

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Union Pacific Railroad Company,

Respondent.

DOCKET NO. CWA-10-2021-0101

CONSENT AGREEMENT

Proceedings Under Sections 309(g) and
311(b)(6) of the Clean Water Act, 33 U.S.C.
§§ 1319(g) and 1321(b)(6)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Sections 309(g) and 311(b)(6) of the Clean Water Act (CWA), 33 U.S.C. §§ 1319(g) and 1321(b)(6).

1.2. Pursuant to CWA Section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), EPA is authorized to assess a civil penalty against any person that has violated CWA Section 307, 33 U.S.C. § 1317.

1.3. CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of Class II civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties, as adjusted for inflation, may not exceed \$22,582 per day for each day during which the violation continues, up to a maximum penalty of \$282,293. *See also* 85 Fed. Reg. 83818 (December 23, 2021).

1.4. Pursuant to CWA Section 311(b)(6)(A), EPA is authorized to assess a civil penalty against any owner, operator, or person in charge of an onshore facility from which oil or

a hazardous substance is discharged in violation of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3).

1.5. CWA Section 311(b)(6)(B), 33 U.S.C. § 1321(b)(6)(B), authorizes the administrative assessment of Class II civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum penalty of \$125,000. Pursuant to 40 C.F.R. Part 19, the administrative assessment of Class II civil penalties, as adjusted for inflation, may not exceed \$19,505 per day for each day during which the violation continues, up to a maximum penalty of \$243,808. *See also* 85 Fed. Reg. 83818 (December 23, 2021).

1.6. Pursuant to CWA Sections 309(g) and 311(b)(6), 33 U.S.C. §§ 1319(g) and 1321(b)(6), and in accordance with Section 22.18 of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Union Pacific Railroad Company (“Respondent” or “UPRR”) agrees to issuance of, the Final Order attached to this Consent Agreement.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b), execution of this Consent Agreement commences this proceeding, which will conclude when the Final Order becomes effective.

2.2. The Administrator has delegated the authority to sign consent agreements between EPA and the party against whom a penalty is proposed to be assessed pursuant to CWA Sections 309(g) and 311(b)(6), 33 U.S.C. §§ 1319(g) and 1321(b)(6), to the Regional

Administrator of EPA Region 10, who has redelegated this authority to the Director of the Enforcement and Compliance Assurance Division, EPA Region 10 (“Complainant”).

2.3. Part III of this Consent Agreement contains a concise statement of the factual and legal basis for the alleged violations of the CWA together with the specific provisions of the CWA and the implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

Statutory and Regulatory Framework

3.1. The objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

Pretreatment Regulations

3.2. CWA Section 307, 33 U.S.C. § 1317, establishes the federal pretreatment program for regulating the introduction of wastewater from non-domestic sources into a publicly owned treatment works (“POTW”).

3.3. CWA Section 307(d), 33 U.S.C. § 1317(d), prohibits any owner or operator of any source to operate in violation of any effluent standard or prohibition or pretreatment standard promulgated under Section 307 of the CWA.

3.4. Pursuant to CWA Section 307(b), EPA promulgated “General Pretreatment Regulations for Existing and New Sources of Pollution” at 40 C.F.R. Part 403 (“Pretreatment Regulations”).

3.5. The Pretreatment Regulations prohibit a user from introducing into a POTW any pollutant which causes “pass through” or “interference.” 40 C.F.R. § 403.5(a)(1).

3.6. The term “pollutant” includes, *inter alia*, chemical wastes and biological materials. 33 U.S.C § 1362(6).

3.7. The term “industrial user” or “user” means “a source of indirect discharge.” 40 C.F.R. § 403.3(j).

3.8. The term “indirect discharge” or “discharge” means the introduction of pollutants into a POTW from any non-domestic source regulated under CWA Section 307(b), (c), or (d). 40 C.F.R. § 403.3(i).

3.9. The term “interference” means a discharge which both inhibits or disrupts the POTW, its treatment processes, or operations; and therefore is a cause of a violation of any requirement of the POTW’s National Pollutant Discharge Elimination System (“NPDES”) permit. 40 C.F.R. § 403.3(k).

3.10. The term “pass through” means a discharge which exits the POTW into waters of the United States in quantities or concentration which is a cause of a violation of any requirement of the POTW’s NPDES permit. 40 C.F.R. § 403.3(p).

3.11. The Pretreatment Regulations prohibit the introduction of specific pollutants to a POTW, including petroleum oil in amounts that will cause interference or pass through and any trucked or hauled pollutants, except at discharge points designated by the POTW. 40 C.F.R. § 403.5(b).

CWA Section 311 Discharge

3.12. The CWA prohibits the discharge of any pollutant, including oil, by any person, except as authorized by and in compliance with other sections of the Act. 33 U.S.C. § 1311(a).

3.13. The CWA further prohibits the discharge of oil into or upon the navigable waters of the United States and adjoining shorelines in such quantities as the President determines may be harmful to the public health or welfare or the environment of the United States. 33 U.S.C. § 1321(b)(3).

3.14. The CWA defines "discharge" to include "any spilling, leaking, pumping, pouring, emitting, emptying or dumping" 33 U.S.C. § 1321(a)(2).

3.15. "Oil" means "oil of any kind or in any form." 33 U.S.C. § 1321(a); 40 C.F.R. § 112.2.

3.16. "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

3.17. Pursuant to 33 U.S.C. § 1321(b)(4), EPA has determined by regulation that the quantities of oil that may be harmful to the public health or welfare or the environment of the United States include discharges of oil that (1) violate applicable water quality standards; (2) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines; or (3) cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines. 40 C.F.R. § 110.3.

3.18. An "onshore facility" is any facility of any kind located in, on, or under, any land within the United States, other than submerged land. 33 U.S.C. § 1321(a); 40 C.F.R. § 112.2.

General Allegations

3.19. Respondent is a corporation, and therefore a "person" under CWA Sections 311(a)(7) and 502(5), 33 U.S.C. §§ 1321(a)(7) and 1362(5).

3.20. On June 3, 2016, a UPRR train consisting of three locomotives, two buffer cars, and 94 tank cars containing Bakken crude oil was passing through Mosier, Oregon. The train had originated in New Town, North Dakota and was bound for Tacoma, Washington. At approximately 12:15 p.m. local time, 16 tank cars derailed in Mosier, Oregon. Three of these cars breached, releasing Bakken crude oil, some of which caught fire and incinerated, and some of which spilled to the ground.

3.21. Approximately 47,000 gallons of oil were released as a result of the derailment. Approximately 30,000 gallons of oil flowed into the adjacent waste water treatment facility for Mosier, Oregon (“Mosier POTW”). Approximately ten gallons of oil passed through the Mosier POTW system and entered the Columbia River, temporarily causing a visible sheen. No oil was observed on the River after June 4, 2016, and there were no observable impacts to fish or wildlife. There were no injuries or fatalities as a result of the derailment and Union Pacific’s response.

3.22. The Mosier POTW ceased operations and remained closed for approximately two weeks. During the initial days of the closure, residents and businesses were prevented from flushing toilets, draining sinks, showers, or bathtubs, or otherwise putting any water down their drains. Subsequently, Respondent diverted wastewater to tanks while cleaning, repairing, and replacing plant equipment, and disposed properly of all diverted wastewater.

3.23. At all times pertinent to this action, each of the three tank cars that derailed and discharged oil was an “onshore facility” within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10).

3.24. Bakken crude oil is “oil” within the meaning of Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and a “pollutant” within the meaning of Section 502(6) of the CWA, 33 U.S.C § 1362(6).

3.25. The Columbia River is a “navigable water” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1367(7) and a “navigable water of the United States” within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

3.26. Respondent is a “user” within the meaning of 40 C.F.R. § 403.3(j).

Alleged Violations

Alleged Violation 1 – Discharge of Oil

3.27. Paragraphs 3.1 to 3.26 are realleged and incorporated herein by reference.

3.28. Respondent’s release of crude oil resulting from the train derailment was a “discharge” as defined in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), and was of a quantity sufficient to cause a sheen upon or discoloration of the Columbia River and its adjoining shoreline.

3.29. On June 3, 2016, Respondent discharged oil in harmful quantities into or upon the Columbia River and its adjoining shoreline, within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3). Violations of CWA Section 311(b)(3) are subject to administrative penalties pursuant to CWA Section 311(b)(6), 33 U.S.C. § 1321(b)(6).

Alleged Violation 2 – Operation in Violation of Pretreatment Regulations

3.30. Paragraphs 3.1 to 3.26 are realleged and incorporated herein by reference.

3.31. Respondent's introduction of oil to the Mosier POTW caused an interference or pass through, as those terms are defined in 40 C.F.R. § 403.3(k) and(p), in violation of 40 C.F.R. § 403.5(a)(1).

3.32. Respondent introduced prohibited pollutants into the Mosier POTW in violation of 40 C.F.R. § 403.5(b).

3.33. Beginning on June 3, 2016, Respondent operated in violation of prohibitions set forth in the Pretreatment Regulations, in violation of Section 307(d) of the CWA, 33 U.S.C. § 1317(d). Violations of CWA Section 307(d) are subject to administrative penalties pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g).

IV. TERMS OF SETTLEMENT

4.1. Respondent admits the jurisdictional allegations of this Consent Agreement.

4.2. Respondent neither admits nor denies the remaining factual allegations contained in this Consent Agreement.

4.3. As required by CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8), EPA has taken into account the seriousness of the alleged violations; Respondent's economic benefit of noncompliance; the degree of culpability involved; any other penalty for the same incident; any history of prior violations; the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; the economic impact of the penalty on the violator; and any other matters as justice may require. As required by CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), EPA has taken into account "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any)

resulting from the violation, and such other matters as justice may require.” After considering all of these factors, including Respondent’s agreement to pay a \$30,000 penalty to the Oregon Department of Environmental Quality for the discharge of oil into the Columbia River, as alleged above, EPA has determined that an appropriate penalty to settle this action is \$52,500.

4.4. Respondent consents to the assessment of the civil penalty set forth in Paragraph 4.3 and agrees to pay the total civil penalty within 30 days of the effective date of the Final Order.

4.5. This Consent Agreement and the Final Order constitute a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III of this Consent Agreement.

4.6. Payment under this Consent Agreement and the Final Order may be paid by check (mail or overnight delivery), wire transfer, ACH, or online payment. Payment instructions are available at: <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier’s check or certified check must be payable to the order of “Treasurer, United States of America” and delivered to the following address:

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

Respondent must note on the check the title and docket number of this action.

4.7. Respondent must serve photocopies of the check, or proof of other payment method described in Paragraph 4.6, on the Regional Hearing Clerk and EPA Region 10 Compliance Officer at the following addresses:

In the Matter of: Union Pacific Railroad Company
Docket Number: CWA-10-2021-0101
Consent Agreement
Page 9 of 12

U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 155, 11-C07
Seattle, Washington 98101

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop 11-C07
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
R10_RHC@epa.gov

Kate Spaulding
U.S. Environmental Protection Agency
Region 10, Mail Stop 20-C04
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101
Spaulding.kate@epa.gov

4.8. If Respondent fails to pay the penalty assessed by this Consent Agreement and the Final Order in full by its due date, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

a. Interest. Pursuant to CWA Section 311(b)(6)(H), 33 U.S.C.

§ 1321(b)(6)(H), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 30 days of the effective date of the Final Order.

b. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to CWA Section 311(b)(6)(H) of the CWA, 33 U.S.C. § 1321(b)(6)(H), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20% of

the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.9. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.8 above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.10. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this Consent Agreement and to bind Respondent to this document.

4.11. The undersigned representative of Respondent also certifies that, as of the date of Respondent's signature of this Consent Agreement, Respondent has corrected the violation alleged in Part III above.

4.12. Except as described in Subparagraph 4.8.b, above, each party shall bear its own fees and costs in bringing or defending this action.

4.13. For the purposes of this proceeding, Respondent expressly waives any affirmative defenses and the right to contest the allegations contained in the Consent Agreement and to appeal the Final Order.

4.14. The provisions of this Consent Agreement and the Final Order shall bind Respondent and its agents, servants, employees, successors, and assigns.

//

//

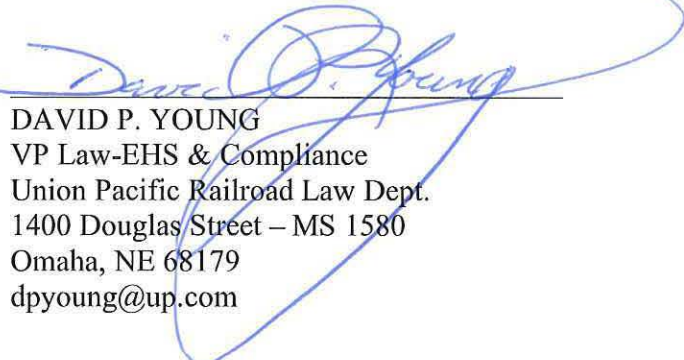
//

4.15. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

6/29/21

FOR RESPONDENT:



DAVID P. YOUNG
VP Law-EHS & Compliance
Union Pacific Railroad Law Dept.
1400 Douglas Street – MS 1580
Omaha, NE 68179
dpyoung@up.com

DATED:

FOR COMPLAINANT:

EDWARD KOWALSKI Digitally signed by EDWARD KOWALSKI
Date: 2021.08.26
16:05:08 -07'00'

EDWARD J. KOWALSKI, Director
Enforcement and Compliance Assurance
Division
EPA Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Union Pacific Railroad Company,

Respondent.

DOCKET NO. CWA-10-2021-0101

FINAL ORDER

Proceedings Under Sections 309(g) and
311(b)(6) of the Clean Water Act, 33 U.S.C.
§§ 1319(g) and 1321(b)(6)

1. The Administrator has delegated the authority to issue this Final Order to the Regional Administrator of the U.S. Environmental Protection Agency (EPA) Region 10, who has in turn delegated this authority to the Regional Judicial Officer in EPA Region 10.
2. The terms of the foregoing Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.
3. The Consent Agreement and this Final Order constitute a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act (CWA) for the violations alleged in Part III of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(a), nothing in this Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

4. This Final Order shall become effective upon filing.

SO ORDERED this _____ day of _____, 2021.

RICHARD
MEDNICK

Digitally signed by
RICHARD MEDNICK
Date: 2021.08.27
10:10:28 -0700'

RICHARD MEDNICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:) DOCKET NO. CWA-10-2021-0101
)
Union Pacific Railroad Company,) **CERTIFICATE OF SERVICE**
)
)
Respondent.)
)
_____)

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER in In the Matter of: Union Pacific Railroad Company, Docket No.:CWA-10-2021-0101**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

J. Matthew Moore
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 155, M/S ORC-11-C07
Seattle, Washington 98101
moore.johnm@epa.gov

Further, the undersigned certifies that a true and correct copy of the aforementioned document was delivered electronically to:

John Barg
Counsel for Respondent
Barg Coffin Lewis & Trapp, LLP
600 Montgomery Street, Suite 525
San Francisco, California 94111
jbarg@bargcoffin.com

David P. Young
VP Law-EHS & Compliance
Union Pacific Railroad Law Depart.
1400 Douglas Street – MS 1580
Omaha, Nebraska 68179
dpyoung@up.com

DATED this _____ day of _____, 2021.

TERESA
YOUNG

Digitally signed by
TERESA YOUNG
Date: 2021.08.27
11:52:17 -07'00'

TERESA YOUNG
Regional Hearing Clerk
EPA Region 10