

**New York State Department of Environmental Conservation**

**Office of General Counsel, Region 4**

1130 North Westcott Road, Schenectady, New York 12306-2014

Phone: (518) 357-2048 • Fax: (518) 357-2087

Website: [www.dec.ny.gov](http://www.dec.ny.gov)



Joe Martens  
Commissioner

CERTIFIED - RETURN RECEIPT REQUESTED

7011 1570 0003 0363 3680

August 5, 2013

Cynthia Scarano, Exc. VP  
Pan Am Railways, Inc.  
1700 Iron Horse Park  
North Billerica, MA 01862

Re: Order on Consent  
R4-2013-0422-61

Dear Ms. Scarano:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$5,000 the civil penalty pursuant to Paragraph I.

Sincerely,

Jill T. Phillips  
Assistant Regional Attorney  
Region 4

Enclosure

cc: J. Hess

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Violations  
of the Environmental Conservation  
Law ("ECL") Article 27,  
and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State  
of New York ("6 NYCRR"),

ORDER ON CONSENT  
File No.  
R4-2013-0422-61

-By-

Pan Am Railways, Inc.

RESPONDENT

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WHEREAS:

Jurisdiction

1. The Department has jurisdiction in all matters pertaining to the collection, treatment and disposal of solid waste pursuant to ECL Article 27 and applicable regulations.
2. Respondent, Pan Am Railways, Inc., owns and operates a railway line, including the railroad right-of-way, through Rensselaer County, New York.
3. Rensselaer County is a forest fire district, as per regulations at 6 NYCRR 191.1(ae).
4. ECL 9-1117(1) states that "the railroad right of way of all railroads which are operated through forest lands shall be kept cleared of all inflammable material whenever required by the department."
5. ECL 9-1105(4) states that "In any of the fire towns, or in any town included in a fire district as defined in subdivision 2 of section 9-1109, brush, logs, slash or other inflammable material shall not be left or allowed to remain on land within 25 feet of the right of way of a railroad or within 20 feet of the right of way of a public highway."
6. Regulations at 6 NYCRR 360-1.2(a) define solid waste as follows:  
  
“(1) Solid waste means, except as described in paragraph (4) of this subdivision, any garbage, refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded materials including solid, liquid, semi-solid, or contained gaseous material, resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permit under 33 USC 1342, as amended (86 Stat. 880), or source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) except as may be provided by existing agreements between the State of New York and the government of the United States (see section 360-1.3 of this Part).

- (2) A material is discarded if it is abandoned by being:
- (i) disposed of;
  - (ii) burned or incinerated, including being burned as a fuel for the purpose of recovering usable energy; or
  - (iii) accumulated, stored or physically, chemically or biologically treated (other than burned or incinerated) instead of or before being disposed of.

(3) A material is disposed of if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into groundwater or surface water.”

7. 6 NYCRR 360-1.5(a)(2) states that “no person shall dispose of solid waste in this State except at a disposal facility authorized to accept such waste for disposal pursuant to this Part or to a department-issued or court-issued order.”

8. ECL 71-2703(1) provides that “any person who violates any provision of Article 27 of the ECL or any rule or regulation promulgated thereunder shall be liable for a civil penalty not to exceed seven thousand five hundred dollars (\$7,500) for a first violation and one thousand five hundred dollars (\$1,500) for each day the violation continues.”

#### Violations

9. On April 19, 2013, Department staff observed numerous piles of abandoned, rotted creosote railroad ties disposed of along the length of Respondent’s railroad right-of-way in Rensselaer County, New York.

10. Respondent’s allowing the rotted creosote railroad ties to remain in the railroad right-of-way is a violation of ECL 9-1105(4) and 9-1117(1).

11. The abandoned, rotted creosote railroad ties constitute solid waste under 6 NYCRR 360-1.2(a).

12. Respondent’s disposal of solid waste, the rotted creosote railroad ties, in the railroad right-of-way is a violation of 6 NYCRR 360-1.5(a)(2).

#### Waiver of Hearing

13. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

NOW, having considered this matter and being duly advised, it is ORDERED that:

I. In respect of the aforesaid violation, a civil penalty in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) is hereby assessed against the Respondent. FIVE THOUSAND DOLLARS (\$5,000) of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by certified or bank check made payable to the NYS DEC.

The balance of the penalty, TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500), is suspended and shall not be payable, provided that Respondent fully complies with the requirements of this Order in a timely fashion. In the event that Respondent fails to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

II. The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or for it.

III. The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

IV. Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns.

V. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

VI. Respondent shall allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

Regional Engineer  
New York State Department  
of Environmental Conservation  
Region 4  
1130 N. Westcott Road  
Schenectady, New York 12306

IX. This Order is deemed effective on the date signed by the Department.

X. Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, his agents, his servants, his employees, his successors and his assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

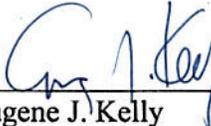
D. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

XII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violation contained in this Order.

DATED: 7/31, 2013  
Rotterdam, New York

Joseph Martens  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

  
\_\_\_\_\_  
Eugene J. Kelly  
Regional Director  
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

Pan Am Railways, Inc.

SIGNED:

Cynthia S. Scaroni

TITLE:

Executive Vice President

DATE:

7/1/13

STATE OF Massachusetts )

COUNTY OF Middlesex )

ss.:

On the 1<sup>st</sup> day of July in the year 2013, before me, the undersigned,

personally appeared Cynthia S. Scaroni,

(Full name)

personally known to me who, being duly sworn, did depose and say that he/she/they reside at

1700 Iron Horse Park, North Billerica, MA 01862

(Full mailing address)

and that he/~~she~~/they is (are) the Executive Vice President

(President or other officer or director or attorney in fact duly appointed)

of the Pan Am Railways, Inc.

(Full legal name of corporation)

the corporation described in and which executed the above instrument; and that he/she/they signed his/her/their name(s) thereto by the authority of the board of directors of said corporation.

Renee M. McDonough

Notary Public

Qualified in the County of: Middlesex

My Commission Expires: 6/22/2013



RENEE M MCDONOUGH  
NOTARY PUBLIC  
COMMONWEALTH OF MASSACHUSETTS  
MY COMMISSION EXPIRES 06/22/2018

## SCHEDULE OF COMPLIANCE

1. By November 1, 2013, Respondent shall remove all railroad ties from the railroad ties disposal sites contained in its railroad right-of-way throughout Rensselaer County and shall properly dispose of such railroad ties. Respondent shall provide proof of the proper disposal of the railroad ties to the Department within 15 days of the completion of the removal of the railroad ties.