



Environment, Land Use & Natural Resources ADVISORY ■

NOVEMBER 2, 2016

Railcars as Potential Point Sources

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According to an October 25, 2016, ruling by the U.S. District Court for the Western District of Washington, a railcar carrying coal may be a “point source” for pollution under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., if there is sufficient evidence to show the railcar is a “discrete conveyance” that sends coal directly into nearby waters.

The CWA defines a point source as “any discernible, confined and discrete conveyance,” including “rolling stock” –i.e., railcars. 33 U.S.C. § 1362(14). Despite the inclusion of railcars in the definition of point source, the court’s ruling appears to be unprecedented.

In *Sierra Club v. BNSF Railway Co.*, the court rejected the railway company’s motion for summary judgment and found that it is potentially liable for “point source discharges of coal that went directly into the water and point source discharges of coal dust that came from trains passing directly above or adjacent to the waters.” No. 13-cv-00967 (W.D. Wash. Oct. 25, 2016). The court found that BNSF’s railcars were akin to crop dusters spraying “directly over” water, which the Ninth Circuit previously found to be a discrete conveyance under the CWA. See *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

If the railcars are found to be a discrete conveyance of pollutants into waters of the United States, then BNSF may have to obtain National Pollutant Discharge Elimination System (NPDES) permits under the CWA. The Interstate Commerce Commission Termination Act of 1995, which provides remedies for the regulation of rail transportation to the exclusion of any other state or federal law, may preclude the CWA’s remedies in this case. But the court deferred resolving that question until after the issue of liability is decided.

The crux of the court’s October 25 holding is whether there is enough evidence to prove that BNSF’s railcars qualify as a “discrete conveyance” that “caused” coal or coal dust to go into nearby waters.

In allowing the case to proceed, the court found that although the plaintiffs had shown that coal and coal dust fall from BNSF railcars, there was insufficient evidence for the court to rule that the BNSF railcars themselves caused the coal and coal dust to go into nearby waters.

The ruling could have far-reaching implications for the transportation industry because it raises the specter that railcars or (under a more expansive interpretation of “rolling stock”) any wheeled vehicle used on roadways that transports materials near or above water may have to obtain an NPDES permit under the CWA.

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