



PUBLIC JUSTICE
IMPACT SERIES

Environmental Enforcement Project

February 22, 2024

Agenda

1. Introductions
2. Strategic Priorities
3. Case Study: *Sierra Club v. BNSF Railway Co.* & Petition to EPA
4. Case Study: *Community Association for Restoration of the Environment, Inc. v. DBD Washington, LLC et al.*
5. Questions & Answers



Environmental Enforcement Project

TEAM



Dan Snyder
Director



Jim Hecker
Senior Attorney



?????
Staff Attorney



Kathy Morris
Legal Assistant



Strategic Priorities



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

Strategic Priorities

The Environmental Enforcement Project focuses its litigation docket on the following issues:

- **Environmental Justice.** Pollution disproportionately impacts communities in the United States that have been and remain underserved and underrepresented. It is in these communities where our work has the greatest impact. Example: coal train petition.
- **Climate Change.** The biggest threat to our continued survival on this planet is Climate Change. We litigate our cases with an eye toward remedies that will slow climate change. Example: WA CAFO General Permit Challenge.
- **Holding Polluters Accountable.** We sue polluters directly in federal court, going toe-to-toe with some of the biggest defense firms in the country. Unlike state or federal regulators, we make polluters pay for their pollution and environmental violations.



CASE STUDY

Sierra Club v. BNSF Railway Co. & Petition to EPA



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

Sierra Club et al. v. BNSF Railway Co. & Petition to EPA

- **Clean Water Act: No person shall discharge pollutants from a point source into navigable waters unless priorly authorized by a National Pollutant Discharge Elimination System permit.**
- **Point source: statutorily-defined as including “rolling stock,” i.e., railcars.**
- **Washington residents along Columbia River Gorge, especially kite-boarders, complain to Sierra Club that passing coal trains pepper them with coal.**



**PUBLIC JUSTICE
IMPACT SERIES**

**ENVIRONMENTAL
ENFORCEMENT PROJECT**





PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT



**PUBLIC JUSTICE
IMPACT SERIES**

**ENVIRONMENTAL
ENFORCEMENT PROJECT**

BNSF Litigation

Coal Investigations

- Expand investigation area into entirety of Washington state.
- Everywhere volunteers looked, they found coal!



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

BNSF Litigation

Trial 2015

- Complex, hotly-contested litigation. Over 1 million total pages of discovery, 10 expert witnesses, nearly 40 depositions, 400 requests for production, and 700 requests for admissions just on Plaintiffs and their members/standees.
- At Summary Judgment, on eve of trial, Court (J. Coughenour) ruled:
 - Plaintiffs establish state-wide article III standing for every waterway in which they alleged discharges occurred.
 - Whenever a BNSF coal train loses coal from either the tops, sides, or bottoms of cars, and that train is traveling adjacent to or over a waterway, it amounts to a point-source discharge of pollutants under the CWA.
 - Issue for trial: how many such discharges occurred based on disputed expert testimony?



BNSF Litigation

Conclusion

- Ten-day trial in Seattle, WA. Plaintiffs' case-in-chief included testimony from individuals witnessing coal discharges.
 - Under cross-examination, BSNF counsel asks whether Plaintiffs' witness "physically saw the coal exit the top of the coal car and land on the ground." Court interrupts before witness can answer: "How do you think that coal got there, counsel? Was it sprinkled by the coal dust fairy?"
- Case settles during trial. Unique posture as court offers, and parties agree, that trial judge will serve as settlement judge while continuing proceedings in court.
- Consent Decree:
 - BNSF Study to evaluate covers for railcars transporting coal.
 - Cleanup coal hotspots.
 - Monitor coal hotspots into future.
 - Pay \$1M in SEPs.



Surface Transportation Board

- Two years later, Association of American Railroads, trade industry rep for all Class I railroads (eg, BNSF, UP, Norfolk Southern, CSX) petition the Surface Transportation Board to exempt Class I's from the Clean Water Act.
- **Argument: Congress vested in the STB exclusive authority to regulate rail commerce in the United States. *See Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501(b).***

“The jurisdiction of the Board over –

(1) Transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities such as rail carriers; and

(2) The construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”



Surface Transportation Board

- Plaintiffs in BNSF case oppose industry's attempt to exempt all railcar discharges from scope of CWA.
- STB issues a decision in December 2020 finding the railroads' petition to be premature, as no state or federal entity has attempted to issue a CWA permit for coal discharges.
- **But** — STB goes on to provide lengthy advisory opinion, finding that if a state issued a CWA permit to a Class I, that likely would run afoul of ICCTA as it would subject railroads to varying regulatory obligations as a train moves in interstate commerce. Because ICCTA was the later-enacted statute, Congress obviously meant to exempt railroads from the CWA when enacted.



Surface Transportation Board

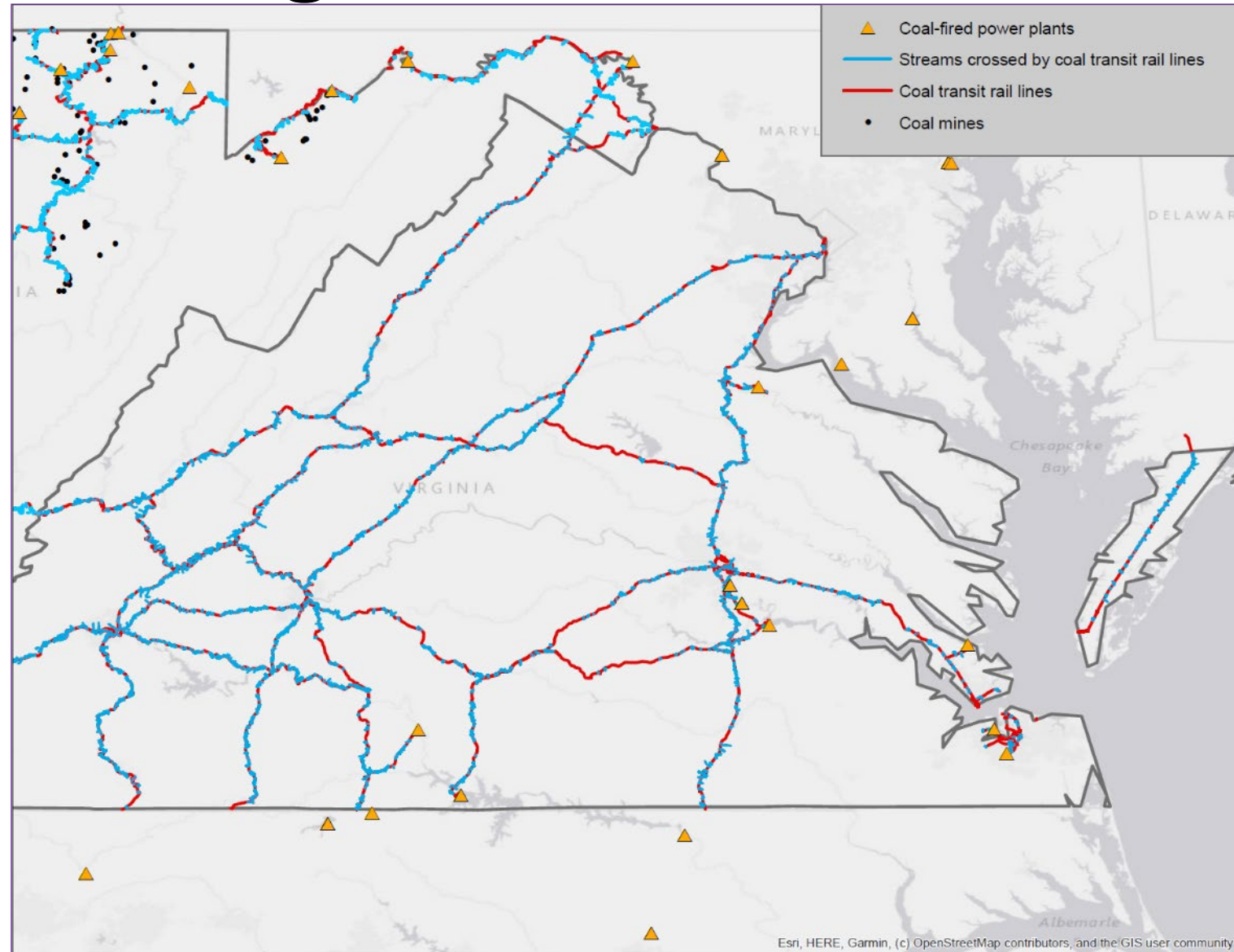
- **STB leaves one “advisory” opening:** *“A nationwide permit, with only uniform requirements, would not create a patchwork of regulation of rail transportation that interferes with the free flow of interstate commerce.”*
- **Stated differently:** if a Class I railroad could apply for one CWA permit that provided for uniform, nationwide regulation of coal discharges across the entire country, then that would likely survive ICCTA harmonization.





Petition to US EPA: Regulate Coal Trains

- Petition asks EPA to establish presumption of discharge based on evidence throughout the United States.
- Presents evidence that coal trains cross thousands of navigable waters everyday.



Intersection of Social Justice & Environmental Law

- Petition includes video testimonials from impacted residences that reside near rail lines transporting coal.
- Coal lines and coal export terminals on the East Coast are mostly located in historically African-American communities, who have been subjected to coal dust problems for the better part of a century.
- From these groups' perspective, it doesn't matter if the environmental hook is the CWA, CAA, or some other statute. **They just want the coal cars covered.**





Javon Bennett –
Lambert's Point Testimony
[https://youtube.com/
shorts/7huh40LTd1M](https://youtube.com/shorts/7huh40LTd1M)



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

Next Steps

- Petition and all exhibits, including video testimonials, located on public-facing box.com site. [Link available upon request](#)
- Working to establish a contact at EPA to discuss the issue.
- Ultimately, issue of ICCTA preemption must be resolved by courts.
- Investigating other railroads for unpermitted discharge claims under CWA.
- Questions?



CASE STUDY

CARE v. DBD Washington, LLC



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

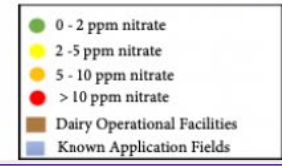
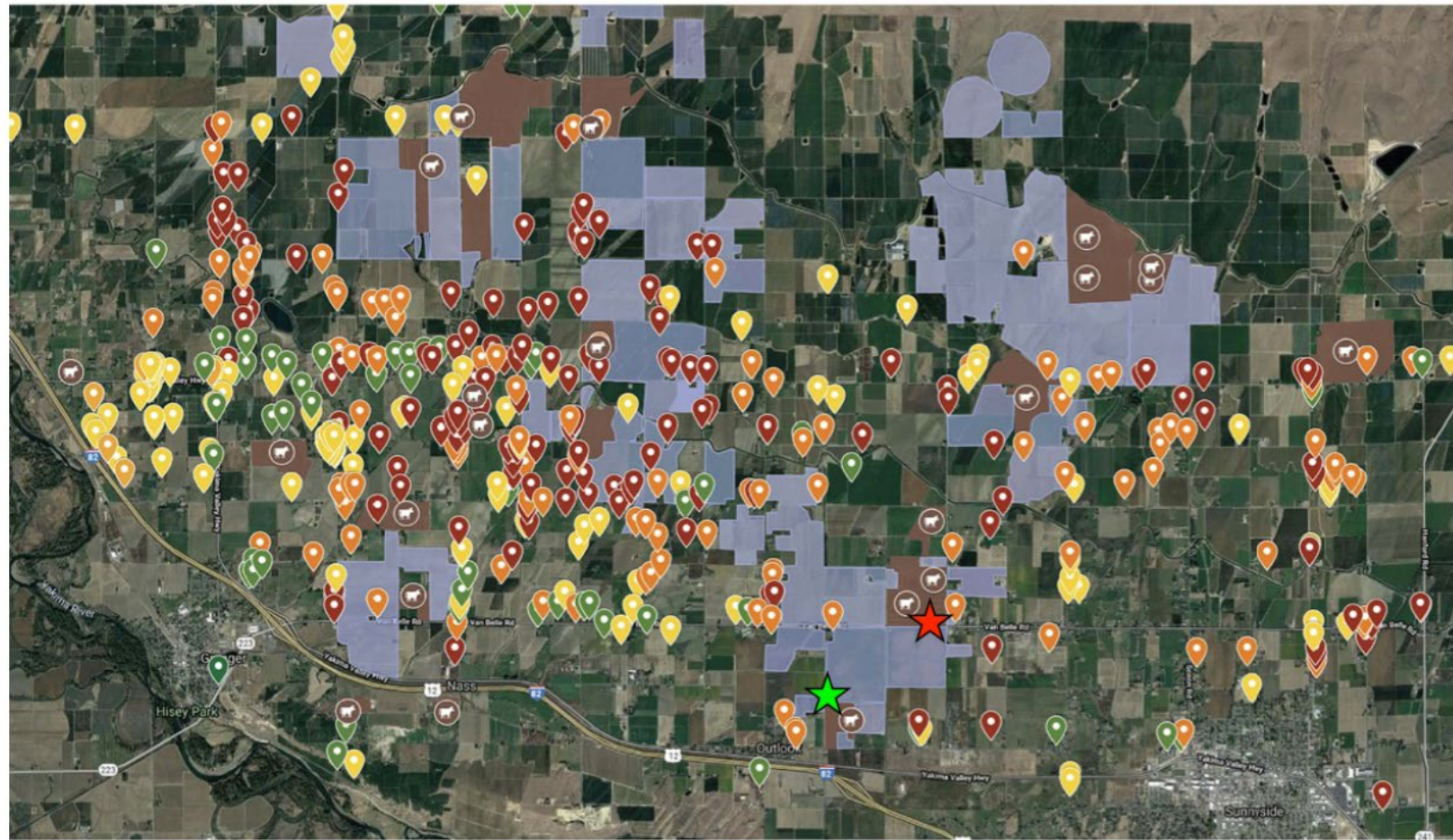
CARE v. DBD Washington, LLC

Background

- Lower Yakima Valley, Washington.
Growing nitrate contamination of aquifer.
 - Nitrate contamination causes host of health impacts, including methemoglobinemia
- *Cow Palace* cases: Resource Conservation and Recovery Act applies to cow manure when overapplied to fields, leaking out of storage lagoons, composted on bare ground.



Groundwater Nitrate Concentration in the Lower Yakima Valley



Map navigation toolbar including icons for pan, zoom in, zoom out, 124% zoom level, print, and other map controls.



CARE v. DBD Washington, LLC

Background

- DBD owns/operates two dairy **Concentrated Animal Feeding Operations (CAFOs)** in Lower Yakima Valley.



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT

CARE v. DBD Washington, LLC

Litigation

- Local groups complain of water contamination in nearby drinking water wells.
- Public records campaign to evaluate compliance by facility with permits and to ascertain nutrient application process.
- Suit filed May 23, 2019, litigated all the way until the eve of trial. Finally settled June 20, 2023.



CARE v. DBD Washington, LLC

Litigation Highlights

- Interesting aspect to this case is demonstration of consolidation of agricultural businesses by large companies.
- Austin “Jack” DeCoster. Quality Egg. Pleaded guilty to felony bribing of public official, introducing deleterious eggs into interstate commerce, and intention to defraud or mislead. Sentenced to jail.
- Discovery leads to DeCoster Enterprises and much larger corporate operation. “It’s my money.”



CARE v. DBD Washington, LLC

Litigation Highlights

- In RCRA Imminent and Substantial Endangerment Cases, **expert testimony is critical.**
- Our experts:
 - Dave Erickson, PE – Infrastructure seepage and operating problems (65-page opening, 12-page rebuttal)
 - Dr. Michael Russelle – Agronomist and overapplications of manure (99-page opening, 31 pages of rebuttal)
 - Dr. Keeve Nachman – Public health expert (90-page opening, no rebuttal)
- Defense experts: 33 pages of expert report total, between three experts. No rebuttals.



CARE v. DBD Washington, LLC

Litigation Highlights: Scope of Overapplications

- **Dr. Russelle:** “The total amount of excess nitrate reached extraordinary levels on these farms. In October 2020, the upper three feet of soil in Field 03 B contained about 58,350 pounds of excess nitrate, while there was about 159,170 pounds of excess nitrate in Field 03 C.”
- **Later:** “In total, Defendants applied at least 2,121,429 gallons of manure to DBD’s application fields in direct contravention” of their own agronomist’s recommendations.
- “Rather than comply with [their nutrient management plan], Defendants appear to have treated their manure as a worthless byproduct of their dairying operations, applying it on fields in large quantities where no fertilization is necessary due to the already excessively high residual nutrient content.”



CARE v. DBD Washington, LLC

Consent Decree & Remedies

- Case settled by **Consent Decree**, a Court-sanctioned settlement over which the Court retains jurisdiction.
- Consent Decree has five key parts:
 1. Double-Lining or Decommissioning leaking lagoons
 2. Strict adherence to nutrient budget intended to bring down residual soil nutrients
 3. Groundwater monitoring into the future
 4. Payment to Clean Drinking Water program
 5. Innovative Pilot Projects to Remediate existing contamination of soil and groundwater under lagoons



CARE v. DBD Washington, LLC

Groundwater Pilot Programs

- **Defendants and Plaintiffs putting up competing visions of remediation.**
 - Plaintiffs envision oxidating the variable levels of ammonium in the soil profile in order to transform it into nitrate, speeding up leaching it into the aquifer, and then pumping it out as irrigation water. DBD envisions an enzyme/electrokinetic trial that may reduce or eliminate nitrate altogether.
- Defendants agree to pay for Plaintiffs' remedial plan as part of settlement, not to exceed \$220K.
- Upon completion of the investigation, the Parties are to confer in good faith about what system to use at the remaining lagoons. Parties agree to tender dispute to third party arbitrator, to be paid by Defendants, if they cannot agree as to which remedial system will work faster.
- Strong possibility the remedial investigations set standard for cleanups at dairy CAFOs in future, both in Yakima and elsewhere.



Questions & Answers



PUBLIC JUSTICE
IMPACT SERIES

ENVIRONMENTAL
ENFORCEMENT PROJECT



PUBLIC JUSTICE
IMPACT. CHANGE.

STAY IN TOUCH

Dan Snyder

dsnyder@publicjustice.net

(202) 861-5251

www.publicjustice.net