

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

March 18, 2021
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Received by

EPA Region VIII
Hearing Clerk

IN THE MATTER OF:)	
)	Docket No. CWA-08-2021-0013
BNSF Railway Company)	
2650 Lou Menk Drive)	
Fort Worth, TX 76131-2830,)	
)	
Respondent.)	CONSENT AGREEMENT
)	

I. INTRODUCTION

1. This is an administrative penalty assessment proceeding pursuant to 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 of Practice), as codified at 40 C.F.R. Part 22.
2. BNSF Railway Company (Respondent) owns and operates locomotives and railcars. On or about February 4, 2019, three of Respondent's locomotives and five railcars derailed in Wendover Canyon, near Guernsey, Wyoming, and diesel fuel and oil were discharged into the North Platte River.
3. The EPA and Respondent, having agreed settlement of this action is in the public interest, consent to the entry of this consent agreement (Agreement) without adjudication of any issues of law or fact herein, and Respondent agrees to comply with the terms of this Agreement.

II. JURISDICTION

4. This Agreement is issued under the authority vested in the Administrator of the EPA by section 311(b)(6)(A) of the Clean Water Act (Act), 33 U.S.C. § 1321(b)(6)(A). The undersigned EPA official has been duly authorized to institute this action.
5. The Regional Judicial Officer is authorized to approve this Agreement with a final order. 40 C.F.R. §§ 22.4(b) and 22.18(b).
6. The final order approving this Agreement simultaneously commences and concludes this proceeding. 40 C.F.R. § 22.13(b).

III. GOVERNING LAW

Discharges of Oil/Pollutants

7. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), in pertinent part, prohibits discharging oil into or upon the navigable waters of the United States in such quantities as may be harmful as determined under section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4).
8. The term "discharge" is defined in section 311(a)(2) of the Act, 33 U.S.C. § 1321(a)(2), to include, in pertinent part, "any spilling, leaking, pumping, pouring, emitting, emptying or dumping. . . ."

9. The term “oil” is defined in section 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1), in pertinent part, 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.”
10. The term “navigable waters” is defined in section 502(7) of the Act, 33 U.S.C. § 1362(7), as “waters of the United States, including the territorial seas.” In turn, “waters of the United States” has been defined to include, inter alia, all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; and tributaries to such waters. 40 C.F.R. §§ 122.2 and 110.1 (1993).
11. The term “pollutant” is defined in Section 502(6) of the Act, 33 U.S.C. § 1362(6), to include in pertinent part, “materials” discharged into water.
12. In accordance with section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4), the EPA has determined, by regulation, those quantities of oil the discharge of which may be harmful to the public health or welfare or the environment of the United States. Discharges of oil in such quantities as may be harmful include discharges of oil that “(a) Violate applicable water quality standards; or (b) Cause a film or 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 adjoining shorelines.” 40 C.F.R. § 110.3.
13. Pursuant to section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), any owner, operator, or person in charge of any vessel, onshore facility or offshore facility from which oil is discharged in violation of section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), may be assessed a class I or class II civil penalty.
14. The term “owner or operator” is defined in section 311(a)(6) of the Act in pertinent part as “in the case of an onshore facility, . . . any person owning or operating such onshore facility” 33 U.S.C. § 1321(a)(6).
15. According to section 311(a)(7) of the Act, “person” includes an individual, firm, corporation, association, and a partnership. 33 U.S.C. § 1321(a)(7).
16. The term “onshore facility” is defined in section 311(a)(10) of the Act as “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)(10).

IV. ALLEGED FACTS

17. Respondent was at all relevant times a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Wyoming.
18. Respondent was at all relevant times a “person” within the meaning of sections 311(a)(7) and 502(5) of the CWA, 33 U.S.C. §§ 1321(a)(7) and 1362(5).
19. On or about February 4, 2019, Respondent reported to the United States Coast Guard National Response Center (NRC Report Nos. 1236802 and 1236824) that approximately 5900 gallons of diesel fuel and approximately 800 gallons of lubricating oil were released into the North Platte River from two of Respondent’s locomotives that derailed in Wendover Canyon. (2019 Discharge)

20. The North Platte River is a navigable water of the United States within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).
21. In response to the 2019 Discharge, BNSF undertook containment, response, remediation and restoration actions. These actions were completed to the satisfaction of the Wyoming Department of Environmental Quality.

V. ALLEGED VIOLATIONS OF LAW

22. The 2019 Discharge impacted the North Platte River, which is an interstate water and a traditional navigable water within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7).
23. The diesel fuel and lubricating oil comprising the 2019 Discharge meets the definition of “oil” in section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1).
24. The release of oil was at all relevant times a “discharge” within the meaning of section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2).
25. Respondent was at all relevant times, the owner and operator of the two locomotives which derailed and discharged diesel fuel and lubricating oil into the North Platte River within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2.
26. The 2019 Discharge violated water quality standards, caused a film or sheen upon or discoloration of the surface of the North Platte River and/or its adjoining shorelines, and/or caused a sludge or emulsion to be deposited beneath the surface of the water(s) and/or upon the adjoining shorelines of the North Platte River within the meaning of section 311(b)(4) of the Act, 33 U.S.C. § 1321(b)(4).
27. The oil discharged into the North Platte River and upon its adjoining shorelines as a result of the release referenced in paragraph 19 above was discharged in “quantities as may be harmful” within the meaning of section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3.
28. The North Platte River and its adjoining shorelines are and were at all relevant times “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
29. Respondent’s discharge of oil to navigable waters constitutes a violation of section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3).

VI. TERMS OF CONSENT AGREEMENT

30. For the purpose of this proceeding, Respondent:
 - a. admits the jurisdictional allegations in section II of this Agreement;
 - b. neither admits nor denies the factual and legal allegations in Sections IV and V of this Agreement;
 - c. consents to the assessment of a civil penalty as stated below;
 - d. acknowledges this Agreement constitutes an enforcement action for purposes of considering Respondent’s compliance history in any subsequent enforcement actions;

- e. waives any right to contest any final order approving this Agreement; and
 - f. waives any rights it may possess at law or in equity to challenge the authority of the EPA to bring a civil action in a United States District Court to compel compliance with the Agreement or Order, or both, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action.
31. Section 311(b)(6) of the Act, 33 U.S.C. § 1321(b)(6), authorizes the EPA to assess a civil penalty in this matter.
32. The EPA conducts an independent assessment of each of the following factors for each incident of discharge. In determining the amount of the penalty to be assessed in this matter, the EPA considered the seriousness of the violations; the economic benefit to Respondent resulting from the violations; 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 Respondent to minimize or mitigate the effects of the discharge; the economic impact of the penalty on Respondent, and any other matters as justice may require, in accordance with section 311(b)(8), 33 U.S.C. § 1321(b)(8).
33. Based on the Alleged Violations of Law, and after consideration of the statutory factors, the EPA has determined a civil penalty of \$140,000 is appropriate to settle this matter.
34. Penalty Payment. Respondent agrees to:
- a. pay a civil penalty in the amount of \$140,000 within 30 calendar days of the Effective Date of this Agreement;
 - b. Pay each instalment of the civil penalty using any method provided on the following website <https://www.epa.gov/financial/makepayment>;
 - c. indicate each and every payment is payable to the “Oil Spill Liability Trust Fund-311” and identify each and every payment with the docket number that appears on the final order;
 - d. within 24 hours of payment, email proof of payment to Ms. Darla Hohman and Charles Figur at hohman.darla@epa.gov and figur.charles@epa.gov (“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 payment has been made according to EPA requirements, in the amount due, and identified with the docket number that appears on the final order).
35. If Respondent fails to timely pay any portion of the penalty assessed under this Agreement, the EPA may:
- a. request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States’ attorneys’ fees and costs for collection proceedings; and a quarterly nonpayment penalty for each quarter during which such failure to pay persist, 33 U.S.C. § 1321(b)(6)(H);
 - b. refer the debt to a credit reporting agency or a collection agency, 40 C.F.R. §§ 13.13, 13.14, and 13.33;

- c. 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; and
 - d. suspend or revoke Respondent's licenses or other privileges or suspend or disqualify Respondents from doing business with the EPA or engaging in programs the EPA sponsors or funds, 40 C.F.R. § 13.17.
36. Consistent with section 162(f)(1) of the Internal Revenue Code, 26 U.S.C. § 162(f)(1), Respondent will not deduct penalties paid under this Agreement for federal tax purposes.
37. This Agreement applies to Respondent and its successors and assigns. Any change in ownership or corporate control of Respondent, including but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Agreement.
38. The undersigned representative of Respondent certifies he or she is fully authorized to execute and enter into the terms and conditions of this Agreement and has the legal capacity to bind the party he or she represents to this Agreement.
39. Except as qualified by paragraph 35, each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.

VII. EFFECT OF CONSENT AGREEMENT

40. In accordance with 40 C.F.R. § 22.18(c), completion of the terms of this Agreement resolves Respondent's liability for federal civil penalties for the violations specifically alleged above.
41. The terms, conditions, and compliance requirements of this Agreement may not be modified or amended except upon the written agreement of both parties, and approval of the Regional Judicial Officer, or other delegatee.
42. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws, nor shall it restrict the 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.
43. Nothing herein shall be construed to limit the power of the EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.
44. If and to the extent the EPA finds, after signing this Agreement, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to the EPA, the EPA reserves any and all of its legal and equitable rights.

VIII. PUBLIC NOTICE

45. As required by section 311(b)(6)(C)(i) of the CWA, 33 U.S.C. § 1321(b)(6)(C)(i), and 40 C.F.R. § 22.45, the EPA will provide public notice and a reasonable opportunity to comment on the penalty that Respondent has agreed to pay in this matter. The EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate this Agreement is improper or inadequate.

IX. EFFECTIVE DATE

This Agreement shall become effective on the date the final order is filed by the hearing clerk.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8,
Complainant.**

JANICE PEARSON

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Date: 2021.03.11 11:09:00 -07'00'

Signature and Date
Janice Pearson, Branch Chief
RCRA and OPA Enforcement Branch

**BNSF RAILWAY COMPANY,
Respondent.**

John Lovenburg

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Date: 2021.03.04 13:45:32 -06'00'

Signature and Date
John Lovenburg
VP Environmental