

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
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CERTIFIED - RETURN RECEIPT REQUESTED
7015 0640 0000 6900 2871

April 15, 2016

Robert Burns, Esq.
Corporate Counsel
Pan Am Railways, Inc.
1700 Iron Horse Park
North Billerica, MA 01862

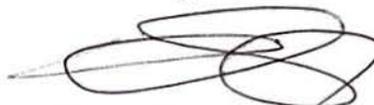
Re: Order on Consent
R4-2015-1013-120

Dear Mr. Burns:

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

This will also acknowledge receipt of \$7,500 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery
Assistant Regional Attorney
Region 4

Enclosure

cc: S. Preston, Captain
J. Hess

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged
Violations of Article 27 of the
Environmental Conservation Law
and Title 6 of the Official
Compilation of Codes,
Rules and Regulations of
the State of New York,

Order on Consent
R4-2015-0103-120

- by-

Pan Am Railways, Inc.
1700 Iron Horse Park
North Billerica, MA 01862

Respondent

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 from Hoosick, New York to Schaghticoke, New York, through Rensselaer County.
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 Subpart).

(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. Regulations at 6 NYCRR 360-1.5 (a)(2) state 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. On July 31, 2013, Respondent entered into an Order on Consent (R4-2013-0422-61) with the Department, for improper disposal of railroad ties.

9. The Order’s Schedule of Compliance provided that *“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.”*

Violations

10. On October 10, 2015, Department staff observed that numerous piles of railroad ties still remain stored on the railroad right-of-way, both in piles and scattered individually. In addition, many broken pieces of railroad ties remain scattered across the right-of-way in numerous locations, scattered in weedy areas or mixed with dirt and gravel in the ditches along the right-of-way. Department staff determined that some of the railroad ties that have been piled up have been removed from the track and replaced with new railroad ties.

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

12. The abandoned, creosote railroad ties constitute solid waste under regulations at 6 NYCRR 360-1.2(a).

13. Respondent's disposal of the creosote railroad ties, in the right-of-way, is a violation of regulations at 6 NYCRR 360-1.5(a)(2).

Civil Penalty

14. 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."*

Waiver of Hearing

15. Respondent affirmatively waives its right to a hearing in the manner provided by law, consents to the issuance and entry of this Order on Consent and agrees to be bound by the terms, provisions, and conditions contained herein.

NOW, being duly advised and having considered this matter, **IT IS HEREBY ORDERED THAT:**

I. Civil Penalty

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

I. With respect to the aforesaid alleged violations, a civil penalty in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000) of which SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500) shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department.

The balance SEVEN THOUSAND FIVE HUNDRED (\$7,500) shall be suspended so long as Respondent shall comply with the Schedule of Compliance. Payment of the above penalties shall not in any way alter Respondent's obligation to complete performance under the terms of this Order.

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. Settlement and Reservation of Rights

A. Upon completion of all obligations created in this Order, this Order settles only all claims for civil and administrative penalties concerning SPDES permit violations that pre-date the effective date of the Order and the violations described in the Motion for Summary Order.

B. Except as provided in Subparagraph III.A of this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or his designee (including, but not limited to, nor exemplified by, the rights to recover natural resources damages and to exercise any summary abatement powers) or authorities with respect to any party, including Respondent.

III. Schedule of Compliance

The attached Schedule of Compliance is incorporated into the Order on Consent.

IV. Force Majeure

Respondent shall not be in default of compliance with this Order if it is unable to comply with any provision of this Order solely because of an action of a national government or court, or an act of nature, war, strike, riot or catastrophe, as to any of which the negligence or willful misconduct of Respondent was not a proximate cause. Respondent shall notify DEC in writing immediately upon obtaining knowledge of any such event. Relief under this clause shall not be available if Respondent fails to timely comply with the notice requirement set out in this paragraph.

V. Communications

All communications required herein shall be made to:

Marcia Ellis
Regional Enforcement Coordinator
DEC Region 4
1130 North Westcott Road
Schenectady, NY 12306

VI. Access

Respondent shall allow duly authorized representatives of DEC and NYC DEP access to the facility referred to in this Order without prior notice, at such times as may be desirable or necessary in order for DEC and NYC DEP to inspect and determine the status of Respondent's compliance with this Order or the ECL.

VII. Indemnification

Respondent shall indemnify and hold DEC, New York State, and their representatives and employees harmless for all claims, suits, 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.

VIII. Review of Submittals

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.
2. The Department shall review each of the submittals Respondent makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.
3.
 - a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.
 - b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.
4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

IX. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent.

X. Modification

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.

XI. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to Paragraph X of this Order. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

XII. Effective Date

The effective date of this Order shall be the date it is signed by the Department.

Dated: *Apr 17 14*, 2016
Rotterdam, NY

Basil Seggos
Acting Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuance and entry of the foregoing Order, waives its rights to a hearing herein as provided by law, and agrees to be bound by the provisions, terms and conditions contained herein.

Pan Am Railways, Inc.

BY: Cynthia Scapano
TITLE: EXECUTIVE VICE PRESIDENT
DATE: 4-5-16

STATE OF MASSACHUSETTS)
~~NEW YORK~~)
COUNTY OF MIDDLESEX) ss.:

On the 5TH day of APRIL in the year 2016 before me, the undersigned, a Notary Public in and for the State, personally appeared CYNTHIA SCAPANO personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Robert B. Burns
Notary Public
Qualified in the County of: MASSACHUSETTS
My Commission Expires: 9-2-16



Schedule of Compliance

1. By December 31, 2016, Respondent shall remove all railroad ties from the disposal sites contained in its railroad right-of-way throughout Rensselaer County and shall properly dispose of such railroad ties. Respondent shall provide proof to the Department, of the proper disposal of the railroad ties, within 15 days of the completion of the removal of the railroad ties.