNITED STATES DISTRICT JUDGE
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