

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

In the Matter of:

Norfolk Southern Railway Company,

Respondent.

**CWA SECTION 311 CLASS II CONSENT
AGREEMENT AND FINAL ORDER
UNDER 40 C.F.R. § 22.13(b)**

Docket No. CWA-04-2022-0404(b)

CONSENT AGREEMENT

I. NATURE OF ACTION

1. This is an administrative penalty assessment proceeding brought under Sections 311(b)(6)(B)(ii) and 309(g)(2)(A) of the Clean Water Act (CWA or the Act), 33 U.S.C. §§ 1321(b)(6)(B)(ii) and 1319(g)(2)(A), and Sections 22.13(b) and 22.18 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 Title 40 of the Code of Federal Regulations (C.F.R.), Part 22.
2. This Consent Agreement and the attached Final Order shall collectively be referred to as the CAFO.
3. Having found that settlement is consistent with the provisions and objectives of the Act and applicable regulations, the Parties have agreed to settle this action pursuant to 40 C.F.R. § 22.18 and consent to the entry of this CAFO without adjudication of any issues of law or fact herein.

II. PARTIES

4. Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 4, who has been delegated the authority on behalf of the Administrator of the EPA to enter into this CAFO pursuant to 40 C.F.R. Part 22 and Section 311(b)(6) of the Act.
5. Respondent is Norfolk Southern Railway Company, a corporation organized under the laws of the State of Virginia and authorized to do business in the State of Georgia.

6. This proceeding pertains to an October 9, 2019, incident in which a multi-car train owned and operated by Respondent (Facility) derailed along a trestle bridge located near 220 Hwy 247 Spur, Kathleen, Georgia 31047.

III. GOVERNING LAW

7. For violations subject to Section 311 of the CWA, 33 U.S.C. § 1321:
 - (a) Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances 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 environment of the United States.
 - (b) Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), provides that any person who is the owner, operator, or person in charge of an onshore facility from which oil is discharged in violation of Section 311(b)(3) of the CWA may be assessed a Class I or Class II civil penalty.
 - (c) Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), defines “person” to include corporations.
 - (d) Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), defines “onshore facility” as “any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.”
 - (e) Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), defines “discharge” to include “any spilling, leaking, pumping, pouring, emitting, emptying or dumping,” except as specifically excluded therein.
 - (f) Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), defines “oil” as “oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.”
 - (g) Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”
 - (h) Pursuant to Section 311(b)(4) of the CWA, 33 U.S.C. § 1321 (b)(4), the determination of the quantity of oil that may be harmful and is thereby prohibited under Section 311(b)(3), 33 U.S.C. § 1321 (b)(3), is defined at 40 C.F.R. § 110.3 to include discharges of oil that (1) violate applicable water quality standards or (2) cause a film or a sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.
8. For violations subject to Section 301 of the CWA, 33 U.S.C. § 1311:

- (a) To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
 - (b) Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing the EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants, including stormwater, into navigable waters subject to specific terms and conditions. The EPA has granted the State of Georgia, through the Georgia Environmental Protection Division (GEPD), approval to issue NPDES permits pursuant to Section 402(b) of the CWA.
 - (c) Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include corporations.
 - (d) Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."
 - (e) Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."
 - (f) Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source . . ."
 - (g) Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" as "[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, discrete fissure, container, rolling stock . . . from which pollutants are or may be discharged."
 - (h) Pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Complainant represents that the State of Georgia was provided a prior opportunity to consult with the Complainant regarding this matter.
9. Pursuant to Sections 311(b)(6)(C) and 309(g)(4)(A) of the CWA, 33 U.S.C. §§ 1321(b)(6)(C) and 1319(g)(4)(A), and 40 C.F.R. § 22.45, Complainant will provide public notice of and reasonable opportunity to comment on the proposed issuance of this CAFO prior to issuance of the Final Order.

IV. EPA's ALLEGED FINDINGS OF FACT

10. Respondent was at all relevant times a corporation organized under the laws of the State of Virginia and doing business in the State of Georgia.
11. On October 9, 2019, a multi-car train owned and operated by Respondent derailed along a trestle bridge located near 220 Hwy 247 Spur, Kathleen, Georgia 31047 (Derailment). The Derailment included a locomotive, 29 loaded auto racks, one loaded tank car of tallow oil, one empty hopper car, one loaded hopper car of malt, and two empty flat cars.
12. As a result of the Derailment, Respondent caused the discharge of approximately 50 gallons of diesel fuel from the locomotive, 12,000 gallons of tallow oil from the loaded tank car, and 10 tons of malt from the loaded hopper car (collectively referred to as the Facility) into or upon Mossy Creek and/or its adjoining shorelines, which flows into Big Indian Creek, and then the Ocmulgee and Altamaha Rivers.
13. Respondent responded to the Derailment with oversight by the emergency response programs of the EPA and GEPCD.
14. As a result of the discharges, Respondent undertook immediate response measures to contain, remediate, and restore the spill site and adjoining shorelines. These actions were completed to the satisfaction of the Complainant.
15. Based on several visits to the spill site, as well as information provided by Respondent, the EPA confirmed that the discharges of diesel fuel and tallow oil caused a sheen, sludge, emulsion or exceedance of water quality standards in Mossy Creek and/or its adjoining shorelines. Respondent also did not have an NPDES permit allowing for the discharge of malt into navigable waters.
16. The EPA obtained the above information from Respondent's June 2, 2021, response to the EPA's CWA Section 308 Information Request, the EPA On-Scene Coordinator's observations documented in the Pollution Report, dated October 18, 2019, and the National Response Center Report Number 1260693, as well as additional information available to the EPA.

V. ALLEGED VIOLATIONS

17. For violations under Section 311 of the CWA, 33 U.S.C. § 1321:
 - (a) Respondent is a "person" within the meaning of Section 311(a)(7) of the Clean Water Act (CWA), 33 U.S.C. § 1321(a)(7).
 - (b) Respondent is an "owner or operator" of the Facility within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10).
 - (c) The Facility is an "onshore facility" within the meaning of Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2. The Facility is a transportation-related facility within the meaning of 40 C.F.R. Part 112 regulations implementing Section 311 of the CWA. *See* 40 C.F.R. Part 112,

Appendix A(2)(D).

- (d) Mossy Creek is a “navigable water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 110.1(1988) and is subject to the jurisdiction of Section 311 of the CWA.
- (e) Tallow oil and diesel fuel are “oil” within the meaning of Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), and 40 C.F.R. §110.1.
- (f) Respondent’s discharge of oil from the Facility caused a film or sheen upon or discoloration of the surface of Mossy Creek and/or adjoining shorelines and therefore was in a quantity that has been determined may be harmful under 40 C.F.R. § 110.3, which implements Section 311(b)(3) and (b)(4) of the CWA, 33 U.S.C. §1321(b)(3) and (b)(4).
- (g) As a result, Respondent’s discharge of oil from the Facility violated Section 311(b)(3) of the CWA, 33 U.S.C. § 3121(b)(3).

18. For violations of Section 301 of the CWA, 33 U.S.C. § 1311:

- (a) Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
- (b) Respondent owned and/or operated the Facility.
- (c) Mossy Creek is a “navigable water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. § 232.2(q)(1988).
- (d) Respondent’s discharge of malt from the Facility was a “discharge of a pollutant,” as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12), without an NPDES permit pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
- (e) As a result, Respondent’s discharge of malt from the Facility violated Section 301 of the CWA, 33 U.S.C. § 1311.

19. Based on the information in Paragraphs 16 and 17 above, the EPA alleges that Respondent violated Sections 311 and 301 of the CWA, 33 U.S.C. § 1321 and 1311, and relevant implementing regulations.

VI. STIPULATIONS

20. The issuance of this CAFO simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).

21. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- (a) admits that EPA has jurisdiction over the subject matter alleged in this CAFO;

- (b) neither admits nor denies the factual allegations set forth in Section IV (Findings of Facts) of this CAFO;
- (c) consents to the assessment of a civil penalty as stated below;
- (d) consents to the conditions specified in this CAFO;
- (e) waives any right to contest the allegations set forth in Section V (Alleged Violations) of this CAFO; and
- (f) waives its rights to appeal the Final Order accompanying this CAFO.

22. For the purpose of this proceeding, Respondent:

- (a) agrees that this CAFO states a claim upon which relief may be granted against Respondent;
- (b) acknowledges that this CAFO constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
- (c) waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States District Court to compel compliance with the CAFO, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action;
- (d) by executing this CAFO, certifies to the best of its knowledge that Respondent is currently in compliance with all relevant requirements of the Act and its implementing regulations, and that all violations alleged herein, which are neither admitted nor denied, have been corrected;
- (e) waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum, or communication is to persuade such official to accept and issue this CAFO; and
- (f) agrees to comply with the terms of this CAFO.

23. In accordance with 40 C.F.R. § 22.5, the individuals named in the certificate of service are authorized to receive service related to this proceeding and the parties agree to receive service by electronic means at the following valid email addresses: joyner.william@epa.gov and stephen.smith@epa.gov for the EPA and matthew.gernand@nscorp.com and david.moore@earthandwatergroup.com for the Respondent.

VII. TERMS OF PAYMENT

24. Respondent consents to the payment of a civil penalty, which was calculated in accordance with the Act, in the amount of **\$77,640.00**, which is to be paid within thirty (30) calendar days of the Effective Date of this CAFO.
25. Payment(s) shall be made by cashier's check, certified check, by electronic funds transfer (EFT), or by Automated Clearing House (ACH) (also known as REX or remittance express). If paying by check, the check shall be payable to: "Environmental Protection Agency." The check shall bear the Facility name and docket number for this matter shall be referenced on the face of the check. If Respondent sends payment by the U.S. Postal Service, the payment shall be addressed to:

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

If Respondent sends payment by non-U.S. Postal express mail delivery, the payment shall be sent to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station: SL-MO-C2-GL
St. Louis, Missouri 63101
Contact Number: (314) 425-1819

If paying by EFT, Respondent shall transfer the payment to:

Federal Reserve Bank of New York
ABA: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

If paying by ACH, Respondent shall remit payment to:

US Treasury REX / Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – checking
Physical location of US Treasury facility:

5700 Rivertech Court
Riverdale, Maryland 20737
Contact: Craig Steffen, (513) 487-2091
REX (Remittance Express): 1-866-234-5681

26. Respondent shall send proof of payment, within 24 hours of payment of the civil penalty, to:

- (a) Regional Hearing Clerk
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
R4_Regional_Hearing_Clerk@epa.gov

and

- (b) William Joyner
Water Enforcement Branch
Enforcement and Compliance Assurance Division
U.S. EPA Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303-8960
joyner.william@epa.gov

27. “Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with the Facility name and “Docket No. CWA-04-2022-0404(b).

28. Pursuant to 33 U.S.C. § 1321(b)(6)(H), if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may recover in addition to the unpaid amount of the penalty assessed the following amounts on any portion overdue:

- (a) Interest. Interest will begin to accrue on the civil penalty from the Effective Date of this CAFO. If the civil penalty is paid within 30 days of the Effective Date of this CAFO, Interest is waived. However, if the civil penalty is not paid in full within 30 days of the Effective Date of this CAFO, Interest will continue to accrue on any unpaid portion until the unpaid portion of the civil penalty and accrued Interest are paid. Interest will be assessed at currently prevailing rates.
- (b) Non-Payment Penalty. A 20 percent quarterly nonpayment penalty pursuant to 33 U.S.C. § 1321(b)(6)(H).
- (c) Attorneys’ Fees and Costs of Collection. The United States’ attorneys’ fees and costs of collection.

29. In addition to what is stated in the prior Paragraph, if Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may:

- (a) refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13, and 13.14;
- (b) collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H;
- (c) suspend or revoke Respondent's licenses or other privileges, or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17; and/or
- (d) request that the Attorney General bring a civil action in the appropriate district court to recover the amount assessed, in addition to the amounts described above, pursuant to 33 U.S.C. § 1321(b)(6)(H). In any such judicial action, the validity, amount, and appropriateness of the penalty and of this CAFO shall not be subject to review.

30. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

VIII. EFFECT OF CAFO

- 31. In accordance with 40 C.F.R. § 22.18(c), Respondent's full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
- 32. Full payment of the civil penalty, as provided in Section VII (Terms of Payment), shall not in any case 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. 40 C.F.R. § 22.18(c),
- 33. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit, except as expressly provided herein.
- 34. Nothing herein shall be construed to limit the power of EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment as provided under the Act.
- 35. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Judicial Officer.

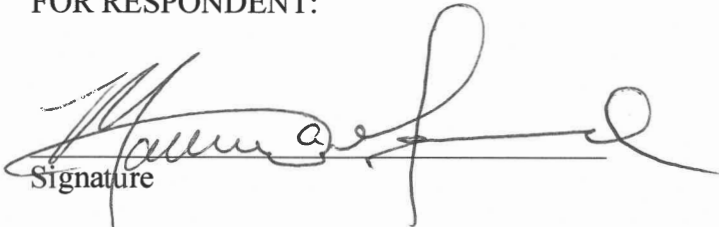
36. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.
37. Any change in the legal status of the Respondent, or change in ownership, partnership, corporate or legal status relating to the Facility, will not in any way alter Respondent's obligations and responsibilities under this CAFO.
38. By signing this Consent Agreement, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.
39. By signing this Consent Agreement, the Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.
40. By signing this Consent Agreement, both Parties agree that each party's obligations under this CAFO constitute sufficient consideration for the other party's obligations.
41. By signing this Consent Agreement, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and continues to be, true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
42. EPA also reserves the right to revoke this CAFO and settlement penalty if and to the extent that EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA. If such false or inaccurate material was provided, EPA reserves the right to assess and collect any and all civil penalties for any violation described herein. EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.
43. Unless specifically stated otherwise in this CAFO, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.
44. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

IX. EFFECTIVE DATE

45. This CAFO shall become effective after execution of the Final Order by the Regional Judicial Officer, on the date of filing with the Hearing Clerk.

The foregoing Consent Agreement In the Matter of Norfolk Southern Railway Company, Docket No. CWA-04-2022-0404(b), is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:


Signature

11/18/22
Date

Printed Name: Matthew A. Gernand
Title: Deputy General Counsel
Address: 650 W. Peachtree St. NW, Atlanta GA 30308

The foregoing Consent Agreement in the Matter of Norfolk Southern Railway Company, Docket No. CWA-04-2022-0404(b), is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

for

Carol Kemker
Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

In the Matter of:

Norfolk Southern Railway Company,

Respondent.

Docket No. CWA-04-2022-0404(b)(b)

FINAL ORDER

The Regional Administrator is authorized to ratify this Consent Agreement which memorializes a settlement between Complainant and Respondent. 40 C.F.R. §§ 22.4(b) and 22.18(b)(3). The foregoing Consent Agreement is, therefore, hereby approved, ratified and incorporated by reference into this Final Order 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.

The Respondent is hereby ORDERED to comply with all of the terms of the foregoing Consent Agreement effective immediately upon filing of this Consent Agreement and Final Order with the Regional Hearing Clerk. This Final Order disposes of this matter pursuant to 40 C.F.R. §§ 22.18 and 22.31.

BEING AGREED, IT IS SO ORDERED.

Daniel Blackman
Regional Administrator

CERTIFICATE OF SERVICE

I certify that the foregoing "Consent Agreement" and "Final Order," in the Matter of Norfolk Southern Railway Company, Docket No. CWA-04-2022-0404(b), were filed and copies of the same were emailed to the parties as indicated below.

Via email to all parties:

To Respondent:

Mr. Matt Gernand
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Senior Assistant Deputy General Counsel
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To EPA:

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Regional Hearing Clerk
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Atlanta, Georgia 30303-8960