

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
UNION PACIFIC RAILROAD COMPANY)	Docket No. CWA-07-2015-0043
DeSoto, Missouri)	
)	
Respondent.)	CONSENT AGREEMENT/ FINAL ORDER
)	
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. § 1319(g))	
_____)	

The United States Environmental Protection Agency (“EPA”), Region 7 (“Complainant”) and Union Pacific Railroad Company (“Respondent”) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). This is a “Class II” penalty action pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. 1319(g)(2)(B). This Consent Agreement and Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45.

A. ALLEGATIONS

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Consent Agreement and Final Order (“CA/FO”) serves as notice that EPA has reason to believe that Respondent has violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7.

4. Respondent is the Union Pacific Railroad Company, a corporation authorized to do business within the state of Missouri.

Statutory and Regulatory Framework

5. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342, which provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit.

6. CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

7. Section 402(p) of CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of stormwater. Section 402(p) of CWA requires, in part, that a discharge of stormwater associated with an industrial activity must comply with the requirements of a NPDES permit issued pursuant to Sections 301 and 402 of CWA.

8. 40 C.F.R. § 122.26(b)(14) defines a stormwater discharge that is “associated with industrial activity,” as “the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” Included in the categories of facilities considered to be engaging in “industrial activity” are transportation related facilities under Standard Industrial Classification 40-45, which includes railcar maintenance facilities. *See* 40 C.F.R. § 122.26(b)(14)(viii).

9. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth the NPDES permit requirements for stormwater discharges.

10. 40 C.F.R. §§ 122.26(a)(1)(ii) and 122.26(c) require dischargers of stormwater associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated stormwater general permit.

11. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

FACTUAL ALLEGATIONS

12. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
13. At all times relevant to this action, Respondent was the owner and operator of a railcar maintenance and refurbishing facility, Union Pacific Railroad DeSoto Car Shop (“Facility”), located at 491 North Main Street, DeSoto, Missouri 63020.
14. Stormwater, snow melt, surface drainage and runoff water leaves Respondent’s facility and flows into Joachim Creek. Storm water runoff from the facility is discharged via 5 outfalls (Outfalls 001 to 005) into Joachim Creek, which runs along the side of the facility. The runoff and drainage from Respondent’s facility is “stormwater” as defined by 40 C.F.R. § 22.26(b)(13).
15. Stormwater contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
16. The Facility has “storm water discharge associated with industrial activity”, specifically discharges associated with facilities classified under Standard Industrial Classification 40, as defined by 40 C.F.R. § 122.26(b)(14)(viii), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
17. Respondent discharged pollutants into Joachim Creek, which is a “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.
18. Stormwater runoff from Respondent’s industrial activity results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).
19. Respondent’s discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(ii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
20. MDNR issued Respondent NPDES Permit No. MO-0116653 (“Permit”) in 1994, with reissuance and/or modifications of the Permit in 1995, 2000, 2009 and 2014. The 2009 Permit reissuance was effective on April 10, 2009 (“2009 Permit”), and expired on April 9, 2014. The 2009 Permit was administratively continued until the issuance of a revised permit effective on November 1, 2014 (“2014 Permit”). Both the 2009 and 2014 permits govern stormwater discharges associated with industrial activity relevant to this CA/FO.
21. Part A (“Effluent Limitations and Monitoring Requirements”) of the 2009 Permit continued limits from the previous 2000 Permit as interim limits through May 1, 2012, and then established new limits for Total Suspended Solids (“TSS”) (62 mg/l daily max/50 mg/l monthly avg.), chromium (2.671 mg/l daily max / 1.331 mg/l monthly avg.), lead (151 ug/l daily max / 75

ug/l monthly avg.), zinc (180 ug/l daily max / 87 ug/l monthly avg.). The 2009 Permit also established a limit on the pH of discharges to the range between 6.0 and 9.0 standard pH units.

22. Part B (“Standard Conditions”) of the 2009 Permit incorporates by reference, Missouri Clean Water Commission Effluent Regulation 10 Code of State Regulations 20-7015, the sampling requirements and methodology of 40 C.F.R. Part 136. The test method set forth in 40 C.F.R. Part 136 for measurement of pH requires measurement of pH within 15 minutes of sample collection.

23. In April 2011, September 2012 and February 2014, MDNR issued Respondent three separate Notices of Violation (“NOVs”) documenting Respondent’s violations of the 2009 Permit’s limits for lead, zinc, TSS and/or Chemical Oxygen Demand (“COD”).

24. On or about March 12, 2014, EPA performed an inspection of the Facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate the management of stormwater at the Facility and compliance with the Facility’s NPDES Permit, in accordance with the CWA.

ALLEGED VIOLATIONS

Count 1

Effluent Limit Violations

25. The facts stated in Paragraphs A.12 through 24 above are herein incorporated.

26. As alleged in Paragraph 21, above, Part A of Respondent’s 2009 NPDES permit (“Effluent Limitations and Monitoring Requirements”) required Respondent to meet effluent limits for TSS, chromium, lead and zinc.

27. Between September 2009 and October 2014 (“Period of Violation”), discharges of stormwater from the Facility by Respondent violated the effluent limits of the 2009 Permit (See, Attachment 1).

28. Respondent’s failures to meet effluent limits are each a violation of the 2009 NPDES permit, and as such, are each a violation of Sections 301(a) and 402(p) of CWA, 33 U.S.C. §§ 1311(a), 1342(p) , and implementing regulations.

Count 2

Failure to properly Monitor for pH

29. The facts stated in Paragraphs A.12 through 24 above are herein incorporated.

30. As alleged in Paragraph A.22, above, Part B of Respondent's 2009 NPDES permit ("Effluent Limitations and Monitoring Requirements") required Respondent to perform pH measurement tests with 15 minutes of sample collection.

31. During the Period of Violation Respondent sent samples to an off-site laboratory and violated the 2009 Permit's requirement to perform pH measurements within 15 minutes of sample collection.

32. Respondent's failures to properly perform the sampling and measurement of pH during the Period of Violation are each a violation of the 2009 NPDES permit, and as such, are each a violation of Section 402(p) of CWA, 33 U.S.C. §§ 1342(p), and implementing regulations.

B. CONSENT AGREEMENT

1. Respondent and EPA agree to the terms of this CA/FO and Respondent agrees to comply with the terms of the Final Order portion of this CA/FO.

2. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

3. Respondent neither admits nor denies the factual allegations and legal conclusions set forth above.

4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above, and its right to appeal the Final Order portion of this CA/FO.

5. Respondent and Complainant agree to conciliate the matters set forth in this CA/FO without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.

6. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

7. Nothing contained in the Final Order portion of this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

8. This CA/FO addresses all civil and administrative claims for CWA violations during the Period of Violation that are specifically alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

9. Respondent certifies by the signing of this CA/FO that to the best of its knowledge, Respondent's Facility is in compliance with Sections 301 and 402 of CWA, 33 U.S.C. §§ 1311, 1342, and regulations promulgated thereunder.

10. The effect of the settlement described in Paragraph B.9 above is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph B.9 of this CA/FO.

11. Respondent agrees that, in settlement of the claims alleged in this CA/FO, Respondent shall pay a penalty of \$58,800, as set forth in Paragraphs B.13 and B.14, below.

12. Respondent understands that failure to pay any portion of the civil penalty on the proper due date may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

Payment Procedures

13. Respondent shall pay a mitigated civil penalty of Fifty-Eight Thousand, Eight Hundred Dollars (\$58,800) within thirty (30) days of the effective date of the Final Order.

14. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

This payment shall reference docket number CWA-07-2015-0043.

Copies of the check shall be mailed to:

Howard Bunch
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

and to

Kathy Robinson
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

15. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

Parties Bound

16. The Final Order portion of this CA/FO shall apply to and be binding upon Respondent and Respondent's agents, successors, or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this CA/FO.

General Provisions

17. Notwithstanding any other provision of this CA/FO, EPA reserves the right to enforce the terms of the Final Order portion of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

18. Complainant reserves the right to take enforcement action against Respondent for any future violations of CWA and its implementing regulations and to enforce the terms and conditions of this CA/FO.

19. The Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

20. Respondent and Complainant shall bear their respective costs and attorney's fees.

21. The headings in this CA/FO are for convenience of reference only and shall not affect interpretation of this CA/FO.

22. Respondent and Complainant agree that this CA/FO can be signed in part and counterpart.

COMPLAINANT:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Date

Howard C. Bunch
Sr. Assistant Regional Counsel
Office of Regional Counsel

RESPONDENT:
UNION PACIFIC RAILROAD COMPANY
(DE SOTO, MISSOURI FACILITY)

5/22/15
Date



Name (Print) DAVID P. YOUNG

Title AVP - Law

C. FINAL ORDER

Pursuant to 40 C.F.R. 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the foregoing Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondent is ORDERED to comply with all terms of the Consent Agreement effective immediately.

So ordered.

Karina Borromeo
Regional Judicial Officer

Date