1 **THE HONORABLE JOHN C. COUGHENOUR**
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8 UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE
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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, v. BNSF RAILWAY COMPANY, a Delaware corporation; CLOUD PEAK ENERGY, Inc., a Delaware corporation; PEABODY ENERGY CORPORATION; a Delaware corporation; GLOBAL MINING HOLDING CO., LLC, a Delaware limited liability company; FIRSTENERGY CORP., an Ohio corporation; AMBRE ENERGY NORTH AMERICA, INC., a Delaware corporation, Defendants.	CASE NO. 2:13-cv-00967-JCC DEFENDANT BNSF RAILWAY COMPANY'S MOTION TO DISMISS PURSUANT TO FRCP 12(B)(1) Note on Motion Calendar: September 6, 2013 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs have long sought to stop the use of coal in the United States and abroad through a combination of litigation and legislation attacking the coal industry. One of Plaintiff Sierra Club's stated goals in its Beyond Coal campaign is "[k]eeping coal in the ground in places like . . . Wyoming's Powder River Basin."[1] As part of this campaign, Plaintiffs have now expanded their attack beyond the coal mines, terminals and utilities to the primary mode of the domestic transportation of coal – the railroads. In this case, Plaintiffs seek to limit rail transportation of coal by asking this Court to expand the reach of the Clean Water Act ("CWA") to all rail cars and trains. Their claims are unprecedented and their assertions unsupported. Despite the fact that neither EPA nor Washington State regulates the transportation of coal under the CWA, Plaintiffs allege that every rail car carrying coal materials on BNSF Railway Company's ("BNSF") tracks unlawfully discharges some portion of its contents "adjacent to, over, and in proximity to Waters of the United States" without a National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the CWA, 33 U.S.C. § 1342. ECF No. 32, at ¶¶ 15-16, 54. To make this claim, Plaintiffs must rely on sweeping, uncorroborated assertions. The sheer breadth of those allegations is also their downfall.

Both of the Plaintiffs' Notices of Intent to Sue ("NOIs"), sent April 2, 2013 and May 9, 2013, and their subsequent First Amended Complaint are plagued by jurisdictional infirmities. For this Court to have jurisdiction under the CWA, Plaintiffs must provide BNSF notice at least 60 days prior to filing a complaint, with sufficient information to allow BNSF to identify how it may be violating the statute so it can take corrective actions to avert a lawsuit. Plaintiffs' NOIs do not satisfy this jurisdictional prerequisite. They identify eight companies (BNSF, Peabody Energy, Arch Coal, Ambre Energy North America, Cloud Peak Energy, Global Mining Holding Co., FirstEnergy and TransAlta USA Inc.) as alleged dischargers, at least nine different types of coal materials allegedly discharged, at least six different factors that could lead to a "discharge event,"

[1] http://content.sierraclub.org/coal/about-the-campaign (visited August 15, 2013).

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including coal train derailments, and some 75 waters (some of which flow across the entire State and beyond) where such a discharge event could take place. But Plaintiffs fail to identify anywhere in its NOIs a single BNSF rail car that actually discharged coal materials to a geographically-specific location in a water of the United States on a particular day and time.

The information in Plaintiffs' NOIs does not tell BNSF whether it or some other party was responsible for a specific discharge or whether the factor or factors allegedly causing a specific discharge are under BNSF's control (*e.g.*, wind vs. speed of travel) such that BNSF could take corrective action. Plaintiffs' NOIs do not even identify the specific date or location of a single actual discharge. That information, particularly the portion of a waterbody where the alleged discharge occurred, is crucial for BNSF to determine what, if anything, could be done. By design rails cars are constantly moving to different locations on BNSF tracks, meaning that different factors could be causing different alleged discharge events at different locations on the tracks at different times. But Plaintiffs have not provided sufficient information to evaluate these alleged discharges. And BNSF is not required to conduct an extensive investigation of its own in response to an NOI – the notice period allows only 60 days to act to prevent a suit. Rather Congress has determined that it is a plaintiff's duty to provide such notice as a precondition to filing suit. Plaintiffs did not do that here, and the First Amended Complaint must be dismissed.

The vague allegations in Plaintiffs' NOIs are repeated in the First Amended Complaint and raise a second jurisdictional bar. Plaintiffs have identified at least 75 waters they claim are affected by the alleged discharges. Some of those waters are up to hundreds of miles long or cross state and national borders (*e.g.*, Columbia River, Yakima River, Skykomish River). But Plaintiffs have not limited their claims to only those named waters. ECF No. 32, at ¶ 63. They also allege that as-of-yet unidentified waters throughout Washington have been impacted. *Id.* With such broad allegations comes an equally high standing requirement, which Plaintiffs do not come close to meeting. They have failed to allege the requisite facts necessary to prove that their members have standing to sue BNSF for essentially any water flowing in Washington State "in proximity

to" a BNSF track. Generic allegations that Plaintiffs' members "reside, work travel, and recreate next to and in the general vicinity of BNSF's railroad tracks in Washington" and the allegedly affected waterways, or live in those waterbodies' massive watersheds, *e.g.*, ECF No. 32, at ¶¶ 12-13, do not prove that Plaintiffs have suffered a cognizable injury-in-fact, for each specific water (or portions thereof) named in the First Amended Complaint, that was caused by BNSF's actions and can be redressed by this Court. Thus, any claim based on a water where no specific standing evidence has been presented to this Court must be dismissed.

Finally, Plaintiffs continue to overreach by requesting relief – remediation and restoration – that is not a remedy provided to them by Congress under the plain language of the CWA citizen suit provision and that request for relief much also be dismissed.

II. FACTUAL BACKGROUND

BNSF is a Class I railroad and a common carrier, transporting intermodal freight and bulk cargo in the United States and into Canada. As a common carrier, BNSF must "provide the transportation or service on reasonable request" and cannot refuse to transport any item, including coal, when such a reasonable request is made. 49 U.S.C. § 11101(a). BNSF also is subject to significant restrictions and oversight by the Surface Transportation Board ("STB") as a common carrier, including approval of any requirements BNSF might wish to impose on the transport of freight, such as coal. 49 U.S.C. § 10501(a)-(b); *Bhd. of Maint. of Way Employes Div. v. Burlington N. Santa Fe Ry. Co.*, 596 F.3d 1217, 1220 (10th Cir. 2010) (STB "imposes a comprehensive scheme of regulation on rail carriers"). Plaintiffs have alleged that the majority of coal transported by BNSF comes from the Powder River Basin ("PRB"), a geologic region located in southeast Montana and northeast Wyoming known for its coal deposits.[2] ECF No. 32, at ¶ 33.

On April 2, 2013, Plaintiffs sent an NOI to Defendant BNSF and seven other entities (Peabody Energy, Arch Coal, Ambre Energy North America, Cloud Peak Energy, Global Mining Holding Co., FirstEnergy and TransAlta USA Inc.). *See* ECF No. 32, Ex. A. On May 9, 2013,

[2] *See* http://energy.usgs.gov/RegionalStudies/PowderRiverBasin.aspx (visited August 15, 2013).

Plaintiffs sent a Supplemental NOI in which they added two additional notifying parties, Spokane Riverkeeper and NRDC, and identified an alternative name for Hangman Creek in the section entitled "Water Affected." *See* ECF No. 32, Ex. B. Otherwise, the Supplemental NOI mirrors the original NOI.

The NOIs indicated that Plaintiffs would file a complaint against all eight companies for discharging pollutants "includ[ing but] not limited to coal, coal chunks, coal dust, metabolites or related byproducts of coal, surfactants applied to the coal, coal chunks and coal dust, petcoke, petcoke chunks, petcoke dust, and suppressants" (hereafter collectively "coal material") "into waters of the United States throughout the State of Washington. . . . under or in proximity to the rail lines and rail cars." ECF No. 32, Exs. A & B at p. 2. While the letters identify a non-exclusive list of 75 waters Plaintiffs claim coal material has been discharged to, "from at least April 2008," they expressly do not provide alleged discharge "information concerning the specific dates, amounts, and exact or approximate locations, along with, for example, 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." ECF No. 32, Ex. A at pp. 3, 5 and Ex. B at pp. 3, 6. Instead, the notices assert that such information is "or should be, in the possession of the Dischargers." *Id.* In place of that information, the NOIs cite testimony from STB proceedings about coal dust issues in Wyoming and Montana as evidence that coal material is being discharged in Washington State. *Id.* at 3-6. Nowhere, however, do they specify which of the eight companies caused any one of alleged discharges since April 2008. *See generally id.*

On June 4, 2013, Plaintiffs filed a Complaint against BNSF and six of the eight companies named in the NOIs (Peabody Energy, Ambre Energy North America, Cloud Peak Energy, Global Mining Holding Co., and FirstEnergy). ECF No. 1. The Complaint incorporated by reference and repeated the allegations made in the NOIs summarized above.

On July 29, 2013, Plaintiffs voluntarily dismissed all parties except BNSF and filed an

1 Amended Complaint against BNSF only. ECF Nos. 31, 32. The First Amended Complaint again
2 incorporates by reference and repeats the allegations from the NOIs. But – for the first time – it
3 identifies one specific alleged discharge for which Plaintiffs claim BNSF is responsible. ECF No.
4 32, at ¶ 55.

5 **III. CLEAN WATER ACT STATUTORY AND REGULATORY BACKGROUND**

6 Section 301(a) of the CWA prohibits the unauthorized "discharge of any pollutant" by any
7 "person" into "navigable" waters. 33 U.S.C. § 1311(a). The statute defines "discharge of a
8 pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.*
9 § 1362(12). Parties subject to section 301(a)'s prohibition may obtain permits through the section
10 402 NPDES program to authorize their point source discharges. *Id.* § 1342.

11 In Washington, the U.S. Environmental Protection Agency ("EPA") has delegated authority
12 to issue NPDES permits to Washington's Department of Ecology ("WA DOE").[3] When a point
13 source discharge is subject to CWA jurisdiction, NPDES permits may be issued in one of two
14 forms: (1) individual permits (issued to one facility or source based on site-specific information to
15 "authorize[] a specific entity to discharge a pollutant in a specific place"), and (2) general permits
16 ("issued for an entire class of hypothetical dischargers in a given geographical region" where the
17 covered discharges involve similar operations, the same types of wastes, and require uniform
18 regulation/conditions). *NRDC v. United States EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002) (citing
19 40 C.F.R. §§ 122.21, 122.28, 124.1-124.21, 124.51-124.66); *see also* 40 C.F.R. §§ 122.21, 122.28
20 (explaining the scope of the individual and general NPDES permitting programs).

21 To BNSF's knowledge, neither EPA nor any of the 47 jurisdictions with delegated NPDES
22 authority has ever issued an individual permit to the owner or operator of a rail car for the
23 transport of any item, including coal. Nor has EPA or any state (including Washington State) ever
24 issued a general NPDES permit applicable to the rail transport of any item, including coal.

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[3] *See* http://www.ecy.wa.gov/programs/wq/permits/ (visited August 15, 2013).

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IV. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Plaintiffs bear the burden of proving that federal jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994). When considering a motion to dismiss pursuant to Rule 12(b)(1), a court is not restricted to the face of the pleadings, but "may review any evidence" to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

V. ARGUMENT

A. This Court Does Not Have Jurisdiction Because Plaintiffs Failed To Provide BNSF With Adequate Notice Under The CWA's Citizen Suit Provision.

Section 505 of the CWA allows private citizens to file an enforcement action in district court under limited circumstances. 33 U.S.C. § 1365. At least 60 days before filing suit, a prospective plaintiff must notify the alleged discharger and the relevant governmental agencies of its intent to sue. *Id.* § 1365(b)(1)(A). EPA's regulations specify seven categories of information that an NOI must include to satisfy that statutory requirement: (1) the specific standard, limitation, or order alleged to have been violated; (2) the activity alleged to constitute a violation; (3) the person or persons responsible for the alleged violation; (4) the location of the alleged violation; (5) the date or dates of such violation; (6) the full name, address, and telephone number of the person giving notice; and (7) the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice. 40 C.F.R. § 135.3(a) and (c). Although compliance with these requirements is a prerequisite to this Court's jurisdiction, Plaintiffs' NOIs ignore more than half of these requirements. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1146 (9th Cir. 2000).

1. Adequate Notice Is Required To Allow Resolution of Alleged Violations Prior To Litigation.

The CWA requires adequate notice "to allow the parties time to resolve their conflicts in a

nonadversarial time period" and avoid litigation altogether. *Wash. Trout v. McCain Foods*, 45 F.3d 1351, 1354 (9th Cir. 1994). The citizen plaintiff bears the burden of providing the jurisdictionally required notice, and the Ninth Circuit requires strict compliance with the terms of the notice provision. *Id. at* 1353-55. "[T]he requirements set forth in 40 C.F.R. § 135.3(a) are not to be looked upon as mere technicalities . . . [t]hey are to be taken seriously as a means of carrying out important public policies." *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 802 (9th Cir. 2009). An NOI therefore must identify the alleged violations with enough detail "[to] inform the alleged violator about what it was doing wrong, so that it kn[ows] what corrective actions w[ill] avert a lawsuit." *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002) (internal quotations and citations omitted).

Consistent with that policy, an NOI "does not need to describe every detail of every violation," but it must "provide enough information that the defendant can identify and correct the problem." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1155 (9th Cir. 2002). And as the Ninth Circuit recently clarified, "even at our most lenient we have never abandoned the requirement that there be a true notice that tells a target precisely what it allegedly did wrong, and when. The target is not required to play a guessing game in that respect." *Marina Point*, 566 F.3d at 801. Nor are alleged dischargers required to undertake "an extensive investigation of their own" to determine what actions they could take to resolve the alleged violations. *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1222 (M.D. Ala. 2001) (dismissing the entire complaint for insufficient notice and taxing costs to the citizen). Adequate notice is required because

> the notice requirement of the CWA provides a relatively short period in which an alleged violator may correct any problems and avoid a lawsuit. Allowing a plaintiff to provide minimal information in a notice letter before bringing suit would place a heavy burden on alleged violators and enforcement agencies alike, a burden inconsistent with the policy goals of the notice requirement. . . . To hold otherwise would frustrate the legislative intent behind the notice provision.

Id. In addition, the notice requirement of the citizen suit provision also serves to control the scope

1 of any subsequently filed litigation because a court does not have jurisdiction over alleged
2 violations that were not adequately described in the NOI.

3 **2. Plaintiffs' NOIs Do Not Set Forth How The Alleged Discharges Could**
4 **Be Prevented By BNSF.**

5 Plaintiffs' NOIs purport to provide notice for a five-year period of any and all discharges
6 of nine different types of coal material by BNSF, Peabody Energy, Arch Coal, Ambre Energy
7 North America, Cloud Peak Energy, Global Mining Holding Co., FirstEnergy and TransAlta USA
8 Inc. from trains and rail cars traveling throughout the State of Washington and from coal loading
9 and unloading activities. While the NOIs provide examples of a variety of alleged coal pollutants,
10 list general factors that may contribute to alleged coal discharges, name eight possible alleged
11 dischargers, and catalogue over 75 possible waters in Washington that may be affected, they do
12 not provide specific information about or make any effort to connect BNSF's activities to any
13 alleged discharge. Without such information, particularly in the absence of any regulation of the
14 rail transport of coal under the CWA, BNSF could not possibly identify any specific discharge for
15 which it is allegedly responsible, correct the alleged problems, or avoid this lawsuit. In short,
16 BNSF could not take any of the actions the CWA's notice requirement was created to achieve
17 based on Plaintiffs' NOIs. *See ONRC*, 286 F.3d at 1143 (describing the intent behind the CWA
18 notice provision).

19 The prototypical citizen enforcement suit brought under the CWA focuses on a single
20 stationary facility that is alleged to discharge pollutant-laden effluent through particular outfalls to
21 a specific body (or bodies) of water in violation of the terms of the relevant NPDES permit. *See*
22 33 U.S.C. § 1365 (generally authorizing private citizens to sue those violating "an effluent
23 standard or limitation"); 40 C.F.R. § 135.3 (delineating the required details of a citizen plaintiff's
24 notice of intent); *see also San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th
25 Cir. 2006) ("In most cases, citizen suits are brought to enforce limitations included in a permit
26 issued by the EPA"); *Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC*, 531 F. Supp. 2d

747, 754 (S.D. W. Va. 2008) (finding that plaintiff had brought a "traditional citizen suit" where it sought to enforce the NPDES permit standards for a particular pollutant discharged from specific outfalls into particular waterbodies). In a typical proceeding, the notice requirement does not pose a substantial burden on the citizen plaintiff because she can point to the particular fixed facility, outfall, effluent discharge and receiving water and demonstrate that discharges have violated the CWA either by conducting independent sampling or referring to the Discharge Monitoring Reports that NPDES permittees are required to submit to the regulating agency.[4] The allegations in this case, however, are far different than the prototypical citizen suit case as there is no existing NPDES permit and no fixed facility, outfall or waterbody being discharged into.

a. Without Regulatory History To Supplement The NOIs, There Is Insufficient Information To Put BNSF On Notice Of Alleged Violations.

Normally, regulatory history is a useful guide to inform a notified party of its alleged violations. *See Paolino v. JF Realty, LLC*, 710 F.3d 31, 37 (1st Cir. 2013) ("The adequacy of the information contained in pre-suit notice will depend upon . . . the nature of the purported violations, the ***prior regulatory history of the site***, and the actions or inactions of the particular defendants.") (emphasis added). That is not the case here. There are no federal or state regulations or guidance setting forth NPDES permitting conditions or requirements for the rail transportation of any item, including coal. And to BNSF's knowledge, in the more than forty years since the NPDES program was established, neither EPA nor any state ever has issued an individual or a general CWA permit covering rail transport of coal or any other item, or initiated an enforcement action for failure to obtain such a permit. In such circumstances, where the regulatory agencies have not defined the requirements or proscriptions that apply to an activity, it is incumbent on the notifying party to inform the alleged violator of its specific unlawful behavior. *Id.* at 38 ("[T]here must be sufficient facts asserted about the mechanisms and sources involved in

[4] *See e.g.,* WA DOE Industrial Stormwater General Permit at 21-24, modification effective January 1, 2010 (available at http://www.ecy.wa.gov/programs/wq/stormwater/industrial/permitdocs/iswgpfinal051612.pdf).

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these unlawful discharges so that the defendants may take appropriate remedial action.”). Plaintiffs’ NOIs fail even this modest requirement.

b. Plaintiffs’ NOIs Do Not Identify Any Time Or Place Of Discharge.

To put a purported discharger on notice of an alleged CWA violation, that party must at least be informed of the two most basic details of the claimed discharge – a “reasonably specific indication of the area and time-frame of the violations.” *San Francisco BayKeeper v. Town of Hillsborough*, No. 08-3760, 2008 U.S. Dist. LEXIS 101989, at *6-7 (N.D. Cal. Dec. 5, 2008); *see also Cal. Public Interest Research Group v. Shell Oil Co.*, Nos. C92-4023, C93-0622, 1994 U.S. Dist. LEXIS 18999, at *4 (N.D. Cal. Jan. 5, 1994). Plaintiffs have provided neither.

Rather than informing BNSF of when and where it allegedly violated the CWA, the NOIs simply allege that “discharges during each of the years 2008 through the present” occurred and continue to occur “[a]ll throughout the State of Washington, where the rail lines and rail cards pass by, cross, or are in proximity to waters of the United States.” ECF No. 32, Exs. A & B at pp. 3, 5. The NOIs go on to state that the geographic locations of discharges “include but are in no way limited to” a list of approximately 75 waters as well as their unnamed “tributaries.” *Id.* At a minimum, referring to unnamed waters throughout the State that may be in “proximity” to BNSF tracks or passed by BNSF rail cars cannot constitute sufficient notice. Plaintiffs’ failure to define “proximity” and “pass by” with any hint of precision further renders the notice meaningless.

The 75 waters that Plaintiffs actually identify by name are not much more illuminating. Some of those waters (*e.g.*, Coal Creek, Cow Creek, Crab Creek, Pilchuk Creek, Grant Lake, East Low Canal) do not appear anywhere near BNSF tracks on federal government maps, while others (*e.g.*, Beckie River, Stuck River, Alder Creek, Crah Creek, Status Creek, Locke Lake, Coweeman Confluence, Dead Canyon) do not appear on the maps at all.[5] Still others cover impossibly large

[5] The U.S. Fish and Wildlife Service has created an electronic map database of the nation’s riparian areas and wetlands. The map can be searched by water and is publically available at http://www.fws.gov/wetlands/Wetlands-

1 geographic areas for BNSF to blindly identify an unknown discharge site. For instance, the
2 Columbia River is hundreds of miles long and traverses the entire State of Washington. BNSF's
3 tracks may be near (but may not be in "proximity" or "pass by") certain portions of the Columbia
4 River as it enters Washington from Canada and meanders south to form the border with Oregon.
5 Without more specific information regarding where alleged discharges to the Columbia River may
6 have occurred (and when they occurred), BNSF is left to guess where they purportedly took place
7 and how they might be prevented, if at all. Such uninformative notices have never passed muster
8 under the CWA. *See, e.g, Klamath Siskiyou Wildlands Ctr. v. MacWhorter*, No. 1:12-cv-1900,
9 2013 U.S. Dist. LEXIS 57721, *6 (D. Or. Apr. 23, 2013) (requiring individual evaluation of and
10 finding inadequate notice for general NOI allegations of violations from multiple mining
11 operations scattered across 1.8 million acres of forest land during a two-year period). Allowing
12 otherwise would permit citizen-plaintiffs to "notify in generalities and plead in specifics, thereby
13 eliminating the purpose underlying the notice requirement." *Id.*

14 Plaintiffs' attachment of an appendix to the NOIs attempting to provide representative
15 locations (and dates) where coal was observed in identified waters does not cure this fatal flaw.
16 ECF No. 32, Exs. A & B, Appx. A at p. 1. The list of locations and accompanying photographs do
17 not indicate when, where or how the observed material arrived in the water or even if it came from
18 a rail car at all. Moreover, while Plaintiffs withheld details from the NOIs that could have allowed
19 BNSF to identify alleged discharges, they now seek to make their case by including that
20 information about one alleged discharge in the First Amended Complaint:

21 On Sunday, July 21, 2013, at approximately 8:05 a.m., a west-bound BNSF coal
22 train, while crossing the point of confluence of the White Salmon River and
Columbia River approximately one mile west of White Salmon, Washington,
23 discharged a significant quantity of coal particles into the White Salmon and
Columbia Rivers.

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26 Mapper.html. The electronic version of the map allows a user to select several different base maps, including the U.S. Geologic Survey Topographic maps that show waters such as creeks as well as railroad tracks.

ECF No. 32, at ¶ 55. Plaintiffs' pleading of this information in the Complaint belies any claim they may make that it was unavailable to them for purposes of providing notice in the NOIs.[6] There is no excuse for their insufficient notice.

Moreover, Plaintiffs' general allegation that discharges occurred at unspecified times over the previous five years independently renders their notice deficient. *See e.g., Cal. Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 796-97, (E.D. Cal. 1995) (dismissing claims based on a notice letter stating that "[f]or the previous five years on hundreds of occasions you have violated your NPDES permit"); *Frilling v. Honda of Am. Mfg., Inc.*, No. C-3-96-181, 1996 U.S. Dist. LEXIS 22526, *25 (S.D. Ohio Oct. 21, 1996) (holding that "the terms 'continuous' and 'nearly daily' are insufficient to satisfy the requirement that the Plaintiffs provide sufficient information to allow the Defendant to identify the date or dates of the alleged violations"). Nor does the list of representative dates where coal was observed in identified waters Appendix A save the inadequacy of the notice.[7] The list and the select photographs simply purport to be evidence that coal was found in or near water, not when the coal was actually discharged, which Plaintiffs concede may have been "prior to this date." ECF No. 32, Exs. A & B, Appx. A at p. 1. Such generalities could never help a putative discharger correct its mistakes and avoid future discharges.

c. Plaintiffs' NOIs Fail To Specify Which Of The Alleged Activities Is Causing Alleged Discharges.

The confusion from Plaintiffs' vague assertions as to the time and place of alleged discharges is compounded by their failure to specify the cause of those discharges. While

[6] Moreover, such detailed allegations in the First Amended Complaint that were omitted from the NOIs must be dismissed for insufficient notice. *See Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001) (affirming dismissal of distinct violations not mentioned in the NOI pursuant to 40 C.F.R. § 135.3(a)).

[7] For instance, one of the dates and locations identified in Appendix A is June 12, 2012; (Snohomish River south of Marysville, WA)." The Snohomish River runs for miles south of Marysville, sometimes near (but perhaps not in "proximity" to) BNSF tracks. Without more information, BNSF cannot identify where or how the alleged discharge occurred, or even whether the alleged pollutant originated from a BNSF rail car.

Plaintiffs list a variety of factors they believe contribute to alleged discharges, they never suggest which factor or factors may have caused any specific discharge. ECF No. 32, Exs. A & B at p. 4. Quite the opposite – Plaintiffs concede they have no "information concerning the specific dates, amounts, and exact or approximate locations, along with, for example, 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." *Id.* at 3.

The NOIs therefore leave BNSF to its own devices to surmise which of the following factors might have caused an alleged discharge (at an untold location and at an unknown time):

- vibrations from rough tracks, track changes, bridges and switches causing coal products to shake out of a rail car;
- loading coal above the top of a rail car;
- transporting coal over windy and bumpy terrain;
- operating rail cars at high speeds;
- operating rail cars over steep terrain;
- allowing rail cars with coal to pass by other trains on adjacent tracks (crosswinds);
- using rail cars that are not water tight;
- not requiring the use of topping agents;
- using topping agents; and
- coal train derailments.

Id. This is an impossible task because Plaintiffs assert that each rail car is a separate point source. And by their nature, rail cars regularly move about and are configured in different combinations on each train. Thus, if Plaintiffs' assertions were correct, each of the above factors might cause discharges at different locations and/or at different times at the same exact location depending on the circumstances. Without more information from Plaintiffs, BNSF will never be able to identify the specific activity or activities that caused the alleged discharges, and therefore cannot be on

notice of them.

In lieu of providing details about how the factors might contribute to alleged coal material discharges, the NOIs point to testimony from STB proceedings about coal dust issues near mines in the Powder River Basin of Wyoming and Montana. *See* ECF No. 32, Exs. A & B at 3-4 n.1-16. That information, however, does not put BNSF on notice of the violations alleged in the State of Washington and is irrelevant.[8]

By withholding information about when, where, and how the alleged factors caused discharges, Plaintiffs have denied BNSF any opportunity to examine their allegations and to correct any issues that may have been uncovered. They did not tell BNSF "what it was doing wrong, so that it knew what corrective actions to take" to avert the lawsuit. *ONRC*, 286 F.3d at 1143. Because the corrective action for a specific location is directly related to the factor causing the discharge at that location, Plaintiffs had an obligation to provide notice regarding the discharges from specific rail cars (the alleged point sources) into specific waters at a particular date and time. They did not do that, and thus Plaintiffs' notice is inadequate.

d. Plaintiffs' NOIs Fail To Identify Which Alleged Discharger Was Responsible For Which Alleged Discharges.

Plaintiffs directed their NOIs to eight distinct entities, including BNSF. ECF No. 32, Exs. A & B at p. 1. Nevertheless, they then lump together all those entities into a single group, which they refer to collectively throughout the NOIs as "Dischargers," and to which they ascribe all liability. *Id.* at 1-7. For example, the NOIs fail to specify which entity is responsible for ensuring that rail cars are watertight, or are not exposed to wind or rain, or are loaded in a particular way.

[8] *See* Hearing Transcript and Recording, July 29, 2010, *Ark. Elec. Cooperative Ass'n*, STB Docket No. FD-35305, Tr. at 40-41 (testimony of Greg Fox noting that coal dust is present along the joint line and "as far as 500 miles from that joint line" placing the outer limit of coal dust testimony somewhere east of Missoula, MT). In the PRB, which is where the coal is mined and loaded into rail cars, STB testimony shows only that coal is intermittently blown into the air, not that coal is discharged by every rail car on every train to every waterbody in the State of Washington that is in "proximity" to a railroad. *Id.* at Tr. at 85:14-19 (Chairman Elliott observing that the compliance method monitors all trains and "that some trains will blow off the dust and go over the number and some may not"); Tr. at 279:9-16 (Greg Fox testifying the coal does not fall off the car "unless it's on the sill of the car"); Tr. at 292:9-15 (Vice Chairman

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See ECF No. 32, Exs. A & B at pp. 3-4. The CWA's notice requirement requires more than these types of blanket accusations.

Failure of an NOI to distinguish among the actors and to attribute discrete activities to each renders notice insufficient. *See Moraine Props., LLC v. Ethyl Corp.*, No. 3:07-cv-229, 2008 U.S. Dist. LEXIS 86896, *15 (S.D. Ohio Oct. 27, 2008) (holding a notice letter insufficient when it did not specify which entity among many may have been responsible for a specific discharge and leaving "Defendant to guess who might have done this and when"); *accord Marina Point*, 566 F.3d at 801. That is particularly true where, as here, plaintiffs could have provided that information in an NOI but did not.[9] Otherwise, once again, Plaintiffs could "notify in generalities and plead in specifics," and alleged violations would go unresolved absent litigation. *Klamath Siskiyou Wildlands Ctr.*, 2013 U.S. Dist. LEXIS 57721 at *6. Dismissal of the other defendants and filing of the First Amended Complaint does not cure this defect since the purpose of the notice provision, to allow BNSF to correct any violations and avoid litigation, cannot be achieved after the fact.

e. Plaintiffs' NOIs Fail To Specify All Pollutants Allegedly Discharged.

To meet the sufficiency requirement, an NOI "must identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001). The NOIs fail this requirement as well. Plaintiffs' NOIs broadly claim that the group of eight "Dischargers"

Mulvey noting evidence from shippers that "some trains went by full of coal . . . and there was virtually no coal dust coming from them. And other trains when by and there was a lot of recorded foulants.").

[9] Indeed, while the NOIs neglected to distinguish among the various activities of the notified parties, Plaintiffs' Complaint provides the information to do just that. For example, the Complaint alleges that BNSF transports coal to locations throughout Washington (ECF No. 1, at ¶ 26), as opposed to Peabody Energy which "operates, directs and controls the loading of coal from the Rawhide mine into rail cars," or Ambre Energy, Cloud Peak Energy, Global Mining Holding Company and FirstEnergy, which are owners and operators of rail cars. ECF No. 1, at ¶¶ 27, 30, 34, 37, 40, 43. Moreover, the First Amended Complaint alleges discharges from loading and unloading activities that the NOIs altogether neglect to mention. ECF No. 32, at ¶ 57. At a minimum, BNSF lacked notice of those alleged discharges.

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1 discharged pollutants such as "coal, coal chunks, coal dust, metabolites or related byproducts of
2 coal, surfactants applied to the coal, coal chunks and coal dust, petcoke, petcoke chunks, petcoke
3 dust, and suppressants." ECF No. 32, Exs. A & B at p. 2. But they do not stop there. They also
4 state that the pollutant list is not exhaustive and claim that other unidentified materials also are
5 being discharged:

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> 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.

10 *Id.* at 2-3. Plaintiffs then make clear that they intend to sue for pollutants that are "not set forth
11 specifically in this letter" – a threat they live up to in the Amended Complaint by bringing claims
12 for discharges of those same unidentified materials. ECF No. 32, at ¶ 52.

13 As with the unnamed waters discussed above, generally referring to unnamed pollutants in
14 an NOI does not constitute sufficient notice under the CWA. *Stephens v. Koch Foods, LLC*, 667
15 F. Supp. 2d 768, 786 (E.D. Tenn. 2009) (dismissing claims for a pollutant not specifically
16 mentioned in the NOI letter); *Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30,
17 36 (D.D.C. 2004) (noting that under *Catskill Mountains* "[n]otice is not proper if the letter
18 generally alleges illegal discharges without naming specific substances"). That "such discharges
19 have not been reported" is irrelevant. "The plaintiffs' lack of information before their suit was
20 filed cannot excuse the deficiencies in the notice letter, because those deficiencies prevented
21 attainment of the legislative objectives of encouraging pre-suit governmental involvement and
22 securing violator compliance." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629
23 F.3d 387, 402 (4th Cir. 2011). Accordingly, BNSF lacked notice of all unnamed pollutants.

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25 **B. Plaintiffs Fail To Plead Facts That Establish Constitutional Standing For Each Alleged Unlawful Discharge.**

26 Plaintiffs' sweeping and generalized allegations also prevent them from demonstrating

1 standing for each violation they allege. Without identifying specific discharge locations, Plaintiffs
2 cannot allege facts sufficient to confer standing to bring this suit. Plaintiffs chose to allege their
3 claim so broadly so as to include discharges of coal material "into waters of the United States,
4 including, but not limited to, rivers, streams, lakes, ponds, coulees, estuaries, bays, sounds, canals,
5 shipping canals, fresh water and tidal wetlands, and coastal waters of the Pacific Ocean[,]" which
6 "derive water from, are tributaries to, forks of, and/or exchange water with many of the waters in
7 the State of Washington, many of which are navigable waters and all of which eventually
8 discharge into the Pacific Ocean." ECF No. 32, at ¶¶ 61, 66-72. Plaintiffs go on to name 75
9 waters allegedly "impacted by" the discharges. *Id.* ¶¶ 61, 63. They then chose to allege that each
10 "coal discharge from each rail car and train into each separate waterway on each separate day
11 constitutes a separate violation of the CWA." *Id.* ¶ 72.
12 Having made these pleading choices, Plaintiffs must accept the burden of proof
13 accompanying them. They must establish standing for each claimed discharge at each location of
14 each named water from April 2008 to the present. *See Wash. Toxics Coal. v. EPA*, No. C01-123C,
15 2002 U.S. Dist. LEXIS 27654, *34 (W.D. Wash. July 2, 2002) (Coughenour, J.) (holding that
16 plaintiffs must establish standing for each action challenged where actions are "not singular, . . .
17 but myriad" and distinguishing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984-86 (9th Cir.
18 1994) as limited to where plaintiffs' claim rests on EPA's alleged failure to carry out a singular
19 mandatory duty). Thus, for each alleged unlawful discharge, Plaintiffs must establish that at least
20 one of their members has (1) suffered some concrete and particularized actual or threatened injury;
21 (2) that the injury is fairly traceable to BNSF's conduct; and (3) that the injury is likely redressable
22 by a favorable decision of the Court. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*
23 *Inc.*, 528 U.S. 167, 180-81 (2000)); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343
24 (1977)).[10] Plaintiffs have not and cannot meet this burden. Thus, the Court should grant BNSF's
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[10] Each Plaintiff organization must also establish that the interests it seeks to protect are germane to its purposes, and that neither the claim asserted nor the relief requested requires individual members to participate in the litigation.

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motion to dismiss Plaintiffs' Amended Complaint for a lack of subject matter jurisdiction.

1. Plaintiffs Fail To Establish A Causal Connection Between Any Alleged Discharge By BNSF And A Geographically Specific Injury To Their Members.

To establish standing, Plaintiffs must demonstrate a causal connection between BNSF's alleged unlawful conduct and a geographically-grounded, concrete and particularized injury to one of its members. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Friends of the Earth*, 528 U.S. at 181. The Supreme Court has held that it is not enough for a plaintiff merely to offer "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which [the challenged] activity has occurred or probably will occur[.]" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Rather, plaintiffs must show "that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern . . . . Thus, the causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties . . . ." *San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 791 F. Supp. 2d 719, 748-49 (N.D. Cal. 2011) (internal quotation marks and citations omitted).

Here, Plaintiffs allege that their respective members reside "next to and in the general vicinity of BNSF's railroad tracks in Washington and the waterways into which defendants discharge pollutants" and reside "within the affected watersheds" of these waters. *See, e.g.*, ECF No. 32 at ¶¶ 12, 13, 14, 17, 19, 20, 22, 23, 24, 26, 28, 30, 32. These standing allegations are far too generalized and geographically attenuated to establish the necessary causal link between Plaintiffs' alleged injuries and BNSF's alleged discharges.

a. Living, Working, Or Recreating "In The Vicinity" Of BNSF's Railroad Tracks Does Not Establish Standing.

Allegations of use of an area "in the vicinity" of BNSF's railroad tracks are insufficient to

See Hunt, 432 U.S. at 343. Although neither of these factors is at issue in this motion, BNSF reserves the right to challenge Plaintiffs' standing based on these factors after factual development through discovery in this litigation.

1 establish the causal link between the challenged conduct and the alleged injury necessary for
2 Article III standing. Courts from the Supreme Court on down have refused to find standing
3 premised on mere averments of use and enjoyment of lands "in the vicinity of" a challenged
4 activity. *See e.g., Lujan*, 497 U.S. at 886 (rejecting standing affidavits averring plaintiffs' use and
5 enjoyment of land "in the vicinity" of "South Pass-Green Mountain, Wyoming," the "Grand
6 Canyon National Park, the Arizona Strip (Kanab Plateau) and the Kaibab National Forest" because
7 there was no showing that plaintiffs' use and enjoyment of such large geographic areas were
8 affected by the government's decision to open certain portions of those areas to mining); *Gulf*
9 *Restoration Network v. Hancock Cnty. Dev., LLC*, 772 F. Supp. 2d 761, 765-66 (S.D. Miss. 2011)
10 (holding that Plaintiffs "must use the area affected by the challenged activity and not an area
11 roughly 'in the vicinity' of it") (quoting *Lujan*, 504 U.S. at 565-66). Yet that is precisely what
12 Plaintiffs here rely on.

13 As Plaintiffs acknowledge, "BNSF owns and operates rail lines throughout the State of
14 Washington." ECF No. 32, at ¶ 26. Despite that understanding, they never attempt to define in
15 the First Amended Complaint the scope of "next to and in the general vicinity" of BNSF's tracks
16 or in any way to tie that description to an alleged discharge – or even a particular waterbody.
17 Without that information, alleging use of an area next to or in the general vicinity of BNSF's
18 tracks is tantamount to alleging that Plaintiffs' members live, work or recreate in some
19 unidentified portion of Washington State. Such allegations do not establish the requisite causal
20 connection and cannot support Plaintiffs' standing.

21 **b. Living, Working, Or Recreating Near Unidentified Waters**
22 **Where Alleged Discharges Occurred Does Not Establish Standing.**

23 Similarly, Plaintiffs' allegations that their members use areas "next to and in the general
24 vicinity of . . . the waterways" into which the alleged discharges have occurred are too vague to
25 support standing. In certain instances, the "'waterways' covered by the CWA may be so large that
26 plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in

1 order to satisfy the 'fairly traceable' element of standing." *Sierra Club, Lone Star Chapter v.*
2 *Cedar Point Oil Co.*, 73 F.3d 546, 558 n.24 (5th Cir. 1996) (citing citations omitted). Many of the
3 waterbodies at issue here (*e.g.*, Puget Sound, the Columbia, Yakima, and Skykomish Rivers,
4 among others) are of just that type.

5 Plaintiffs' failure to identify the geographic relationship or distance between any member's
6 alleged use and any alleged discharge location prevents them from establishing that their alleged
7 injuries are fairly traceable to BNSF's contested conduct. Allegations that Plaintiffs use waters
8 "downstream from" an alleged discharge (*see* ECF No. 32, at ¶¶ 12, 15, 18, 21, 24, 27, 31) are not
9 sufficient on their own to establish standing because a court cannot "assume that an injury is fairly
10 traceable to a defendant's conduct solely on the basis of the observation that water runs
11 downstream." *See Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 362
12 (5th Cir. 1996) (holding that a plaintiff organization could not establish standing where its
13 members used a waterbody 18 miles downstream from the alleged discharge point). To hold
14 otherwise would allow a plaintiff to establish standing for any waterbody west of the Continental
15 Divide based solely on evidence of use or enjoyment of the Pacific Ocean.

16 In addition, because Plaintiffs fail specifically to identify any lands and waters within
17 Washington allegedly used by their members, their generic, conclusory allegations of use of
18 "waters in the immediate vicinity of" the alleged discharges (*see* ECF No. 32, at ¶¶ 12, 15, 18, 21,
19 24, 27, 31) fail to satisfy pleading requirements for standing. In the rare case where the Plaintiffs
20 identify a specific waterbody in the First Amended Complaint, they (1) describe the waterbody in
21 unlimited terms without identifying where the feature is used, and (2) neglect to allege that any
22 member actually uses that waterbody at any specific location or otherwise. For example, Sierra
23 Club alleges that it has concerns regarding "waters of the U.S. within the state of Washington,
24 including the Puget Sound, the Columbia River, and all life connected to these waterbodies, from
25 their headwaters to the Pacific Ocean." ECF No. 32, at ¶ 12. Similarly, Columbia Riverkeeper
26 alleges an interest in "the Columbia River Basin" (*Id.*, ¶ 20), which it admits drains "an area the

size of France (259,000 square miles)."[11]

Allegations concerning locations of members' actual use do not help either as Plaintiffs provide no geographic specifics and instead offer only conclusory allegations of use in relation to unspecified alleged discharges, wherever they may occur. *See, e.g.,* ECF No. 32, at ¶¶ 12, 15, 18, 21, 24, 27, 31 (Each Plaintiff alleges that its members "use and enjoy the waters lands into and onto which Defendants' railcars discharge, including waters in the immediate vicinity of, and downstream from, Defendant's discharges into water of the United States.") Tellingly, even in the single instance that Plaintiffs have alleged a specific discharge in a particular location, Plaintiffs still failed to specifically allege that any of their members use the area near the "confluence of the White Salmon River and Columbia River approximately one mile west of White Salmon, Washington." *See* ECF No. 32, at ¶ 55. In the absence of more specificity as to the area of use by each Plaintiff's members and more specificity as to the locations of the claimed discharges, Plaintiffs cannot establish a causal connection between the alleged unlawful activity and Plaintiffs' alleged injuries. To hold otherwise would render standing's causation prong meaningless.

c. Living In Watersheds Affected by Alleged Discharges Does Not Establish Standing.

Finally, Plaintiffs' even broader allegations that their members live in the watersheds "affected" by the alleged unlawful discharges similarly are insufficient to establish a causal connection necessary for standing. The watersheds surrounding the waters at issue here cover nearly the entire State of Washington and, in fact, extend beyond the borders of Washington and the United States. For example, Columbia Riverkeeper admits that the Columbia River watershed "extends from the Canadian Rockies in British Columbia to the Pacific Ocean near Astoria, Oregon . . . . [, and] drains portions of seven states and British Columbia."[12] Accordingly, simply alleging that Plaintiffs' members reside in the same watersheds where discharges allegedly

[11] *See* http://columbiariverkeeper.org/the-river/facts/ (visited August 15, 2013).

[12] *See* http://columbiariverkeeper.org/the-river/facts/ (visited August 15, 2013).

occurred no more confers standing on Plaintiffs or their members than on any of other seven million residents of Washington. Such broad allegations that fail to identify a specific area of geographic concern are again insufficient to support Plaintiffs' standing.

By choosing to bring claims for thousands of alleged unlawful discharges to waterbodies throughout the State of Washington, Plaintiffs took on the burden of establishing constitutional standing to assert each of those claims. They have not met that burden. Their generic allegations fall far short of establishing that Plaintiffs have suffered a cognizable injury-in-fact, for each specific water (or portions thereof) named in the First Amended Complaint, that was caused by BNSF's actions and can be redressed by this Court. Every claim lacking specific standing evidence therefore must be dismissed for lack of subject matter jurisdiction.

C. The Court Lacks Jurisdiction For Relief Seeking Remediation Or Restoration.

Plaintiffs' request for relief consisting of remediation and/or restoration of waterways from alleged past discharges is contrary to the plain language of the CWA's citizen suit provision, which authorizes district courts only "to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under section 309(d) of this Act." 33 U.S.C. § 1365(a). Any order requiring remediation or restoration of allegedly impacted waters (or other relief beyond what is allowed under the statute) would be well beyond that jurisdictional scope.[13] Accordingly, Plaintiffs' request for injunctive relief in the form of restoration or remediation of the environment must be dismissed.

VI. CONCLUSION

For the reasons stated above, BNSF respectfully requests that this Court dismiss Plaintiffs' First Amended Complaint for lack of subject matter jurisdiction.

[13] Plaintiffs also seek to enjoin BNSF from taking certain actions and order BNSF to take other actions in its Amended Complaint. BNSF believes that these requests are also outside the jurisdictional scope of the CWA citizen suit provision and intends to challenge the requested relief at a later date.

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DATED this 15th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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In addition, I hereby certify that on this day I served a copy of the foregoing via U.S. mail to:

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DATED this 15th day of August, 2013 at San Francisco, California.

s/ *Suzanne Querubin*
Suzanne Querubin