



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

JUL 13 2017

REPLY TO THE ATTENTION OF:

SENT VIA E-MAIL

To: Thomas C. Burman
Attorney, Stinson Leonard Street, LLP
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
thomas.burman@stinson.com

Re: Consent Agreement and Final Order
Dakota, Minnesota & Eastern Railroad Corporation
Docket No: **CWA-05-2017-0008**

Dear Mr. Burman:

Attached, please find a signed, fully-executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The original was filed on July 13, 2017, with the Regional Hearing Clerk (RHC).

Your client should pay the civil penalty in the amount of \$69,873, in the manner prescribed in paragraphs 21-23 of the CAFO. If paying by check, the client should include the notation "OSLTF - 311" and the docket number of this case CWA-05-2017-0008. Your client's payment is due within 30 calendar days of the effective date of the CAFO.

Thank you for your cooperation in resolving this matter. If you have any questions or concerns regarding this matter, please contact Ellen Riley, of my staff, at 312-886-9497 or at riley.ellen@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Hans".

Michael E. Hans, Chief
Chemical Emergency Preparedness and Prevention Section

Attachments

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. CWA-05-2017-0008
)	
Dakota, Minnesota & Eastern Railroad Corporation)	Proceeding to Assess a Class II Civil Penalty under Section 311(b)(6)(B)(ii) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(ii)
)	
Respondent.)	
_____)	



Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 311(b)(6)(B)(ii) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990, and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. § 22.13(b) and 22.18(b)(2) and (3).
2. The Complainant is, by lawful delegation, the Director of the Superfund Division, United States Environmental Protection Agency, Region 5 (EPA).
3. The Respondent is Dakota, Minnesota & Eastern Railroad Corporation, doing business as CP (“Respondent” or “CP”), a corporation doing business in the State of Minnesota.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO, including its right to request a hearing under Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. § 22.15(c), its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, any right to contest the allegations in this CAFO, and its right to appeal this CAFO. Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or the environment of the United States.

10. 40 C.F.R. § 110.3 specifies the quantity of oil that has been determined may be harmful to the public health or welfare or environment of the United States. The quantity of oil includes discharges of oil that cause a film or a sheen upon or discoloration of the surface of the water or adjoining shorelines.

11. Section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), and 40 C.F.R. § 19.4 authorize EPA to assess a civil penalty of up to \$18,107 per day for violations of Section 311(b)(3) of the Act that occurred after November 2, 2015 (up to a maximum of \$226,338).

Factual Allegations and Alleged Violations

12. CP is a "person" within the meaning of Sections 311(a)(7) and 502(5) of the Act.

13. The railroad tank cars referred to below are "onshore facilities" within the meaning of Section 311(a)(10) of the Act.

14. CP is the "owner or operator" of the CP train referred to in paragraph 16, below, within the meaning of Section 311(a)(6) of the Act.

15. The Mississippi River is a navigable water of the United States as defined in Section 502(7) of the Act, and 40 C.F.R. § 110.1.

16. On January 26, 2016, a CP train derailment occurred near Brownsville, Minnesota. Approximately 15 railroad cars derailed along the banks of the Mississippi River. Six of those 15 cars derailed into the Mississippi River. The six cars that derailed into the river were railroad tank cars carrying food-grade canola oil.

17. On or about January 26, 2016, Respondent discovered/reported a release from one or more railroad tank cars containing food-grade canola oil.

18. Between January 26 and January 29, 2016, Respondent released approximately 885 gallons of food-grade canola oil from two derailed railroad tank cars. All six derailed railroad tank cars were removed from the Mississippi River by January 31, 2016.

19. At the time of the release, the two derailed railroad tank cars were resting in the Mississippi River, and the release was directly to the Mississippi River.

20. In subsequent monitoring, a sheen was observed on the Mississippi River.

21. The discharge of oil from January 26 to January 29, 2016, from the two railroad tank cars into or upon the Mississippi River and its adjoining shorelines in a quantity that has been determined may be harmful is a violation of Section 311(b)(3) of the Act.

Civil Penalty

22. Based on an analysis of the factors set forth in Section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8), and in the Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act, taking into account the facts of this case and information submitted by Respondent, Complainant has determined that an appropriate civil penalty to settle this action is \$69,873. Respondent agrees to pay this amount as a civil penalty.

23. Within 30 days after the effective date of this CAFO, Respondent shall pay a \$69,873 civil penalty by cashier's or certified check, or by electronic funds transfer (ETF). If paying by check, Respondent shall submit a cashier's or certified check, payable to "Environmental Protection Agency," and bearing the notation "OSLTF – 311" and the docket number of this case. If the Respondent sends payment by check, the payment shall be addressed to:

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

If paying by EFT Respondent shall transfer \$69,873 to:

Federal Reserve Bank of NY
ABA 021030004
Account 68010727
33 Liberty Street
New York, New York 10045

Field Tag 4200 of the EFT message shall read "D 68010727 Environmental Protection Agency."

24. This civil penalty is not deductible for federal tax purposes.

25. The Respondent shall submit copies of the check (or, in the case of an EFT transfer, copies of the EFT confirmation) to the following persons:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Ellen Riley (SC-5J)
Chemical Emergency Preparedness
and Prevention Section
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

Erik H. Olson
Associate Regional Counsel (C-14J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604

26. Failure by Respondent to pay timely this civil penalty may subject Respondent to a civil action to collect any unpaid portion of the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 311(b)(6)(H) of the

Act, 33 U.S.C. § 1321(b)(6)(H). In any such collection action, the validity, amount, and appropriateness of the penalty agreed to herein shall not be subject to review.

General Provisions

27. Consistent with the “Standing Order Authorizing E-Mail Service of Order and Other Documents Issued by the Regional Administrator or Regional Judicial Officer Under the Consolidated Rules,” dated March 27, 2015, the parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: olson.erik@epa.gov (for Complainant), and matthew.seltzer@stinson.com (for Respondent). The parties waive their right to service by the methods specified in 40 C.F.R. § 22.6.

28. This CAFO resolves only Respondent’s liability for federal civil penalties for the violations alleged in this CAFO.

29. This CAFO does not affect the rights of the Administrator or the United States to pursue applicable injunctive or other equitable relief or criminal sanctions for any other violations of law not alleged in this CAFO.

30. This CAFO shall not affect Respondent's right to assert any defense in any action by the Administrator or the United States to pursue applicable injunctive or other equitable relief or criminal sanctions for any violations of law.

31. This CAFO does not affect Respondent’s responsibility to comply with the Act and any other applicable federal, state and local laws.

32. Compliance with this CAFO shall not be a defense to any action subsequently commenced pursuant to federal laws and regulations administered by the EPA.

33. Respondent certifies that it has addressed the violations alleged in this CAFO and is now in compliance with Section 311 of the Act, 33 U.S.C. § 1321, and its implementing regulations.

34. This CAFO is a “final order” for purposes of 40 C.F.R. § 22.31 and the August 1998 CWA Penalty Policy.

35. The CAFO shall be binding upon Respondent and Respondent’s officers, directors, agents, servants, employees, and successors or assigns.

36. The CAFO does not constitute a waiver, suspension, or modification of the requirements of Section 311 of the Act, 33 U.S.C. § 1321, or any regulations promulgated thereunder.

37. If Respondent fails to comply with this CAFO, Respondent waives any rights it may possess in law or equity to challenge the authority of the EPA to bring a civil action in the appropriate United States District Court to compel compliance with this CAFO and/or seek an additional penalty for non-compliance with the CAFO.

38. Each party shall bear its own costs and attorney’s fees in connection with the action resolved by this CAFO.

39. EPA has provided a thirty-day opportunity for public notice and comment on this proposed CAFO pursuant to Section 311(b)(6)(C)(i) of the Act, 33 U.S.C. § 1321(b)(6)(C)(i), and 40 C.F.R. § 22.45(b).

40. Complainant reserves the right, pursuant to 40 C.F.R. § 22.45(c)(4)(iii), to withdraw this CAFO within 15 days of receipt of a Commenter’s petition requesting, pursuant to 40 C.F.R. § 22.45(c)(4)(ii), that the Regional Administrator set aside the CAFO on the basis of material evidence not considered.

41. The undersigned representative of each Party to this CAFO certifies that he or she is duly authorized by the Party he or she represents to enter into the terms and bind that Party to them.

42. This CAFO shall become effective on the date it is filed with the Regional Hearing Clerk, Region 5.

In the Matter of: Dakota, Minnesota & Eastern Railroad Corporation

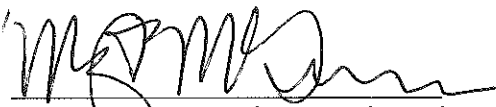
Dakota, Minnesota & Eastern Railroad Corporation, Respondent

Date: MAY 4, 2017


Glen Wilson, AVP Environmental Risk

U.S. Environmental Protection Agency, Complainant

Date: 5/22/2017


Margaret M. Guerriero, Acting Director
Superfund Division
U.S. Environmental Protection Agency
Region 5

In the Matter of: Dakota, Minnesota & Eastern Railroad Corporation
Docket No. CWA-05-2017-0008



FINAL ORDER

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. § 22.18 and 22.31. IT IS SO ORDERED.

Date: July 11, 2017

A handwritten signature in cursive script, appearing to read "Ann L. Coyle", written over a horizontal line.

Ann L. Coyle
Regional Judicial Officer
United States Environmental Protection Agency
Region 5

In the matter of: **Dakota, Minnesota & Eastern Railroad**
Docket Number: **CWA-05-2017-0008**

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, Docket Number **CWA-05-2017-0008**, which was filed on July 13, 2017, in the following manner to the addressees:

Copy by e-mail to

Respondent:

(Authorized in CAFO)

Thomas C. Burman

thomas.burman@stinson.com

Stinson Leonard Street LLP

150 South Fifth Street, Suite 2300

Minneapolis, MN 55402

Copy by e-mail to

Attorney for Complainant:

Erik Olson

olson.erik@epa.gov

Copy by e-mail to

Case Assignee:

Ellen Riley

riley.ellen@epa.gov

Copy by e-mail to

Regional Judicial Officer:

Ann Coyle

coyle.ann@epa.gov

Dated:

July 13, 2017



LaDawn Whitehead

Regional Hearing Clerk

U.S. Environmental Protection Agency, Region 5