

James D. Freeman  
Senior Attorney  
Environmental Enforcement Section  
U.S. Department of Justice  
999 18<sup>th</sup> Street  
South Terrace, Suite 370  
Denver, CO 80220  
303-844-1489

VICTORIA FRANCIS  
Assistant United States Attorney  
District of Montana  
316 N 26th St #5018  
Billings, MT 59101

JESSICA WILKERSON  
Legal Counsel  
Montana Department of Environmental Quality  
1225 Cedar Street  
Helena, MT 59601

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION**

UNITED STATES OF AMERICA and  
THE STATE OF MONTANA,

Case No. \_\_\_\_\_

Plaintiffs,

v.

BNSF RAILWAY COMPANY,

Defendant.

**COMPLAINT**

Plaintiffs, the United States of America, by authority of the Attorney General of the United States and acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Montana (“State”), on behalf of the Montana Department of Environmental Quality (“MDEQ”), file this Complaint and allege as follows:

### **NATURE OF ACTION**

1. This is a civil action pursuant to Sections 106, and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9606, 9607(a), to require response actions at Operable Unit 6 (“OU6”) of the Libby Asbestos Superfund Site (“Site”) in Lincoln County, Montana and for recovery of response costs incurred by the United States and the State in responding to releases or threatened releases of hazardous substances at the Site. The United States and the State also seek a declaration of Defendant’s liability pursuant to Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), for all future response costs to be incurred by the United States in connection with Operable Unit 6 at the Site.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action and the parties hereto, pursuant to Sections 106, 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9606, 9607(a) and 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b), 1391(c), and 1395 and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the releases or threatened releases of hazardous substances that gave rise to the claims in this action occurred in this district, and because the Site is located in this district.

### **DEFENDANT**

4. Defendant BNSF Railway Company (“BNSF”) is a Delaware corporation, in good standing, doing business in the State of Montana.

5. Defendant is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

### **THE SITE**

6. The Libby Asbestos Superfund Site is located in Lincoln County, Montana, in and around Libby, Montana and Troy, Montana.

7. OU6 of the Site consists of approximately 42 miles of BNSF’s railroad right-of-way and railyards in both Libby and Troy. The width of the right-of-way is approximately 100 feet to either side of the track centerline, and BNSF’s track and right-of-way generally follow the courses of the Fisher and Kootenai Rivers.

8. BNSF owns and operates the approximately 42 miles of railroad right-of-way and railyards in Libby and Troy that make up OU6.

9. Mining of vermiculite at Zonolite Mountain commenced by the Universal Zonolite Company in the 1920s. In 1963, W.R. Grace purchased Zonolite Mountain and continued operations until 1990. The processed ore was transported by truck down the Rainy Creek Road to a Screening Plant, which separated the ore into various sizes. Subsequently, the screened ore was moved by conveyor belt across the Kootenai River to a rail loading facility owned and operated by W.R. Grace, where it was loaded by W.R. Grace employees into rail cars and shipped to vermiculite processing facilities across the country, including over the track and railyards that make up OU6.

10. At various times during the shipment of vermiculite over the track and railyards that make up OU6, some vermiculite spilled or was otherwise released from the railcars to the track beds and right of way below.

11. Vermiculite mined and processed in and near Libby, Montana, contains asbestos.

12. Sampling has shown that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate, and other soil-like materials at various locations in and around the community of Libby, including OU6. Visible expanded vermiculite has been found along BNSF's right-of-way and in its Libby railyard.

13. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Libby Asbestos Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on October 24, 2002, 67 Fed. Reg. 65,315.

#### **RESPONSE ACTIVITIES AND RELATED LITIGATION**

14. In approximately 2006, BNSF completed a response action at its Libby railyard, pursuant to an Administrative Order on Consent (EPA Docket No. CERCLA-08-2003-0004) ("Order"). EPA accepted final reports detailing BNSF's response action in 2010.

15. In response to a release or substantial threat of a release of hazardous substances at or from the Libby Asbestos Site, EPA commenced a remedial investigation and feasibility study ("RI/FS") on September 24, 2013, pursuant to 40 C.F.R. § 300.430.

16. Pursuant to EPA's request for additional removal action under the Order, BNSF completed a RI report on April 30, 2014. EPA completed a FS report in May 2015.

17. EPA's decision on the remedial action to be implemented at the Site is embodied

in a Record of Decisions (“ROD”), executed on February 8, 2016, on which the State of Montana concurred. EPA published notice of the final plan in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b). The ROD includes a responsiveness summary to the public comments.

18. BNSF conducted additional post-ROD confirmation sampling, at depths and intervals established by EPA and MDEQ, along locations in the right-of-way identified for further characterization.

19. After BNSF’s 2006 response action, the ROD, and post-ROD confirmation sampling, EPA determined that institutional control actions in the railyards and on the rail bed and right of way that constitutes OU6 were also necessary to limit and control future disturbance of asbestos remaining within OU6 to protect human health and the environment.

### **FIRST CLAIM FOR RELIEF**

20. The allegations contained in Paragraphs 1-19 are realleged and incorporated herein by reference.

21. At times relevant to this complaint, Defendant was the “owner” and “operator” of OU6 at the time of disposal of hazardous substances at the Site within the meaning of Sections 101(20)(A) and 107(a)(2) of CERCLA, 42 U.S.C. §§ 9601(20)(A), 9607(a)(2).

22. Defendant is the “owner” and “operator” of OU6.

23. Pursuant to Section 107(a) of CERCLA, Defendant is liable for “all costs of removal or remedial action incurred by the United States Government or a State or

an Indian tribe not inconsistent with the national contingency plan . . . .” 42 U.S.C. § 9607(a).

24. OU6 is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

25. Hazardous substances, within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), were disposed of at OU6 at times relevant to this action.

26. There have been and continue to be releases, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), or the threat of releases of hazardous substances into the environment at or from OU6.

27. The actions taken by the United States and the State of Montana in connection with the OU6 constitute “response” actions within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25). The United States has incurred costs in performing those response actions and will incur costs in the future.

28. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Defendant is jointly and severally liable to the United States and the State for all costs incurred and to be incurred by the United States and the State with respect to OU6, including prejudgment interest on all such costs.

## **SECOND CLAIM FOR RELIEF**

29. The allegations contained in Paragraphs 1-28 are realleged and incorporated herein by reference.

30. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), provides in pertinent part:

In addition to any other action taken by a State or local government, when the

President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

31. The release or threatened release of hazardous substances at or from OU6 previously alleged may present an imminent and substantial endangerment to the public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

32. Defendant is jointly and severally liable under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), for taking such actions as may be necessary to abate the imminent and substantial endangerment at OU6.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff United States of America and the State of Montana pray that this Court:

A. Enter judgment in favor of the United States and the State and against Defendant for costs incurred by the United States, including prejudgment interest, with respect to response actions taken at the Site;

B. Enter a declaratory judgment, pursuant to Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), on liability for further response costs that will be binding in any subsequent action by the United States against the Defendant to recover any further response costs related to OU6 of the Site;

C. Enter judgment against the Defendant, pursuant to Section 106(a) of CERCLA,

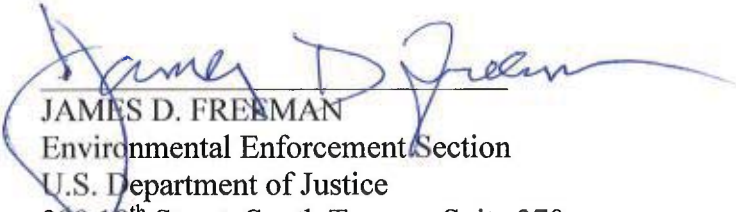
42 U.S.C. § 9606(a), ordering the Defendant to undertake response action in conformity with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 (as amended) to abate the imminent and substantial endangerment at the Site; and

D. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

FOR THE UNITED STATES

NATHANIEL DOUGLAS  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice



JAMES D. FREEMAN  
Environmental Enforcement Section  
U.S. Department of Justice  
999 18<sup>th</sup> Street, South Terrace, Suite 370  
Denver, Colorado 80202  
Telephone: (303) 844-1489  
Fax: (303) 844-1350  
Email: James.Freeman2@usdoj.gov

KURT G. ALME  
United States Attorney  
District of Montana  
316 N 26th St #5018  
Billings, MT 59101

VICTORIA FRANCIS  
Assistant United States Attorney  
District of Montana  
316 N 26th St #5018  
Billings, MT 59101



FOR THE STATE OF MONTANA

A handwritten signature in blue ink that reads "Jessica Wilkerson". The signature is fluid and cursive, with the first name "Jessica" and last name "Wilkerson" clearly legible.

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JESSICA WILKERSON  
Special Assistant Attorney General  
Attorney for the State of Montana ex rel.  
Department of Environmental Quality  
1225 Cedar Street  
Helena, MT 59601