

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
ADMINISTRATIVE ORDER

2009 SEP -3 AM 10: 35

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF BNSF Railway Company (BNSF) Burlington Northern Santa Fe
Railroad (BNSF) 500 Depot Street, Whitefish, MT, 59937-2567 (Whitefish River
petroleum spill)

Docket Number: CWA-08-2009-0027

Proceedings under Section 311 (c) of the Clean Water Act (CWA), 33 U.S.C. § 1321
(c), as amended by the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 et seq.

I. DEFINITIONS

- a. "CWA" shall mean the Clean Water Act, 33 U.S.C. §§ 1251-1387.
- b. "Data Quality Objectives" shall mean those qualitative and quantitative statements derived from the outputs of a scientific and legally defensible data collection planning process.
- c. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.
- d. "Discharge" shall have the meaning set forth in section 311(a)(2) of the CWA, 33 U.S.C. §1321(a)(2), and 40 CFR Part 110.1 for purposes of the work to be performed under this Order, and shall have the meaning set forth in section 1001(7) of OPA, 33 U.S.C. §2701(7), for purposes of reimbursement of cost.
- e. "Effective Date" shall be the date on which this Order is signed by EPA officials.
- f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or successor agencies of the United States.
- g. "Facility" shall mean the Burlington Northern Santa Fe Railroad Operations, Maintenance and former Fueling Facility located at 500 Depot Street, Whitefish, MT. The facility shall also have the meaning as set forth in section 311(a)(10) and (a)(11) of the CWA, 33 U.S.C.

§1321(a)(10) and (a)(11), and by section 1001(22) and (24) of OPA, 33 U.S.C. § 2701(22) and (24).

- h. "Hazardous Substance" shall mean any substance defined in section 311(a)(14) of the CWA 33 U.S.C. § 1321(a)(14).
- i. "Hazardous Waste" shall have the meaning set forth at section 1004(5) of RCRA, 42 U.S.C. § 6903(5) and 40 C.F.R. §§ 261.3 and 261.10.
- j. "MDEQ" shall mean the Montana Department of Environmental Quality.
- k. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan codified at 40 C.F.R. Part 300.
- l. "Navigable water" shall have the meaning set forth in section 502(7) of the CWA, 33 U.S.C. § 1362(7) and section 1001(21) of OPA, 33 U.S.C. § 2701(21), and 40 C.F.R. Part 110.
- m. "Oil" as used in this Order shall have the meaning set forth in section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), for purposes of the work to be performed under this order, and OPA section 1001(23), 33 U.S.C. § 2701(23), for purposes of reimbursement of costs.
- n. "OPA" shall mean the Oil Pollution Act, 33 U.S.C. § 2701-2761.
- o. "OSC" refers to the EPA On-Scene Coordinator.
- p. "Order" shall mean this Administrative Order, any amendments thereto, and any documents incorporated by reference into this Order.
- q. "Respondent" means Burlington Northern Santa Fe Railroad or BNSF.
- r. The "Site" as used in this Order shall mean the Facility, as described above, and the total expanse of the oil contamination described in this Order.
- s. "Work" shall mean all the activities and requirements specified in this Order including, but not limited to any Work Plan and/or Additional Work that may be required by this Order.

II. GENERAL PROVISIONS

1. This Order shall apply to and be binding upon Respondent and Respondent's officers, directors, employees, agents, successors, assigns, trustees, receivers, and upon all persons, including but not limited to contractors and consultants,

acting on behalf of Respondent. Any change in the ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

2. Respondent shall ensure that its contractors, subcontractors, laboratories, consultants, and representatives comply with this Order and shall be responsible for any noncompliance with this Order.
3. Respondent's obligation to perform the Work will begin on the Effective Date of this Order.
4. The Work undertaken pursuant to this Order is subject to EPA approval and shall be conducted in compliance with all applicable EPA guidance, policies and procedures and with this Order.
5. In the event of an inability or unanticipated inability on the part of Respondent to perform any of the actions or Work required by this Order in the time and manner required herein, the Respondent shall notify EPA orally as soon as possible, but no later than within twenty-four (24) hours of the time the Respondent becomes aware or should have become aware of such event (or, if the event occurs on a Friday or Saturday, no later than the following Monday) and in writing no later than seven (7) calendar days after Respondent becomes aware or should have become aware of such delay or anticipated delay. Such written notice shall describe fully the nature of the delay, including how it may affect the Work, Work Plan and schedule; the actions that will be or have been taken to mitigate, prevent, and/or minimize further delay; and the timetable according to which future actions to mitigate, prevent and/or minimize the delay will be taken. The Respondent shall adopt all reasonable measures to avoid and minimize such delay.
6. Failure of Respondent to carry out any requirement of this Order in accordance with the terms and conditions specified herein may result in the unilateral performance of the required actions by EPA.
7. Noting in this Order shall be construed to limit any powers EPA may have under the CWA, OPA, NCP, or any other law or regulation.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

- A. The Respondent's facility is an "onshore facility" as defined by CWA section 311(a)(10), 33 U.S.C. § 1321(a)(10), and by OPA section 1001(24), 33 U.S.C. § 2701(24).
- B. Respondent is a "person" as defined by CWA section 311(a)(7), 33 U.S.C. § 1321(a)(7), by OPA section 1001(27), 33 U.S.C. § 2701(27).

- C. Respondent is an "owner or operator" of the facility, as defined by CWA section 311(a)(6), 33 U.S.C. § 1321(a)(6), and OPA section 1001(26), 33 U.S.C. § 2701(26).
- D. A "removal" as defined in CWA section 311(a)(8), 33 U.S.C. § 1321(a)(8), and OPA section 1001(30), 33 U.S.C. § 2701(30), is necessary at the Facility to minimize and to mitigate damage to the public health and welfare.
- E. An actual or threatened "discharge" as defined in CWA section 311(a)(2), 33 U.S.C. § 1321(a)(2), OPA section 1001(7), 33 U.S.C. § 2701, and 40 C.F.R. § 110.1, is occurring and has occurred at or from the Facility.
- F. Diesel fuel is "oil" within the meaning of CWA section 311(a)(1), 33 U.S.C. § 1321(a)(1), and OPA section 1001(23), 33 U.S.C. § 2701(23).
- G. Oil is currently present at and around the Facility, including in the Whitefish River. A sheen has been observed on the river at different locations for approximately a two mile stretch. Analytical samples taken in October 2007, showed diesel range organics detected in the range of 14-19,000 mg/kg on both sides of the river.
- H. The Whitefish River is a "navigable water" of the United States as defined in CWA section 502(7), 33 U.S.C. § 1362(7), and OPA section 1001(21), 33 U.S.C. § 2701(21).
- I. The Whitefish River and its banks and sediments are a "natural resource" within the meaning of the NCP, 40 C.F.R. § 300.5, and OPA section 1001(20), 33 U.S.C. § 2701(20).
- J. "Natural resources", as defined in OPA section 1001(20), 33 U.S.C. § 2701(20), and the NCP, 40 C.F.R. § 300.5, have been or may be affected by the discharge or threatened discharge at or from the Facility.
- K. The discharge of oil from the Facility is an actual or threatened discharge of oil in violation of CWA section 311(b), 33 U.S.C. § 1321(b).
- L. The discharge of oil from the Facility has occurred or threatened to occur in a "harmful quantity" within the meaning of CWA section 311(b)(3), 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3, because a discharge of oil from the Facility into the navigable water has or would violate applicable water quality standards and has caused a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or caused a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.
- M. There may be an imminent and substantial threat to public health or welfare because of the actual or threatened discharge of oil from the Facility in violation of CWA section 311(b), 33 U.S.C. § 1321(b).
- N. The measures set forth in this Order are necessary and appropriate to abate, minimize, stabilize, mitigate or eliminate the discharge or substantial threat of discharge of oil at or from the Facility and to protect the public health or welfare,

within the meaning of the CWA. Further, these measures ensure effective and immediate removal of a discharge and mitigation or prevention of a substantial threat of a discharge of oil into or on the navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. These measures are also necessary to protect the public health and the environment.

- O. Historically, through the present day, a discharge or a substantial threat of a discharge of oil, including diesel fuel, and/or hazardous substance(s), reached or may reach Whitefish River in Whitefish, MT, which is a navigable water of the United States. This discharge or substantial threat of a discharge from the Burlington Northern Santa Fe Railroad Operations, Maintenance and former Fueling Facility (500 Depot Street, Whitefish, MT 59937-2667) constitutes a substantial threat to the public health or welfare.

IV. ORDER

- A. Based on the above, and on other information contained in the administrative record for this Order, EPA has determined that the activities required by this Order are necessary to protect human health and/or the environment. EPA, therefore, hereby orders Respondent to perform the work specified in this Order in the manner and by the dates specified herein. All work undertaken pursuant to this Order shall be performed in a manner consistent with this Order, including all documents incorporated herein pursuant to this Order, and all applicable laws.
- B. Respondent shall finance and perform the Work in accordance with this Order, including, but not limited to, plans, standards, specifications and schedules set forth in this Order or developed by Respondent and approved by EPA pursuant to this Order.
- C. This Order is being issued under § 311(c) of the Clean Water Act, 33 U.S.C. § 1321 for a discharge or a substantial threat of discharge of oil and/or a hazardous substance into waters of the United States.
- D. BNSF is or will be liable to the United States Government for any costs that the United States has incurred or may incur in connection with the Facility, under OPA section 1002(b)(1), 33 U.S.C. § 2702(b)(1), and/or as otherwise provided by law.
- E. Respondent shall undertake and complete all of the Work to the satisfaction of EPA.
- F. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Respondent or its contractors or agents while performing work under this Order.
- G. A site health and safety plan shall be in effect before any clean-up activities commence. This plan shall comply with applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910.

- F. All containment, remediation, mitigation, and removal actions performed by Respondent shall be consistent with OPA, CWA and NCP.
- H. Respondent shall perform all actions pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations.

V. WORK TO BE PERFORMED

A. **RESPONDENT IS HEREBY ORDERED** to complete the tasks described below within the dates specified and in accordance with the National Contingency Plan, 40 CFR Part 300, and any appropriate area contingency plan, and any applicable § 311(j) facility response plan.

B. IMMEDIATE STABILIZATION AND MITIGATION ACTIONS
(see attached sheet for further requirements)

See Attachment _____

BY / / .

C. REMOVAL ACTION

See Attachment _____

D. REPORTING REQUIREMENTS

- _____ Respondent(s) shall prepare and submit to the On-Scene Coordinator the following reports:
_____ Bi-Weekly Progress Reports due on _____
- X Monthly Progress Reports due beginning July 1, 2009, and the first of each month thereafter. Final Completion Report due 120 days after the completion of the Removal Action

VI. RESERVATION OF RIGHTS AND PENALTIES

- A. This Order does not preclude EPA from taking any actions authorized by CWA, the National Contingency Plan, or any other law. EPA reserves the right to direct all activities and to comment on and direct changes to deliverables, off-site shipping and disposal, and all other matters.
- B. Respondent shall notify EPA of any response actions it takes as to this discharge that are in addition to those described in this Order.

- C. Violation of any term of this ORDER may subject Respondent to an administrative civil penalty of up to \$37,500 per day of violation or an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure. (Section 311(b)(7)(B) of the Clean Water Act, 33 U.S.C. § 1321(b)(7)(B) as amended by the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq.)

VII. EFFECTIVE DATE

The effective date of this ORDER shall be the date of the receipt of this Order by the Respondents.

David Romero 7/30/09
On-Scene Coordinator Date

Received by [Signature] 8/7/09
Representing Respondent Date

ATTACHMENT TO ADMINISTRATIVE ORDER BURLINGTON NORTHERN SANTA FE RAILROAD – WHITEFISH RIVER PETROLEUM SITE pursuant to Section V, Work to be Performed

The Work to be conducted by the Burlington Northern Santa Fe Railroad (BNSF) on the Whitefish River Site, is broken up into the following four deliverables:

1. Upper reach of the Whitefish River (defined as that portion of the Whitefish River upstream of Second Street bridge in Whitefish, MT, to the northern most property boundary of the BNSF facility adjacent to the Whitefish River);
2. Lower reach of the Whitefish River (that portion of the Whitefish River downstream of Second Street bridge to the intersection of JP Road in Whitefish, MT);
3. Investigation of the trench recovery system (located adjacent to the BNSF facility);
4. Investigation of other potential contaminant source(s) within the BNSF facility.

Upper Reach of the Whitefish River

- a. Submit a Sampling and Analysis Plan to delineate the extent of contamination in the river and depth of contaminated/impacted sediments in the river and adjoining shoreline sediments by August 10, 2009; sampling activities must be completed by September 1, 2009.
- b. Present/discuss with EPA, selected remedial technologies for removal activities by August 10, 2009. Draft work plan on removal activities by September 15, 2009. Removal activities (if needed) should address upper reach of Whitefish River; start/mobilize by September 25, 2009.

Lower Reach of the Whitefish River

- a. Submit Sampling and Analysis Plan to delineate the extent of contamination in the river from the Facility and depth of contaminated/impacted sediments in the river from the Facility and adjoining shoreline sediments by October 30, 2009. Complete sampling activities by January 1, 2010.
- b. Submit a work plan and presentation for removal activities by June 1, 2010.
- c. Conduct removal activities (if needed) - start/mobilize by September 13, 2010.

Interceptor Trench Investigation

- a. Submit a trench investigation plan to verify performance and efficiency by August 10, 2009.

- b. Submit a removal work plan, pending evaluation results, to address release(s) (if needed), into the Whitefish River by September 15, 2009.
- c. Conduct removal activities (if needed) based on evaluation results; start/mobilize by September 30, 2009.

Investigation of other source contaminants within the BNSF Facility

- a. Based on consolidated data on prior investigations submit a Sampling and Analysis Plan (if needed) to investigate other possible contaminant sources within the property of BNSF rail yard facility by March 1, 2010.
- b. Based on the findings of investigation conducted within BNSF's property, submit a removal work plan to address any potential release into the Whitefish River of petroleum contaminant source(s) within the BNSF Facility by August 30, 2010.
- c. Conduct removal activities (if needed); start/mobilize by September 30, 2010.

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **EMERGENCY ADMINISTRATIVE ORDER** in the matter of **BNSF RAILWAY (BNSF) BURLINGTON NORTHERN SANTA FE RAILROAD; DOCKET NO.: CWA-08-2009-0027** was filed with the Regional Hearing Clerk on September 3, 2009.

Further, the undersigned certifies that a true and correct copy of the documents were delivered David Romero, On-Scene Coordinator, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned documents were placed in the United States mail certified/return receipt requested on September 3, 2009, to:

David Smith
Manager, Environmental Remediation
Burlington Northern Santa Fe Railroad
825 Great Northern Blvd., Suite 105
Helena, MT 59601

September 3, 2009



Tina Artemis
Paralegal/Regional Hearing Clerk

