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HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
Seattle, Washington

In the Matter of:)

BNSF Railway Company)
Portland, Oregon)

Respondent)

Proceeding under Section 3008(a) of the)
Resource Conservation and Recovery Act)
42 U.S.C. § 6928(a))

) Docket No. RCRA-10-2012-0035

) **CONSENT AGREEMENT**
) **FINAL ORDER**

CONSENT AGREEMENT

I. Preliminary Statement

1.1. Complainant, the Director of the Office of Compliance and Enforcement of the United States Environmental Protection Agency ("EPA"), Region 10, brings this administrative action seeking a civil penalty under Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, ("RCRA"), 42 U.S.C. § 6928, and in accordance with the United States Environmental Protection Agency's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation / Termination or Suspension of Permits, Title 40 C.F.R. Part 22 ("Consolidated Rules of Practice"). The Respondent is BNSF Railway Company ("BNSF" or "Respondent").

1.2. Pursuant to Section 3006 (b) of RCRA, 42 U.S.C. § 6926(b), the State of Oregon has been granted final authorization for its hazardous waste management program. The Oregon Revised Statutes provide authority for the Oregon Administrative Rules Chapter 340-100 et seq.,

which includes the regulations that are part of the state program authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926.

1.3. When EPA determines that any person has violated or is in violation of Subtitle C of RCRA, including any violation of an authorized state program, EPA may, pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), issue an order assessing a civil penalty for any past or current violation of RCRA, and require compliance with Subtitle C immediately or within a specified time period. In the case of a violation in a state that is authorized to carry out a hazardous waste program, EPA shall notify the state in which such violation has occurred prior to issuing an order. The State of Oregon has been notified of this action in accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

1.4. In a Notice of Violation dated February 19, 2010, EPA alleges that the Respondent violated certain provisions of RCRA and the regulations promulgated thereunder. The parties have engaged in settlement discussions regarding the alleged violations. The parties have agreed that settlement of this matter is in the public interest, and that entry of this Consent Agreement and the accompanying Final Order without further litigation is the most appropriate means of resolving this matter. Thus, pursuant to 40 C.F.R. §§ 22.13 and 22.18(b)(2), EPA is simultaneously commencing and concluding this proceeding.

1.5. This Consent Agreement and the Final Order resolves the alleged violations identified below. In accordance with 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3),

Complainant EPA alleges the following:

II. Allegations

2.1. Respondent is a “person” as that term is defined in Oregon Revised Statute (ORS) 465.003.

- 2.2. Respondent is registered to do business in Oregon.
- 2.3. On or about March 30, 2005, Respondent entered into a License with the Oregon Department of Environmental Quality (ODEQ) ("March 2005 License").
- 2.4. The purpose of the March 2005 License was to provide ODEQ access to Respondent's property to install a soil cap as part of the remedy to address contamination from the former McCormick & Baxter Creosoting Company ("M&B").
- 2.5. M&B operated a wood-treating facility on the parcel adjacent to the Respondent's property from the mid-1940 until 1991.
- 2.6. The M&B Superfund Site ("M&B Site") is listed on the EPA National Priorities List ("NPL") pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, 42 U.S.C. § 9601 *et seq.*
- 2.7. The M&B Site was listed on the NPL on May 31, 1994.
- 2.8. M&B used a variety of wood preserving chemicals including those that were later regulated under RCRA as F032, F034, and F035.
- 2.9. The hazardous waste listings F032, F034, and F035 apply to environmental media that contain constituents of those hazardous wastes when the environmental media, such as soil, is actively managed, for example, when soil is excavated.
- 2.10. During the month of October 2009, Respondent retained contractors to excavate soil from Respondent's property that is situated adjacent to the former M&B wood-treating facility.
- 2.11. The excavated material included the area of the soil cap addressed by the March 2005 License as evidenced by orange fencing that had been placed as a demarcation layer.

2.12. Soil excavated by Respondent's contractors from Respondent's property in October 2009 was contaminated with constituents of the listed hazardous wastes F032, F034 and/or F035.

2.13. Respondent is a "generator" as that term is defined in ORS 465.003.

Count 1: Failure to Make a Hazardous Waste Determination

2.14. The regulation at OAR 340-102-0011(2) states that: "[a] person who generates a residue as defined in OAR 340-100-0010 must determine if that residue is a hazardous waste using the following method: (a) Persons should first determine if the waste is excluded from regulation under 40 C.F.R. § 261.4 or OAR 340-101-0004; (b) Persons must then determine if the waste is listed as a hazardous waste in Subpart D of 40 C.F.R. Part 261...."

2.15. The listing for F032, found at 40 C.F.R. § 261.31(a) is: "Wastewaters (except those that have not come into contact with process contaminants), process residuals, preservative drippage, and spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations (except potentially cross-contaminated wastes that have had the F032 waste code deleted in accordance with § 261.35 of this chapter or potentially cross-contaminated wastes that are otherwise currently regulated as hazardous wastes (i.e., F034 or F035), and where the generator does not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol."

2.16. The listings for F032 and F034 contain similar language, except that they do not include the reference to waste code deletion.

2.17. Respondent failed to make a determination whether the soil contained a hazardous waste in accordance with the requirements of the Oregon regulations.

2.18. Respondent's failure to make this determination is a violation of OAR 340-102-0011(2).

Count 2: Failure to Obtain an EPA RCRA Identification Number

2.19. The regulation at OAR 340-100-0002(1) incorporates by reference 40 C.F.R. § 262.12(a) which states that a generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number.

2.20. Prior to generating and transporting the contaminated soil, Respondent did not obtain an EPA/state RCRA Identification Number.

2.21. Only after at least three truckloads of soil contaminated with listed hazardous waste were shipped to Scappoose Sand & Gravel (SS&G) and after that soil was analyzed did Respondent notify DEQ of its activities that require it to obtain and complete an Oregon State Hazardous Waste Site Identification Form.

2.22. Respondent's failure to obtain an EPA/state RCRA Identification Number and to notify ODEQ of its hazardous waste activities is a violation of OAR 340-100-0002(1).

COUNT 3: Failure to Prepare a Hazardous Waste Manifest

2.23. The regulation at OAR 340-100-0002(1) incorporates by reference 40 C.F.R. § 262.20(a)(1) which states that a generator who offers for transport a hazardous waste for offsite treatment, or disposal, must prepare a Manifest (OMB Control number 2050-0039) on EPA Form 8700-22, and, if necessary, EPA Form 8700-22A.

2.24. Respondent's contractors transported hazardous waste without preparing a manifest to accompany the shipment.

2.25. Respondent's failure to prepare a manifest for the hazardous waste is a violation of OAR 340-100-0002(1).

COUNT 4: Failure to Ensure Delivery of Hazardous Waste to a Permitted Treatment, Storage, and Disposal Facility

2.26. The ORS at 466.100 restricts the disposal of hazardous waste anywhere in the State of Oregon except at a hazardous waste disposal site permitted pursuant to ORS 466.110 to 466.170.

2.27. Respondent's contractors transported the soil contaminated with listed hazardous waste to SS&G.

2.28. SS&G is not a hazardous waste disposal site permitted pursuant to ORS 466.110 to 466.170.

2.29. Respondent's disposal of hazardous waste at a facility that was not permitted pursuant to ORS 466.110 to 466.170 is a violation of ORS 466.100.

COUNT 5: Failure to Comply with LDR Requirements

2.30. The regulation at OAR 340-100-0002(1) incorporates by reference 40 C.F.R. § 268.7(a)(1) and (2).

2.31. The regulation at 40 C.F.R. § 268.7(a)(1) sets forth the testing, tracking and recordkeeping options for generators of hazardous waste that choose to land dispose their waste.

2.32. The regulation at 40 C.F.R. § 268.7(a)(2) requires that a generator determine if the waste must be treated before it can be land disposed, or send a one-time written notice to each treatment or storage facility receiving the waste.

2.33. Respondent's contractors shipped soil contaminated with listed hazardous waste to SS&G without determining whether the soil needed to be treated and without providing the one-time notice to SS&G.

2.34. Respondent's failure to determine whether the soil needed to be treated and shipping the soil without providing the one-time notice to SS&G is a violation of 40 C.F.R. § 268.7(a).

COUNT 6: Failure to Comply with LDR Treatment Standards for Contaminated Soil

2.35. The regulation at OAR 340-100-0002(1) incorporates by reference 40 C.F.R. § 268.49.

2.36. The regulation at 40 C.F.R. § 268.49 requires generators to comply with LDR treatment standards for contaminated soil prior to disposal of the contaminated soil.

2.37. Respondent's contractors shipped soil contaminated with listed hazardous waste to SS&G without first complying with the LDR treatment standards set forth in 40 C.F.R. § 268.49.

2.38. Respondent's failure to comply with the LDR treatment standards is a violation of 40 C.F.R. § 268.49.

COUNT 7: Violation of the Prohibition of Storage of Hazardous Waste Restricted from Land Disposal

2.39. The regulation at OAR 340-100-0002(1) incorporates by reference 40 C.F.R. § 268.50(a).

2.40. The regulation at 40 C.F.R. § 268.50(a) prohibits storage of restricted hazardous waste except in accordance with certain conditions.

2.41. The conditions set forth in 40 C.F.R. § 268.50(a) allow generators to store hazardous waste only in tanks, containers, or in a containment building solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment or disposal.

2.42. Respondent's contractors stored the three truckloads of soil contaminated with F032 listed hazardous waste on the ground.

2.43. Respondent did not meet any of the other conditions for storage of the three truckloads of soil contaminated with F032.

2.44. The soil contaminated with F032 is a hazardous waste restricted from land disposal.

2.45. Respondent violated the prohibition on storage of restricted waste set forth in 40 C.F.R. § 268.50.

III. Terms of Settlement

3.1 Pursuant to Sections 3008(a)(3) and (g) of RCRA, 42 U.S.C. § 6925(a)(3) & (g), and the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. § 19.4, any person who violates any of Subtitle C of RCRA, including any violation of an authorized state program, shall be liable to the United States for a civil penalty in an amount not to exceed \$37,500 per day of noncompliance for each violation of a requirement of Subtitle C. The penalty assessed must take in to account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In accordance with EPA's RCRA civil penalty policy, since the violations stemmed from a failure to make a hazardous waste determination, EPA exercised its discretion and compressed the penalties for each count into the penalty for Count 1. EPA calculated a penalty of \$47,000 for the violations. Given the statutory maximum of

\$37,500 for each violation, however, EPA has determined that an appropriate civil penalty to settle this action is in the amount of THIRTY SEVEN THOUSAND AND FIVE HUNDRED DOLLARS (\$37,500).

3.2 In settlement of Counts 1-7 above, Respondent admits the jurisdictional allegations contained in this Consent Agreement; neither admits nor denies the factual stipulations in the Consent Agreement; consents to the assessment of the civil penalty contained in Paragraph 3.1; and waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

3.3 Respondent shall pay the full amount of the assessed penalty no later than thirty (30) days after the Effective Date of the Final Order accompanying this Consent Agreement and signed by the Regional Judicial Officer.

3.4 Respondent shall make its payment of the penalty by cashier's check or certified check 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.

3.5 Respondent must serve photocopies of the check described in Paragraph 3.4 on the Regional Hearing Clerk and EPA Region 10 at the following address:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

with a copy to:

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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101
(206) 553-8311

Cheryl Williams, Environmental Protection Specialist
U.S. Environmental Protection Agency
Region 10, Mail Stop: OCE-127
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

3.6 If Respondent fails to pay the penalty assessed by this CAFO in full by the due dates set forth in Paragraph 3.3, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such a failure may also be subject Respondent to a civil action to collect the assessed penalty under Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), together with interest, handling charges, and nonpayment penalties, as set forth below.

3.6.1 Interest. Any unpaid portion of the of the assessed penalty shall bear interest at the rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1), provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the date of mailing of the executed Consent Agreement and accompanying Final Order.

3.6.2 Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of \$15 shall be paid if any portion of the assessed penalty is more than thirty (30) days past due.

3.6.3 Nonpayment Penalty. Pursuant to 31 U.S.C. § 3717(e)(2), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 3.1. Respondent shall pay a nonpayment penalty in an amount equal to six percent (6%) per annum on any portion of the assessed penalty that is more than ninety (90) days past due, which nonpayment penalty shall be calculated as of the date the underlying penalty first becomes past due.

3.7 The penalty described in Paragraph 3.1, including any additional costs incurred under Paragraph 3.6 above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

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

3.9 Except as described in Subparagraph 3.6.2, above, each party shall bear its own fees and costs in bringing or defending this action.

3.10 The provisions of this Consent Agreement shall bind Respondent and its agents, servants, employees, successors, and assigns.

DATED:

29 March 2012

FOR RESPONDENT:

Dava K. Kartala
Signature

Print Name: Dava K. Kartala

Title: Senior General Attorney

DATED:

April 4, 2012

FOR COMPLAINANT:

Edward J. Kowalski
Edward J. Kowalski, Director
Office of Compliance and Enforcement


FINAL ORDER

1.1 Pursuant to the provisions of RCRA, 42 U.S.C. § 6901 *et seq.*, and EPA Region 10 and BNSF Railway having entered into the foregoing Consent Agreement, the terms of the Consent Agreement are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of the settlement.

1.2 The Consent Agreement constitutes a settlement by EPA of all claims for civil penalties pursuant to RCRA for the particular violations alleged. In accordance with 40 C.F.R. § 22.31(a), nothing in the Consent Agreement and 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. The Consent Agreement and this Final Order do not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of RCRA, the Oregon Revised Statutes, and regulations and permits issued thereunder.

1.3 The Consent Agreement and this Final Order shall become effective upon filing.

SO ORDERED this 16th day of April 2012.



Thomas M. Jahnke
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

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EPA -- REGION 10

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In The Matter Of: BNSF Railway Company, Docket No. RCRA-10-2012-0035** was filed with the Regional Hearing Clerk on April 16, 2012.

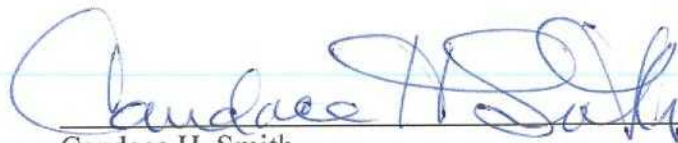
On April 16, 2012, the undersigned certifies that a true and correct copy of the document was delivered to:

Jennifer MacDonald
U.S. Environmental Protection Agency
Region 10, M/S: ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on April 16, 2012 to:

Craig S. Trueblood
K&L Gates LLP
925 Fourth Avenue, Suite 1900
Seattle, Washington 98104-1158

DATED this 16th day of April, 2012.



Candace H. Smith
Regional Hearing Clerk
EPA, Region 10