

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,)	
<i>ex rel.</i> LISA MADIGAN, Attorney General)	
of the State of Illinois,)	
)	
Complainant,)	PCB 2008-007
)	
v.)	
)	
UNION PACIFIC RAILROAD COMPANY,)	
a Delaware corporation,)	
)	
Respondent.)	

NOTICE OF FILING

John Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street - Suite 11-500
Chicago, Illinois 60601


Thomas A. Andreoli
Austin Kaplan
Sonnenschein Nath & Rosenthal LLP
233 South Wacker Drive
Chicago, Illinois 60606

Bradley P. Halloran
Hearing Officer
James R. Thompson Center
100 W. Randolph Street - Suite 11-500
Chicago, Illinois 60601

Please take notice that today, April 22, 2009, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing Complainant's Response in Opposition to Respondent's Motion to Sever, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

BY: 
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PEOPLE OF THE STATE OF ILLINOIS,)
ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois,)
)
Complainant,)
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)
v.)
)
UNION PACIFIC RAILROAD COMPANY)
)
Respondent.)

PCB 2008-07

**COMPLAINANT'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO SEVER**

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois and in support of its Response in Opposition to Respondent's motion to sever states as follows:

ARGUMENT

The State respectfully moves the Illinois Pollution Control Board ("The Board") to dismiss Respondent's motion to sever brought pursuant to 35 Ill. Adm. Code §§ 101.406 and 101.408. The Board should not sever this action because the Complaint properly consolidates claims that involve the same responsible party, the same facility, the same regulatory program – the NPDES program, the same NPDES Permit # IL0002127, and the same theory of liability.

Severance is only appropriate "in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused." 35 Ill. Adm. Code §101.408. Further, claims may be properly consolidated "if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party." 35 Ill. Adm. Code §101.406.

“The Board will not consolidate proceedings where the burdens of proof vary.” *Id.* Here, the law “clearly indicates that an action involving materially different issues may be severed by the court,” *Mount v. Dusing*, 414 Ill. 361, 367-68 (Ill. 1953). In this case the claims at issue arose on Respondent’s property and no material prejudice would be caused by the consolidation of the claims. The convenience, expediency, and complete determination of claims would be best served by both issues being consolidated and would “enhance the convenient disposition of the business of the court.” *Id.*, 414 Ill. at 367.

The Pertinent Facts

“Proviso Yard” and “Global 2” inter modal facility are located on the same parcel of land, just in different locations on the parcel. The weir structure is located on the northern edge of Respondent’s property. A simple Google map search shows that they have different street addresses based upon their proximity to specific streets bordering the entire facility, but they are located on the same parcel of land. “*Union Pacific Railroad operates a railroad classification yard and an intermodal facility located in Cook County that encompasses approximately 500 acres of land....Stormwater runoff from the railroad yard facility...pass through a weir structure located on the northern edge of the Union Pacific Railroad’s property. This weir structure serves as the discharge point for the IL NPDES permit # IL0002127*”. (Lee Hammond, UPRR’s Manager of Environmental Field Operations response to VN dated June 6, 2006. See letter attached as Complainant’s Exhibit A).

More significantly to the law suit, the violations were noted at and below UPRR’s onsite oil/water separator. The issue and violations in both incidents involve inadequate operation/maintenance/design of the oil/water separator to comply with UPRR’s NPDES permit,

which allowed oil sheens downstream of the permitted discharge point. A properly sized, maintained and operated oil/water separator would not cause or allow sheen from its effluent.

Respondent's argument that the violations occurred "in different years" is only technically accurate but legally insufficient to be a cause for severance. The first incident was observed on November 23, 2005, and the second on or about February 19, 21006. There is less than 90 days separating these incidents, which were observed in the same location- immediately downstream of UPRR's oil/water separator. Such a vacuous argument provides no support to the claim that two separate proceedings are warranted to avoid any prejudice to Respondent.

Respondent is erroneously arguing that if violations occurred on the northern edge and southern edge of its property, separated only by a couple of months, two separate claims should be brought because the locations of the violations are not identical even though both violations occurred on the same property owned by the same party. This kind of position leads to absurd results which results in the waste of scarce resources and prejudice to both parties.

This case in no way differs from cases involving POTWs where there are a few months of BOD violations caused by a particular problem like undersized calrifiers and some months of fecal coliform effluent violations caused by inadequate chlorination. No Court or the Board would force the State to prosecute these violations separately –they all involve the same responsible party, the same facility and the same regulatory scheme – the NPDES program. Absolutely no prejudice would come to UPRR by trying this case in a single matter. If any prejudice would come, it would be to the State if the Board allowed the matters to be severed as the Board would be precluded from considering the pattern of violations at this facility and would have to waste scarce resources to essentially try the same matter twice.

Theory of Liability

Respondent argues that “...the State’s theory of liability as to each instance is distinct.” (Respondent’s Motion p.5). This is incorrect. The Act imposed *malum prohibitum* liability on parties under the Act. The Act is “*malum prohibitum*, there being no proof of guilty knowledge or mens rea necessary to support a finding of guilt” *Hindman v. The Pollution Control Board*, 42 Ill. App.3d 766, 769, 356 N.E.2d 669, 672 (1976).

Respondent contends that because the state can not identify the cause or source of the alleged November 23, 2005 release and because the cause of the February 19, 2006 release was not that of a Union Pacific employee, UPRR cannot be held liable for the release. However, contrary to Respondents assertion, the appellate court in *Bath v. Pollution Control Board*, 10 Ill.App.3d 507, 294 N.E.2d 778 (1973), held that “knowledge, intent or scienter is not an element of the case to be established by the Environmental Protection Agency at the hearing before the Pollution Control Board upon the issue of [pollution]” *Id.*, 10 Ill.App.3d at 510, 294 N.E.2d at 781 (1973). Further, Illinois courts have found environmental liability even if the “discharges were accidental and not intentional or that they were the result of an “Act of God” beyond [defendant’s] control” *Freeman Coal Mining Corporation v. Pollution Control Board*, 21 Ill.App.3d, 157,163, 313 N.E.2d 616, 621 (1974).

Even though the Act is not a strict liability statute, Illinois courts have repeatedly held that ... “the analysis applied by courts in Illinois for determining whether an alleged polluter has violated the Act is whether the alleged polluter exercised sufficient control over the source of the pollution” *Illinois v. Davinroy Contractors*, 249 Ill.App.3d 788, 793, 618 N.E.2d 1282, 1286

(1993). In the case at bar, the Respondent exercised sufficient control over the rail yard, the source of the pollution,

CONCLUSION

The Respondent erroneously asserts that both claims should be severed because the “claims considered together would create an impermissible negative inference as to Respondents liability” and the claims are “based on different standards”. (Respondent’s Motion p.4). Both assertions are not supported by the facts. The claims should remain consolidated “in the interest of convenient, expeditious, and complete determination of claims.” 35 Ill. Adm. Code §101.408. Further, under a long line of Illinois environmental cases, the pertinent inquiry is whether or not the Respondent had sufficient control over the source of the pollution at the time of the discharge of the pollutant. It does not matter whether the discharge was accidental or beyond the control of the Respondent. It is undisputed that Respondent exercised sufficient control over the source of the pollution at the time of the discharge.

Trying the matter together prejudices no party, provides an economy of effort on the part of all parties and avoids an awkward, arbitrary, inefficient and highly prejudicial position of trying the same case twice.

Therefore, for the reasons stated above, the Board should dismiss Respondent’s motion to sever and hear this one consolidated claim unified by the same facts, the same responsible party, the same regulatory program, and the same theory of liability.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

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UNION PACIFIC RAILROAD COMPANY



1400 Douglas St.
Stop 1080
Omaha, NE 68179

June 6, 2006
File: Environmental Protection
Proviso Yard, Melrose Park, IL

RECEIVED
JUN 07 2006

IEPA

UPS Tracking # 1Z 635 800 22 1287 441 1

Illinois Environmental Protection Agency
Ms. Beverly Booker
Bureau of Water
CAS #19,
P.O. Box 19276
Springfield, IL 62794-9276

Org: Records Unit
cc: Beverly Booker
Roger Callaway
Tim Kluge
Des Plaines Region, WPC
John Waligore, DLC
Emergency Response, MC #29

Agency reply due 07/05/2006

Re: IEPA Violation Notice: M-2006-02009 Facility I.D. #: IL0002127 Incident # H-2006-0193

Dear: Ms. Booker,

The following is a response to Violation Notice M-2006-02009 dated April 25, 2006 pursuant to Section 31(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)(1).

Attachment A of the violation notice references an investigation conducted by the Illinois EPA on February 19 and 22, 2006 of Union Pacific Railroad - Proviso Yard facility I.D. # IL0002127. Responses to each violation are explained with what actions have been or will be implemented and the time frame for implementation.

Attached for reference is a copy of Union Pacific Railroads response to IEPA's Incident Inquiry Letter dated 3-1-2006. Together this letter and the response to the incident inquiry form the response to the violation notice.

Deposited Contaminants

Union Pacific Railroad operates a railroad classification yard and an intermodal facility located in Cook County that encompasses approximately 500 acres of land. The area is in general bounded by Addison Creek to the east, The City of Melrose Park and Northlake to the north, The City of Berkley and Bellwood to the south and the Tri-State Expressway and City of Elmhurst to the west. Stormwater runoff from the railroad yard facility, the surrounding municipalities, the Tri-State Expressway and adjacent industries pass through a weir structure located on the northern edge of the Union Pacific Railroad's property. This weir structure serves as the discharge point for the IL NPDES permit # IL0002127.

The Global 2 Intermodal facility occupies the southern property boundary of Union

- Complainant Exhibit A -

Pacific railroads operations. Global 2 Intermodal facility has two areas that have been identified in the Stormwater Pollution Prevention Plan that perform maintenance activities to tractors and lift cranes used in intermodal operations. Outside contractors under contract to Union Pacific Railroad perform these maintenance activities. Quarterly inspections are performed by Union Pacific Railroad to ensure best management practices are being followed and petroleum products are stored properly. Spill absorbents are kept on hand for emergencies at both the tractor garage and the lift crane maintenance area. Structural improvements to both areas include the installation of oil water separators at the tractor garage and the lift crane maintenance pad. These improvements are now schedule to be installed the first quarter 2007.

Other outside contractors and drivers of other intermodal equipment have access to Global 2 Intermodal 24 hours a day 7 days a week. As part of an inbound inspection procedure all trucks, trailers and containers pass through an inspection gate where the condition of the vehicle and equipment is part of an overall inspection procedure. Operating personnel are trained to identify potential conditions that may cause environmental problems while on Union Pacific property.

Contractors working for shipping companies and Union Pacific Railroad are observed on a daily basis by onsite security personnel and railroad operating managers. Equipment found to be in need of repair or where housekeeping needs improvement, are directed to make corrections as required. Maintenance of vehicles (tractors and trucks) is restricted to certain areas of the facility.

Union Pacific Railroad will continue to maintain and monitor the weir structure on a daily basis for visible contaminates. Notification of spills and releases of regulated substances on railroad property will be reported, as required and clean up activities will be initiated. Non-regulated materials released while in transportation will be removed as part of the railroads annual track cleaning activities and disposed of in the appropriate manner. Stormwater contamination from upstream and down stream adjacent municipalities and industries will be brought to their attention and information forwarded to IEPA. Adjacent industries will be asked to correct conditions causing contaminated stormwater runoff.

While not required by NPDES permit IL0002127, a Stormwater Pollution Prevention Plan (SWPPP) has been written and implemented at both the railroad yard and intermodal facility. Quarterly and annual stormwater inspections of regulated source areas are conducted and deficiencies corrected as required. The plan is reviewed on an annual basis and updated as necessary.

A Spill Prevention, Control and Countermeasure (SPCC) plan is in place at both Proviso Yard and Global 2 Intermodal facility. Annual training is conducted for personnel who are required handle or use petroleum products. The SPCC plan has been submitted to the Metropolitan Water Reclamation District of Greater Chicago for their review.

Discharge of Contaminates

The weir provides stormwater treatment for source areas upstream of the structure. The weir structure is a three-compartment weir designed to separate petroleum products from stormwater. Two rope skimmers provide a means to remove oils from the water surface. The treated water and oil mixture drain to an in ground process tank. Absorbent booms and containment booms are also placed in the structure to aid in petroleum product removal. Maintenance of the weir structure, process tank and absorbents continue on a daily basis.

An upstream groundwater source of contamination has been identified as a possible source of petroleum contamination. The fueling facility located on the south side of the Proviso diesel shop has been re-built with a containment liner and a ground water collection system. The existing stormsewer adjacent to the diesel shop has been slipped lined to prevent groundwater infiltration into the sewer. This site has been entered into the Illinois Site Remediation Program (IL Inventory # 0311865222). The current construction project was completed in May 2006.

To improve oil separation a new in ground oil water separator will be installed in the 3rd quarter 2006 to replace the existing weir structure. A new discharge point will be provided to industries located to the north of Union Pacific Railroad property.

Caused Offensive Conditions

The current weir structure continues to provide oil-water separation within the NPDES permit limits. Daily monitoring of the weir structure and the adjacent industries and municipalities are conducted to prevent conditions where the weir will not function as designed. As required, vacuum trucks and absorbent materials are used to supplement the oil skimming operations from the water surface. Spills and releases of regulated substances to the environment, if they occur, are contained and cleaned up.

Installing a new oil separation system and segregating stormwater flow from other industries will improve the quality of Union Pacific Railroads discharge.

Training in stormwater pollution prevention and spill containment procedures are given to affected employees on an annual basis. Periodic safety meetings are held where spill prevention and stormwater issues are discussed and solutions to correct conditions implemented.

Maintenance of the railroad yard to include periodic cleaning of the track structure will continue on an annual basis. Monitoring of stormwater flows from adjacent municipalities and industries will continue. Where off-site contamination is found, IEPA will be notified.

Other non-specific "offensive conditions" will be dealt with on a case by case basis.

If such a situation arises, employees are trained to notify the railroad's Response Management Communication Center at 1-888-877-7267. Local emergency response personnel and equipment are available if conditions warrant action.

If you have any questions or require additional information, please contact Lee Hammond at 402-544-8826.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Lee Hammond", with a long horizontal flourish extending to the right.

W. Lee Hammond
Manager Environmental Field Operations

Attachment.

g:\msword03\northern\closeout5\WLH 4-25-06 IEPA NOV Proviso Weir

CERTIFICATE OF SERVICE

I, Zemeheret Bereket-Ab, an attorney, hereby certify that I caused a copy of Complainant's Response in Opposition to Respondent's Motion to Sever, along with Notice of Filing and Certificate of Service, to be served upon the service list on April 22, 2009, by regular mail.



ZEMEHERET BEREKET-AB