

Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence Street
Eugene, OR 97401
Ph: 541-344-3505 Fax: 541-344-3516

April 2, 2013

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Matthew K. Rose, Chairman & CEO
BNSF Railway Company, *a division of*
Burlington Northern Santa Fe, LLC
2650 Lou Menk Drive
Fort Worth, TX 76131-2830

Colin Marshall, President & CEO
Cloud Peak Energy
385 Interlocken Crescent, Suite 400
Broomfield, CO 80021

Gregory H. Boyce, Chairman & CEO
Peabody Energy
Peabody Plaza
701 Market St.
St. Louis, MO 63101-1826

Global Mining Holding Co., LLC
Reg. Agent: Corporation Service Company
2711 Centerville Rd, Ste. 400
Wilmington, DE 19808

John W. Eaves, President & CEO
Arch Coal, Inc.
One City Place Drive, Ste. 300
St. Louis, MO 63141

Anthony J. Alexander, President & CEO
FirstEnergy Corp.
76 South Main Street
Akron, OH 44308

Everett King, President & CEO
Ambre Energy North America, Inc.
170 South Main Street, Ste. 700
Salt Lake City, UT 84101

Paul Taylor, President
TransAlta USA Inc.
724 Columbia Street NW, Ste. 320
Olympia, WA 98501

Re: Notice of Intent to Sue under §505 of the Federal Water Pollution Control Act

Dear Sirs and Madams:

This letter is to provide you with notice that the Sierra Club, Inc., Puget Soundkeeper Alliance, Columbia Riverkeeper, Friends of the Columbia Gorge, and RE Sources for Sustainable Communities (“Notifiers”) intend to file a citizen lawsuit against Burlington Northern Santa Fe Railroad Company (“BNSF”), and Peabody Energy, Arch Coal, Ambre Energy, Cloud Peak Energy, Transalta and First Energy (“Coal Companies”) (BNSF and Coal Companies are hereafter collectively called “Dischargers”), who discharge coal, coal chunks, coal dust, metabolites or related byproducts of coal, and other substances or materials added to the coal including, but not limited to, surfactants and suppressants, and petroleum coke (“petcoke”) and its byproducts (collectively hereafter “pollutants”) into waters of the United

States throughout the State of Washington. Waters of the U.S. are under or in proximity to the rail lines and rail cars such that pollutants discharge into them from the rail cars. This lawsuit will be brought pursuant to Section 505(a)(1)(A) of the Federal Water Pollution Control Act (commonly known as the “Clean Water Act” (CWA)), 33 U.S.C. §1365(a)(1)(A). Upon the expiration of the sixty (60) day statutory waiting period, Notifiers intend to file a civil action or actions in federal district court.

VIOLATIONS OF FEDERAL LAW

This lawsuit will allege that the Dischargers have violated, are violating, and will continue to violate the Clean Water Act as the discharge of pollutants is unpermitted, and potentially unpermittable, under the Clean Water Act (“CWA”). The discharges also constitute fill material, some of which remains present and visible in areas within the vicinity of the train tracks running on or near wetlands, streams, rivers and other areas subject to CWA jurisdiction. Coal Companies own the coal, and the resultant pollutants, that are transported via rail lines through and within the State of Washington. BNSF operates rail lines in the State of Washington, which rail lines the Coal Companies use for coal transport, and are also used for transporting petroleum coke. Coal Companies, as owners, and BNSF as operator, are persons subject to the requirements of the Clean Water Act. Rail trains and rail cars (“rolling stock”) are considered point sources under the Clean Water Act. 33 U.S.C. §1362(14). The point sources include, but are not limited to, each and every train and rail car transporting coal.

The Dischargers have discharged, are discharging, and will continue to discharge pollutants from point sources into waters of the United States, including, but not limited to, rivers, streams, lakes, ponds, coulees, estuaries, bays, sounds, canals, shipping canals, fresh water and tidal wetlands, and coastal waters of the Pacific Ocean. The list of waters of the United States into which the pollutants are discharged is extensive, spanning much of the State of Washington and are named in part below. These waters derive water from, are tributaries to, forks of, and/or exchange water with many of the waters in the State of Washington, many of which are navigable waters and all of which eventually discharge into the Pacific Ocean. The Dischargers have violated, are violating, and will continue to violate the Clean Water Act by illegally discharging pollutants into waters of the United States.

POLLUTANTS BEING DISCHARGED

The pollutants that the Dischargers have discharged, are discharging, and will continue to discharge include, but are not limited to, coal, coal chunks, coal dust, metabolites or related by-products of coal, surfactants applied to the coal, coal chunks and coal dust, petcoke, petcoke chunks, petcoke dust, and suppressants. All pollutants being discharged not set forth specifically in this letter are violations that are or should be known to the Dischargers and may be included in any future legal actions by Notifiers. Such pollutants may only be known to Dischargers and eyewitnesses who are yet to be determined because such discharges have not been reported by Dischargers.

DISCHARGE EVENTS

The Dischargers have discharged, are discharging, and will continue to discharge pollutants to waters of the U.S. by each and every one of the Dischargers' trains, and each and every one of the Dischargers' rail cars. Each and every train and each and every rail car discharges pollutants to waters of the United States when travelling adjacent to, over, and in proximity to waters of the United States. The information concerning the specific dates, amounts, and exact or approximate locations, along with, for example, the rail conditions, rail car conditions, design and performance of rail cars, weather conditions, passing trains, loading practices employed, and incline or decline of railways in specific locations of the discharges during each of the years 2008 through the present are, or should be, in the possession of the Dischargers. Since the Dischargers' entire files are not available to the Notifiers, this information remains exclusively within the control of the Dischargers and, consequently, Notifiers cannot be expected to provide all details of discharge times, locations, or amounts.

By Dischargers' own testimony before the Surface Transportation Board (STB), which testimony is publicly available, each rail car loses between 250 and 700 pounds of coal and coal dust¹ on each trip for an average loss of 500 pounds of coal lost from each car per trip.² For trains with 120 cars—the typical length of a coal train—over 30 tons of coal is lost each trip.³ In other studies, again according to BNSF, as much as three percent of the coal in each car (around 3,600 lbs. per car) can be lost in the form of dust.⁴ Furthermore, BNSF's own testimony indicates that in 2008, a limited "cleanup" was attempted near certain streams and waterways, and over 300 rail cars of coal deposits were removed.⁵ Evidence indicates that the coal obtained from the Powder River Basin is generally sub-bituminous coal, and can produce a finer dust than other sources of U.S. coal;⁶ thus, the behavior of the Powder River Basin coal may exceed the average coal dust loss per transport.

The Notifiers believe in good faith that numerous factors contribute to the discharge of coal, coal chunks, coal dust, metabolites or related byproducts of coal, surfactants, and other substances or materials added to the coal and petcoke into waters of the U.S. First, rail cars used for transporting coal and petcoke are open-top, that is to say that they are not covered or enclosed, but are open to the air. Passing over rough rail tracks, track changes, bridges, and switches causes rail cars to vibrate and chunks of coal, coal dust and petcoke are shaken out of rail cars.⁷ Loading coal above the top of a rail car, and transporting coal over windy and bumpy

¹ Hearing Transcript and Recording, July 29, 2010, *Arkansas Electric Cooperative Association – Petition for Declaratory Order*, Surface Transportation Board, Docket No. FD 35305, tape 1 at Transcript (Tr.) at 102:9-103:7.

² Id. at tape 1 at 37:07, 1h:42; Tr. at 42:5-13, 102:9-103:7 (BNSF Testimony).

³ Id. An average of 500 lbs./car x 120 cars/train=60,000 lbs. or 30 tons.

⁴ Burlington Northern Santa Fe Railway, "Coal Dust FAQ," March 2011. Available at <http://www.coaltrainfacts.org/docs/BNSF-Coal-Dust-FAQs1.pdf>.

⁵ Id. at Tape 1 at 40:30. Tr. at 45: 13-19 (Testimony of Gregory Fox, Vice President of Transportation for BNSF) "In 2008, BNSF did a very limited clean up of coal dust around waterways and we removed over 300 rail cars of coal dust; 1.58 million tons as shown on the chart would equate to 14,000 rail cars of coal dust that needs to be removed from the joint line, obviously, an extreme condition." Fox continued: "oftentimes we'll load in rail cars and take it to a disposal site. Other times, frankly, we will put it on to the right of way roads well away from the track structure." Tape 1h:54; Tr. at 114:16-115:8..

⁶ Id. at Tape 1 at 10:46, Tr. 17:1-16.

⁷ See, e.g., Id. at Tape 2, 4:10; Tr. at 161:13-164: 9.

terrain leads to further coal loss.⁸ When combined with high operating speeds, which are known to occur, the chances of coal falling out increases.⁹ Second, the discharge of pollutants is pervasive regardless of the terrain, but discharges are even more pronounced on the descending side of an incline. Such descents occur, among other places, in the Cascade Mountains. Coal loss accumulations are higher in pronounced descents and pronounced ascents, and places where a rail line crosses perpendicular to a valley.¹⁰ The same topographic features which cause coal and petcoke to fall out of rail cars also put the rail cars in proximity to waterways when discharges occur.¹¹ Third, bridges are frequently located at the bottom of “big sags” or pronounced descents, and Dischargers have identified these locations as having high accumulations of coal and petcoke discharges, due in part to the slack action shock waves throughout the train caused by braking on descent and then accelerating to ascend.¹² This shock wave redistributes coal and petcoke in the open-top rail car and causes chunks of coal and petcoke to fall out.¹³ Fourth, by design, performance, age, or other factors, rail cars have holes in the sides, bottoms and other places. Rail cars are not watertight, which results in the discharge of pollutants. Discharges from holes in the rail cars are exacerbated in precipitation-related events, which are frequent and regular occurrences for much of the year, particularly west of the Cascade Mountains. Fifth, when there are crosswinds, or winds created from passing trains, more pollutants are discharged. Finally, the use of topping agents such as surfactants is not required. Further, even if topping agents are applied, it is not effective to fully prevent coal and petcoke discharge into waterways.¹⁴ Surfactants themselves are also pollutants and, if applied, would be discharged from the rail cars.

Coal dust has also been shown to be a cause of rail bed instability and derailments, which can pose a significant public safety hazard, as discussed in a recent proceeding before the Surface Transportation Board (STB), which found coal dust to be “a pernicious ballast foulant.”¹⁵ “Coal dust, even in small amounts, poses a real threat to the integrity of the ballast section and track stability.”¹⁶ Coal train derailments pose a threat to human health and safety and constitute Clean Water Act violations when they spill coal into waterways. Derailments occur on an intermittent, but expected, basis and will likely continue to occur. All discharges resulting from derailments are subject to anticipated action by Notifiers.

⁸ Id. at Tape 1, 2h:18.; Tr. at 141:4-142:14.

⁹ Id. at Tape 2, 9:00; Tr. at 165:10-166:122.

¹⁰ See, e.g., Id. at Tape 2, 4:10; Tr. at 161:13-164:9

¹¹ Id., Tape 2 at 8:00; 164:22-165:9.

¹² Id., Tape 2 at 9:00.; Tr. at 165:10-166: 22.

¹³ Id.

¹⁴ While BNSF has a voluntary mandate encouraging the use of surfactants, the Surface Transportation Board (STB) proceedings evaluating that practice are ongoing. In the absence of binding regulation, over 70% of coal shippers are electing not to apply any sort of topping agent or surfactant. See *Some shippers not complying with BNSF coal dust tariff*, Platts Energy Week, November 3, 2011, accessed <http://www.wusa9.com/news/local/story.aspx?storyid=173329>

¹⁵ See Surface Transportation Board Decision, *Re: Ark Arkansas Electric Cooperative Corporation - Petition for Declaratory Order*, Docket No. FD 35305 (Mar. 3, 2011) (available at <http://www.stb.dot.gov/decisions/readingroom.nsf/WebDecisionID/40436?OpenDocument>).

¹⁶ See Testimony of Gregory Fox Vice President of Transportation for BNSF, Surface Transportation Board Hearing Transcript (“STB Hearing Transcript”), *Re: Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, Docket No. FD 35305 (July 29, 2010), Tape 42:06; Tr. 46:18-20.

WATERS AFFECTED

The waters of the U.S. that are located in, in proximity to, or which run through the State of Washington at issue in this notice and which pollutants reach are numerous. BNSF's northern route for transportation of coal runs from Spokane through Odessa, Ephrata, Wenatchee, to Everett and down to Seattle. BNSF's southern route for transportation of coal runs from Spokane, through Pasco and then west to Vancouver, Washington. BSNF may also transport coal from the Seattle – Everett area north to Vancouver, British Columbia. All throughout the State of Washington, where the rail lines and rail cars pass by, cross, or are in proximity to waters of the United States, pollutants are discharged and remain present in the waters. At a minimum, these waters include, but are in no way limited to, the Columbia River, Puget Sound, Alder Creek, Ashes Lake, Bass Lake, Beckie River, Beckler River, Chamberlain Lake, Chiwawa River, Chuckanut Bay, Coal Creek, Cow Creek, Cowlitz River, Coweeman Confluence, Crab Creek, Crah Creek, Dakota Creek, Dead Canyon, Deschutes River, Drano Lake, East Low Canal, Elliott Bay, Esquatzel Coulee, Franz Lake, Glade Creek, Green River, Grant Lake, Hangman Creek, Hewett Lake, Horsethief Lake, Howard Hanson Reservoir, Kalama River, Klickitat River, Lake Union, Lewis River, Little White Salmon River, Little Spearfish Lake, Look Lake, Locke Lake, Newaukum River, Nisqually River, Nooksack River, North Fork – Skykomish River, Pilchuk Creek, Pilchuk River, Possession Sound, Quilceda Creek, Rock Cove, Rowland Lake, Salmon Creek, Samish River, Shilshole Bay, Skagit River, Skookumchuck River, Skykomish River, Snake River, Snohomish River, South Fork – Skykomish River, Spokane River, Status Creek, Steamboat Slough, Stillaguamish River, Stuck River, Sultan River, Teanaway River, Toppenish Creek, Toutle River, Union Slough, Wallace River, Washougal River, Wenatchee River, West Canal, White Salmon River, Wind River, Yakima River and their tributaries. See Appendix A for dates of examples of violations and photographic representations of violations.

DISCHARGES UNLAWFUL

Section 301 of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of any pollutant from a point source into waters of the United States unless such discharge is authorized pursuant to a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act and/or a dredge and fill permit issued pursuant to Section 404 of the Act. The Dischargers have never obtained a NPDES permit or dredge and fill permit for such discharges. The types of discharges that have occurred, are occurring and that are likely to continue to occur are not permitted under federal law. As Dischargers plan to continue loading and transporting coal and petcoke in the current methods and manners, the Dischargers are continuing, and will continue, to illegally discharge pollutants into waters of the United States without a NPDES permit or a dredge and fill permit.

HISTORY OF VIOLATIONS

Notifiers believe and allege that a history of violations has continued from at least April 2008 (and for many years prior to 2008) and that violations are presently ongoing and continuous. These violations have occurred, are occurring, and will continue to occur on a regular basis (daily, or multiple times per week or per month), during transportation of each coal or petcoke shipment, at virtually all locations where waters of the U.S. are present, along the rail

transportation routes in the State of Washington (as well as other areas along the rail lines). All violations not set forth specifically in this letter, including specific dates and locations of such discharges, are violations that are or should be known to the Dischargers and may be included in any future legal actions by Notifiers. All specific discharges discovered subsequent to the sending of this notice, of similar type and nature, whether occurring prior or subsequent to this notice, shall be included in the action in this case without the need for further notice under 33 U.S.C. §1365(b). Such discharges may only be known to the Dischargers and eyewitnesses who are yet to be determined because such discharges have not been, and are not, reported by Dischargers.

ACTIONS TO BE TAKEN

Absent cessation of the discharges by the Dischargers, Notifiers intend, at the close of the sixty (60) day notice period to file a citizen lawsuit under Section 505 of the Clean Water Act against Dischargers, both individually and collectively, seeking injunctive relief, remedial relief, declaratory relief, and civil penalties for each day of each violation for each U.S. water body over the past five (5) years and sixty (60) days from the date of this notice relating to the illegal discharges through the date of this letter and all violations of Section 301 of the Clean Water Act which occur subsequent to the date of this letter, plus costs, attorney and expert witness fees, and such other relief as may be appropriate. Notifiers will also seek removal of the pollutants from waterways as such discharges constitute illegal fill material in violation of Sections 301 and 404 of the Clean Water Act and the Rivers and Harbors Act of 1899, 33 U.S.C § 403, et seq.

CIVIL PENALTIES

Notifiers intend, at the close of the sixty (60) day notice period, to file a citizen suit under §505 of the Clean Water Act, 33 U.S.C. §1365, against the Dischargers for the applicable statutory maximum for each violation, presently \$37,500 per day for each violation. 33 U.S.C. §1319(d) and 40 C.F.R. §19 and §19.4 Table 1 (or as otherwise provided by federal regulations). Civil penalties are mandatory once violations are found. 33 U.S.C. §1319(c); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 (9th Cir. 1995) (civil penalties under Clean Water Act are mandatory, not discretionary). Dischargers are on notice that each day of a discharge into each waterway by each rail car, as well as each train, constitutes a distinct and separate violation subject to civil penalties. Thus, each rail car discharging pollutants into a different waterway constitutes a separate violation. Furthermore, the pollutants that remain in the waterways constitute continuing violations of the Act which are also subject to daily penalties until removed.

The name, address and phone number of the persons giving Notice of Intent to File a Citizen Lawsuit under the Clean Water Act are:

Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
Tel: (415) 977-5500

Puget Soundkeeper Alliance
5305 Shilshole Avenue NW - #150
Seattle, WA 98115
Tel: (206) 297-7002

Columbia Riverkeeper
111 Third Street
Hood River, OR 97031
Tel: (503) 348-2436

Friends of the Columbia Gorge
522 SW 5th Ave., Ste. 720
Portland, OR 97204
Tel: (503) 241-3762

RE Sources for Sustainable Communities
2309 Meridian Street
Bellingham, WA 98225
Tel: (360) 733-8307


The names, addresses and phone numbers of the counsel for the Notifiers are:

Charles M. Tebbutt, Esq.
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
Tel: (541) 344-3505

Andrea K. Rodgers Harris
Mattson Rodgers, PLLC
2907 S. Adams Street
Seattle, WA 98108
Tel: (206) 696-2851

During the sixty (60) day notice period, we will be available to discuss effective remedies and actions which will assure the Dischargers' future compliance with the Clean Water Act and all applicable state water pollution control laws. In addition, we welcome discussion about whatever facts you believe are relevant which are not itemized in this notice letter. If you wish to avail yourself of this opportunity, please contact the undersigned. The Notifiers request that any person receiving this notice direct all inquiries to the undersigned legal counsel.

Sincerely,



Charles M. Tebbutt
Law Offices of Charles M. Tebbutt, P.C.

cc: Bob Perciasepe, Acting Administrator, U.S. EPA (certified U.S. Mail)
Dennis J. McLerran, Administrator, Region 10, U.S. EPA (via U.S. Mail)
C T Corporation System, Registered Agent for Burlington Northern Sante Fe Railroad
and for TransAlta USA Inc. (via U.S. Mail)
Corporation Service Company, Registered Agent for Cloud Peak Energy Logistics, LLC
(via U.S. Mail)
Maia Bellon, Director, Washington State Department of Ecology (via U.S. Mail)

APPENDIX A

Locations of Dischargers' violations include, but are not limited to, those listed in the "Waters Affected" section of Notifiers' letter during each and every transport of coal and petcoke. The photographs below, which are also identified by date in the next paragraph, are examples of the types of discharges occurring to some of the affected waters.

Coal was discharged into the water on or before the following dates and locations, including but not limited to: June 28, 2011 (Lake Washington Ship Canal BNSF Rail Bridge, Puget Sound, Shilshole Bay); November 6, 2011 (Colony Creek near the intersection under Chuckanut Drive/SR-11); November 10, 2011 (Skagit River Bridge); November 17, 2011 (Lake Washington Ship Canal BNSF Rail Bridge, Puget Sound, Shilshole Bay); May 16, 2012 (Columbia River at White Salmon River); June 12, 2012; (Snohomish River south of Marysville, WA); July 14, 2012 (Columbia River near Horsethief Lake); November 11, 2012 (Columbia River at White Salmon River); January 9, 2013 (Columbia River near Drano Lake; Columbia River at the mouth of Rock Creek, Stevenson, WA; Columbia River at White Salmon River; Columbia River at Wind River); January 26, 2013 (Columbia River near Horsethief Lake); February 12, 2013 (Cowlitz River; Coweeman River under the railroad bridge just south of the Hwy 432 bridge; Kalama River; Lewis River; Toutle River); February 21, 2013 (Horsethief Lake); February 26, 2013 (Ballard Locks of Puget Sound); February 27, 2013 (Picnic Point Beach, Edmonds, Puget Sound); March 1, 2013 (Marina Beach Park, Edmonds, Puget Sound); March 5, 2013 (Howarth Park, Everett, Puget Sound, Union Slough, Snohomish River); March 8, 2013 (Skagit River Rail Trestle near E Whitmarsh Road and South Burlington Blvd, North of Mt Vernon; Creek flowing into Puget Sound at Golden Gardens Park, Puget Sound); March 18, 2013 (Carkeek Park, Puget Sound; Creek flowing into Puget Sound at Golden Gardens Park, Puget Sound); March 21, 2013 (Creek flowing into Puget Sound at Golden Gardens Park, Puget Sound); March 24, 2013 (Lake Washington Ship Canal BNSF Rail Bridge, Puget Sound, Shilshole Bay); March 26, 2013 (Lake Washington Ship Canal BNSF Rail Bridge, Puget Sound, Shilshole Bay); March 27, 2013 (Columbia River near Horsethief Lake); and March 28, 2013 (Columbia River near Horsethief Lake; Lake Washington Ship Canal BNSF Rail Bridge, Puget Sound, Shilshole Bay).

Coal was observed in the water on these dates. The coal may have been discharged prior to this date.

Location: Columbia River near Horsethief Lake

Date: January 26, 2013



Location: Coweeman River under the railroad bridge just south of the Hwy 432 bridge

Date: February 12, 2013



Location: Columbia River near Horsethief Lake

Date: July 14, 2012



Location: Rock Creek Delta near Stevenson, WA

Date: January 9, 2013



Location: Columbia River near Horsethief Lake

Date: February 20, 2013



Location: Hiram M. Chittenden Locks, Lake Washington Ship Canal at Salmon Bay, Puget Sound (“Ballard Locks”)

Date: November 17, 2011

