

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
UNION PACIFIC) Docket No. CWA 07-2011-0115
RAILROAD COMPANY)
)
Respondent) FINDINGS OF VIOLATION,
) ORDER FOR COMPLIANCE
)
Proceedings under Section 309(a) of the)
Clean Water Act, 33 U.S.C. § 1319(a))
_____)

Preliminary Statement

1. The following Findings of Violation and Order for Compliance (Order) are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (CWA), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (EPA) to the Regional Administrator, EPA, Region 7 and further delegated to the Director of Region 7's Water, Wetlands and Pesticides Division.
2. Respondent is Union Pacific Railroad Company, a corporation registered under the laws of the State of Delaware and authorized to conduct business in the State of Kansas.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.
4. The CWA prohibits the discharge of "pollutants" from a "point source" into a "navigable water" of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.
5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA,

- requires, in part, that a discharge of storm water associated with an industrial activity must conform to the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA.
6. Pursuant to Section 402(p) of the CWA, EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.
 7. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) requires dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.
 8. 40 C.F.R. § 122.26(b)(14)(vi) defines “storm water discharge associated with industrial activity,” in part, as “the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.” A facility classified as Standard Industrial Classification 40 is considered to be engaging in “industrial activity” for purposes of paragraph (b)(14)(iii).
 9. The Kansas Department of Health and Environment (KDHE) is the state agency with authority to administer the federal NPDES program in Kansas pursuant to Section 402 of the CWA. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.
 10. The KDHE issued Kansas Water Pollution Control General Permit No. S-ISWA-0507-1 to Union Pacific Railroad for the “KCKS Yards,” which provides permit coverage for the contiguous 18th Street, Armstrong and Armourdale Yards, for the discharge of storm water under the NPDES on April 2, 2007.

Factual Background

11. Respondent corporation is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
12. At all times relevant to this action, Respondent was the owner and/or operator of an industrial facility engaged in the operation of a railroad transportation facility engaged in vehicle and equipment maintenance including vehicle and equipment rehabilitation, mechanical repairs, and vehicle servicing (including fluid changes, repairs, parts cleaning, sanding, refinishing, painting, fueling, and lubrication) known as Union Pacific Railroad KCKS Yards, located at 1200 McAlpine Avenue, Kansas City, Kansas (the Site) with a SIC code of 4011.
13. Storm water, snow melt, surface drainage and runoff water leave Respondent’s facility and flow into the Kansas River a “Water of the United States”, as defined in Section 502(7) of the Act, 33 U.S.C. § 1362(7). The runoff and drainage from Respondent’s facility is “storm water” as defined by 40 C.F.R. § 122.26(b)(13).

14. Storm water contains “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
15. The Site has “storm water discharges associated with industrial activity” as defined by 40 C.F.R. § 122.26(b)(14)(x), and is a “point source” as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
16. Respondent discharges pollutants into “navigable waters” as defined by CWA Section 502, 33 U.S.C § 1362.
17. Storm water runoff from Respondent’s industrial activity results in the addition of pollutants from a point source to navigable waters, and thus is the “discharge of a pollutant” as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).
18. Respondent’s discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(iii), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
20. Permit No. S-ISWA-0507-1 for the operation of a railroad transportation facility engaged in vehicle and equipment maintenance including vehicle and equipment rehabilitation, mechanical repairs, and vehicle servicing was issued by KDHE to Respondent on April 2, 2007, and expired in August 2011. The permit has been administratively extended by the KDHE and remains in effect.
21. On April 27-29, 2011, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 318(a). The purpose of the inspection was to evaluate compliance with the CWA.

Findings of Violation

Failure to Develop an Adequate SWPPP

22. The facts stated in paragraphs 11 through 21 above are herein incorporated.
23. Section 2.4.2 of Respondent’s Permit No. S-ISWA-0507-1 requires that site maps identify the outlined drainage areas of each storm water outfall; storm water conveyances and area inlets for each outfall.
24. Section 2.4.4 of Respondent’s Permit No. S-ISWA-0507-1 requires that a comprehensive site compliance evaluation shall be conducted at least once per year. A report summarizing the scope of the evaluation, personnel making the evaluation, the date(s) of the evaluation, major observations relating to the implementation of the storm water pollution prevention plan, and any actions taken shall be made and retained as part of the storm water pollution prevention plan.
25. EPA’s inspection referenced in Paragraph 21, determined that the Respondent failed to

indicate the storm water drainage patterns on the SWPPP maps for Area 3, Area 6, and Area 7.

26. EPA's inspection referenced in Paragraph 21, determined that the Respondent failed to prepare and include the required annual site evaluation report with the SWPPP.
27. Respondent's failure to mark all storm water drainage patterns for all outfalls on the SWPPP site maps and to include the annual site evaluation report with the SWPPP is a violation of the terms and conditions of the Respondent's NPDES permit, and as such, is a violation of Section 301(a), 33 U.S.C. § 1311(a) and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Failure to Update the SWPPP

28. The facts stated in paragraphs 11 through 21 above are herein incorporated.
29. Section 2.4.6.a of Respondent's Permit No. S-ISWA-0507-1 states, "The SWPPP shall be re-evaluated and modified in a timely manner, but in no case more than 90 days after: a change in design, construction, operation or maintenance that has a significant effect on the potential for the discharge of pollutants to the waters of the State."
30. During the EPA inspection referenced in Paragraph 21, EPA reviewed the current SWPPP for the Facility. The SWPPP available for review during the inspection was not up to date and did not reflect the following changes:
 - a) The tank numbers in Table 2 of the SWPPP did not match the tank numbers on the SWPPP maps and in the narrative portion of the SWPPP.
 - b) The SWPPP team names were incorrectly listed and not up to date in Table 2 of the SWPPP.
 - c) The spill information provided in SWPPP Table 1 was not current and consistent with the information provided on the SWPPP inspection records (October 13, 2010).
31. Respondent's failure to update the SWPPP to reflect current site conditions and practices is a violation of the terms and conditions of the Respondent's NPDES permit, and as such, is a violation of Section 301(a), 33 U.S.C. § 1311(a) and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Failure to Conduct Quarterly Site Inspections

32. The facts stated in paragraphs 11 through 21 are herein incorporated.
33. Section 2.4.3.d of Respondent's Permit No. S-ISWA-0507-1 requires identification of facility personnel trained to inspect at appropriate intervals, (inspection frequency shall be stated in SWP2 Plan, but at a minimum quarterly inspections shall be performed),

designated equipment and storage areas for raw material, finished product, chemicals, recycling, equipment, paint, fueling and maintenance; and loading, unloading, and waste management areas. A set of tracking or follow-up procedures shall be used to ensure that appropriate actions are taken in response to the inspection. The inspection report shall include completion dates for correction of all deficiencies. Records of inspections shall be maintained on-site or in a readily accessible location for at least three years after the date of the inspection.

34. Respondent's SWPPP in Section 4.4.1 and Table 1 describes the inspection frequency and procedures used at the facility.
35. EPA's inspection referenced in Paragraph 21, determined that the Respondent failed to conduct quarterly inspections during the following quarters: 1st quarter 2011, 4th quarter 2009, 3rd quarter 2008, and 4th quarter 2008.
36. Respondent's failure to conduct quarterly site inspections is a violation of the terms and conditions of the Respondent's NPDES permit, and as such, is a violation of Section 301(a), 33 U.S.C. § 1311(a) and a permit issued pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

Failure to Conduct Monitoring and Record Keeping Requirements

37. The facts stated in Paragraphs 11 through 21 above are herein incorporated.
38. Section 2.4.5 of Respondent's Permit No. S-ISWA-0507-1 requires Visual Examination of Stormwater Quality. The permittee shall periodically, (frequency shall be stated in SWPPP, but at a minimum of once per year) perform and document a visual examination of a storm water discharge associated with industrial activity from each identified storm water outfall. Visual examination reports shall be maintained onsite and be made available for KDHE and EPA inspection upon request.
39. The EPA inspection referenced in Paragraph 21 above, revealed that the inspection reports included as part of the SWPPP, from January 2008 until October 2010 did not include storm water monitoring data from any of the outfalls listed in the SWPPP.
40. Respondent's failure to conduct annual storm water observations of each facility outfall is a violation of Respondent's NPDES permit, and as such, is a violation of Sections 301(a) and a permit issued pursuant to 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Order For Compliance

41. Based on the Factual Background and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

42. Within thirty (30) days of the Effective Date, as defined in Paragraph 53 herein, Respondent shall take all corrective action that is necessary to correct the deficiencies, eliminate and prevent recurrence of the violations cited in this Order and to come into compliance with all of the applicable requirements of its Permit.
43. Within forty-five (45) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein, including:
 - a) an acknowledgement of receipt of this Order;
 - b) a description of all activities initiated to date to achieve compliance with the current NPDES permit conditions and to ensure the SWPPP is thoroughly revised to accurately reflect the current site conditions as required by the NPDES permit.
44. In the event that Respondent believes correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall include in its report to be submitted pursuant to Paragraph 43, above, a comprehensive written Plan for the correction of any remaining violations. Such Plan shall describe in detail, the corrective actions to be taken and why such actions are sufficient to correct the remaining violations. The Plan shall include a detailed Schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.
45. If applicable, the EPA will review the Plan and Schedule submitted by Respondent pursuant to Paragraph 44. The EPA shall approve the Schedule or require modification and resubmission of a portion or all of the Plan and/or Schedule pursuant to Paragraph 46, below. Upon approval, the Schedule shall be deemed incorporated into and become enforceable under this Order. Review and comment on the Plan and approval of the Schedule by the EPA does not relieve Respondent of the responsibility to comply with its NPDES permit, Storm Water General Permit, the CWA, applicable State law, or this Order.
46. If required by the EPA pursuant to Paragraph 45 above, the Respondent shall within forty-five (45) days of receipt of any written comments from EPA regarding the Plan and/or Schedule, to make modifications and changes to it as directed by EPA, and resubmit the Plan and/or Schedule to the EPA. Upon request, the EPA may grant, in writing, a longer period of time for resubmission of such documents.

Certification

47. Each submittal to EPA pursuant to the requirements of this Order shall include a written statement by Respondent signed by a principal executive officer or a ranking elected official, or by a duly authorized representative of that person, that contains the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Submissions

48. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Mr. Lantz Tipton
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

49. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.
50. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Section 309(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

51. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

52. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

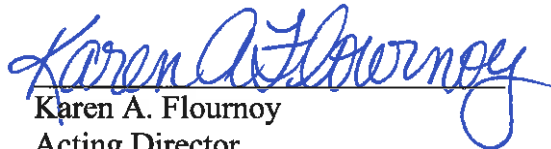
Effective Date

53. The terms of this Order shall be effective and enforceable against Respondent upon the date signed by the Director, Water, Wetlands and Pesticides Division, EPA, Region 7.

Termination

54. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

Issued this 5th day of October, 2011.



Karen A. Flourmoy
Acting Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101



Kristen Nazar
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North Fifth Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter to:

The Corporation Company, Inc.
Registered Agent, Union Pacific Railroad Company
112 Southwest 7th Street Suite 3C
Topeka, Kansas 66603

Mr. John Stewart, Manager
Environmental Field Operations
Union Pacific Railroad
1000 W. 4th Street
North Little Rock, Arkansas 72114

Union Pacific Railroad
Maintenance and Fueling Facilities
Kansas City, Kansas 66101

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Kansas:

Mr. Michael B. Tate
Interim Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612

10/6/11
Date

Jarah A. Moreno
Sender