

Sierra Club Intends to Sue Over Rail Car Coal Spills

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On April 2, 2013, the Sierra Club provided notice of its intent (NOI) to file a Clean Water Act citizen suit against Burlington Northern Santa Fe Railroad Company (BNSF) and a group of coal producers, based on alleged discharges of coal and coal byproducts into jurisdictional waters within the State of Washington. The NOI alleges that rail cars operated by BNSF constitute “point sources” under the Clean Water Act, which discharge coal into waters of the United States without a NPDES permit as required under the Clean Water Act. The NOI also contends that the coal debris released from rail cars constitutes a discharge of dredge and fill material, for which a Section 404 permit is required. The proposed lawsuit comes as many coal producers are seeking to increase coal exports to Asia, given the decrease in coal-fired electricity generation within the United States. The rail cars transport coal from coal-producing states to coal export terminals for shipment to Asia. The Sierra Club plans to file suit within 60 days of the notice.

If the lawsuit is filed, the Sierra Club will face an uphill battle. The Clean Water Act defines a “point source” as “any discernible, confined and discrete conveyance.” Also, recent efforts to expand the definition of a “point source” have failed. A recent decision issued by a federal district court judge for Alaska rejected similar claims made against a coal company and railroad for allowing coal dust and debris from hauling activities to enter jurisdictional waters. And, the Ninth Circuit recently rejected an argument that stormwater discharges from utility poles were point source discharges under the Clean Water Act, holding that a utility pole is not a “discernible, confined and discrete conveyance.”

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