

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.)	
)	VIA ELECTRONIC FILING
UNION PACIFIC RAILROAD COMPANY,)	
a Delaware Corporation,)	
)	
Respondent.)	

NOTICE OF FILING

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Please take notice that on August 27, 2010, I filed with the Office of the Clerk of the Illinois Pollution Control Board, by electronic filing, Union Pacific Railroad Company's Motion for Leave to File *Instantly*, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY



By:

Attorney for Respondent
Union Pacific Railroad Company

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MOTION FOR LEAVE TO FILE *INSTANTER*

NOW COMES Union Pacific Railroad Company (“Union Pacific”), by and through its attorney, Thomas A. Andreoli, pursuant to Section 101.502 of the General Rules of the Illinois Pollution Control Board (the “Board”), 35 Ill. Admin. Code § 101.502, and 735 ILCS 5/2-616(a), and hereby requests leave to file its Answer and Amended Affirmative and Additional Defenses. A copy of Union Pacific’s amended pleading is attached to this motion as Exhibit A. In support of this motion, Union Pacific states as follows:

1. The State filed its Complaint on July 16, 2007.
2. This matter was continued on various occasions to provide the parties an opportunity to resolve the Complaint’s allegations amicably. *See, e.g.*, Hr’g Officer Orders (Aug. 30, 2007, Oct. 26, 2007, Dec. 13, 2007, Feb. 28, 2008, April 24, 2008, June 26, 2008, Sept. 4, 2008, Oct. 9, 2008, Nov. 5, 2008, and Jan. 15, 2009). The parties were unable to reach an amicable resolution. Hr’g Officer Order (March 5, 2009).
3. On April 3, 2009, Union Pacific filed a Motion to Sever pursuant to Sections 101.406 and 101.408, 35 Ill. Admin. Code §§ 101.406 and 101.408 and 735 ILCS 5/2-1006. The

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Board motion denied the Motion to Sever on August 20, 2009. The Board denied Union Pacific's Motion for Reconsideration on December 3, 2009.

4. Union Pacific timely filed its Answer and Affirmative and Additional Defenses on January 8, 2010. The State did not reply or otherwise respond to Union Pacific's pleading within the 30 days provided under the Board's General Rules, 35 Ill. Admin Code § 101.506, or the time period for challenging pleadings other than the complaint provided under Illinois Supreme Court Rule 182, Ill. S. Ct. R. 182 (21 days).

5. On February 11, 2010, the Hearing Officer ordered the parties to serve written discovery on or before March 12, 2010. Am. Hr'g Officer Order, Feb. 11, 2010. The State and Union Pacific each served written discovery by March 12, 2010.

6. The State and Union Pacific responded to one another's written discovery and produced documents during May 2010. Union Pacific responded to 28 interrogatories and 19 production requests and produced 579 pages of documents to the State.

7. In its written discovery, the State asked Union Pacific to state all bases, facts and assumptions supporting the three Additional and Affirmative Defenses Union Pacific had filed on January 8, 2010. Union Pacific answered these interrogatories in full. *See* Union Pacific's Answers to the State's 1st Set of Interrogs. at Nos. 23-25 (attached to this motion as Exhibit B). Union Pacific also produced and identified the documents relied upon or referenced in support of its asserted defenses. *See* Union Pacific's Resp. to the State's 1st Set of Requests for Produc. at No. 3 (attached as Exhibit C).

8. During the May 24, 2010 telephonic status conference, the State raised the issue of its omission to respond to Union Pacific's Answer and Affirmative and Additional Defenses. Am. Hr'g Officer Order (May 24, 2010). Union Pacific advised that it would object in the event

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the State filed a motion directed at the sufficiency of Union Pacific's asserted defenses at that late date in the proceeding, including after exchange of discovery.

9. On the June 29, 2010 telephonic status, the parties discussed the exchange of supplemental written discovery and the scheduling of oral discovery. Hr'g Officer Order, June 29, 2009.

10. Union Pacific supplemented its discovery during July 2010 including production of an additional 166 pages of documents. Written discovery is complete, although Union Pacific has requested that the State also supplement its discovery. (The State has not supplemented its discovery as of this date.) Union Pacific also has served notices of depositions on the State and subpoenaed a third-party witness referenced in the State's discovery, with those proceedings to be scheduled by agreement of the counsel.

11. On August 9, 2010, the State filed a Motion to Strike and Dismiss Union Pacific's Affirmative Defenses pursuant to 735 ILCS 5/2-615. The motion did not disclose that Union Pacific previously had responded in detail to discovery from the State regarding the bases for the asserted defenses.

12. Union Pacific has opposed the State's Motion to Dismiss. Union Pacific Opp'n to Motion to Strike & Dismiss Affirmative Defenses (Aug. 27, 2010). The State's motion should be denied for three reasons: (1) It is untimely under the General Rules, 35 Ill. Admin. Code § 101.506, and/or the Supreme Court Rules, Ill. S. Ct. R. 182. (2) The alleged pleadings defect challenged by the motion is moot; Union Pacific previously has detailed for the State the specific facts underlying its asserted defenses in response to discovery. And (3) the State's motion is substantively without merit. Each of Union Pacific's asserted defenses is well-pled consistent

with Illinois law and, if proved—which is *not* at issue at this juncture—would defeat the State’s claims entirely.

13. With this motion, Union Pacific is requesting leave pursuant to Section 2-616(a) to file *instanter* the Answer and Amended Affirmative and Additional Defenses (attached as Exhibit A). Amendment of pleadings is available anytime before final judgment, whether in form or in substance, on just and reasonable terms. 735 ILCS 5/2-616(a). A party’s request to amend its defenses should be liberally construed and any doubts should be resolved in favor of allowing amendment. *See, e.g., People v. Vill. of Round Lake Park*, 171 Ill. App. 3d 443, 447, 525 N.E.2d 868, 870-71 (2d Dist. 1988).

14. In this case, Union Pacific’s request should be granted as a matter of course. There is no possible prejudice to the State which already is fully on notice of the facts supporting Union Pacific’s amended affirmative defenses. On the other hand, denial of Union Pacific’s request to amend would impose extreme prejudice by divesting Union Pacific of its defenses without cause. Just as the State must be put to its proof in any enforcement proceeding, Union Pacific equally should have the chance to prove its defenses. *See, e.g., Vill. of Round Lake Park*, 171 Ill. App. 3d at 449, 525 N.E.2d at 872 (“The ends of justice have been served here by at least allowing defendants to pursue their defense.”).

15. Because this motion is not dispositive of the proceeding, it is properly directed to the Hearing Officer. 35 Ill. Admin. Code § 101.502(a).

WHEREFORE, for these reasons, Union Pacific Railroad Company respectfully requests that the Hearing Officer grant its Motion for Leave to File *Instante*.

Dated: August 27, 2010

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

A handwritten signature in black ink, appearing to read 'T. Andreoli', with a horizontal line extending to the right.

By:

Thomas A. Andreoli
Its Attorney

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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, an attorney, hereby certify that I caused a copy of Union Pacific Railroad Company's Motion for Leave to File *Instanter* along with Notice of Filing and Certificate of Service to be served upon the following persons on August 27, 2010, by regular mail and email:

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**UNION PACIFIC RAILROAD COMPANY'S
ANSWER AND AMENDED AFFIRMATIVE AND ADDITIONAL DEFENSES**

Union Pacific Railroad Company ("Union Pacific"), by and through its attorney,
Thomas A. Andreoli, and for its answer to plaintiff's Complaint states as follows:

Count I

Causing, Threatening or Allowing Water Pollution

1. This count is brought on behalf of the People of the State of Illinois, *ex rel.* LISA MADIGAN, the Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA"), pursuant to Section 31 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/31 (2004).

ANSWER: Union Pacific admits the State filed a Complaint on or about July 16, 2007. To the extent that the allegations in Paragraph 1 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 1 and, on that basis, denies the same.

2. The Illinois EPA is an agency of the State of Illinois created pursuant to Section 4 of the Act, 415 ILCS 5/4 (2004), and charged, *inter alia*, with the duty of enforcing the Act.

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Additionally, pursuant to Section 402(b) of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1342(b), the Illinois EPA administers and enforces the CWA’s National Pollutant Discharge Elimination System (“NPDES”) permit program within the State of Illinois.

ANSWER: To the extent that the allegations in Paragraph 2 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 2 consist of opinion, argument and/or legal conclusions, no response is required. Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 2 and, on that basis, denies the same.

3. At all times relevant to this Complaint, Union Pacific Railroad Company (“Respondent”), has been a Delaware corporation duly authorized to do business in Illinois.

ANSWER: Union Pacific admits that it is a corporation organized and existing under the laws of the State of Delaware. Union Pacific admits that it is authorized to do business in the State of Illinois.

4. At all times relevant to this Complaint, Respondent has operated a rail yard and intermodal facility, located at 301 West Lake Street, City of Northlake, County of Cook, Illinois (“Facility”).

ANSWER: Union Pacific admits that it operates a classification yard, the Proviso Yard, at 5050 W. Lake Street, Melrose Park, Ill. Union Pacific admits that it operates an intermodal facility, Global II, located at 301 W. Lake Street, Northlake, Ill. Union Pacific further responds that the Proviso Yard and Global II are different properties and denies that they are the same “Facility.” Union Pacific denies any remaining allegations of Paragraph 4.

5. Stormwater and accumulated groundwater from the Facility are treated by passing through an oil/water separator (“Separator”), prior to being discharged into Mud Creek, which is a tributary of Addison Creek. The Separator consists of several weirs over which water flowing

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through the Separator passes, prior to being discharged. Respondent's discharge of the treated stormwater and accumulated groundwater is authorized under the terms of its Illinois EPA-issued NPDES Permit No. IL0002127 ("NPDES Permit").

ANSWER: Union Pacific admits that NPDES Permit No. IL0002127 applies to a discharge point located at the Proviso Yard. Union Pacific further responds that the Proviso Yard is located at the downstream end of the regional storm water drainage basin and that the discharge point drains an area larger than the Proviso Yard including offsite sources. Union Pacific admits that Mud Creek receives the outflow from NPDES Permit No. IL0002127. Union Pacific admits that Mud Creek connects with Addison Creek. Union Pacific admits that the discharge point described in Paragraph 5 consisted of a weir structure in the past. Union Pacific further responds that portions of the Proviso Yard have been enrolled in the Illinois Environmental Protection Agency's voluntary site remediation program since 2003 for storm water management improvements, which have included replacement of the weir structure with best available technology. In addition, Union Pacific responds that storm water discharge from the separate Global II intermodal property was governed under a different general NPDES permit (No. ILR003013) until approximately March 1, 2006. Union Pacific denies any remaining allegations of Paragraph 5.

6. On November 23, 2005, an employee of the Metropolitan Water Reclamation District of Greater Chicago ("MWRDC") notified Illinois EPA that there had been a recent fuel oil release at the Facility.

ANSWER: Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6 and, on that basis, denies the same.

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7. On November 23, 2005 (“November 23rd Inspection”) the Illinois EPA inspected the Facility and observed a rainbow and silver colored sheen on the water extending from a storm culvert at the Facility’s Locomotive Fueling Pad, continuing on through a drainage ditch and ultimately flowing into the Separator and then proceeding over the final weir in the Separator, before being discharged into Mud Creek.

ANSWER: Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7 and, on that basis, denies the same.

8. During the November 23rd Inspection, the Illinois EPA observed the rainbow and silver colored sheen along the length of the oil/water separator structure, continuing past the final weir in the structure, and, ultimately, in Mud Creek.

ANSWER: Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8 and, on that basis, denies the same.

9. On February 19, 2006, or on a date better known to Respondent, a diesel fuel release occurred at the Facility.

ANSWER: Union Pacific admits that on or about February 19, 2006 a non-railroad, third-party contractor spilled diesel fuel at Global II. Union Pacific denies any remaining allegations of Paragraph 9.

10. On February 21, 2006, representatives of the Illinois EPA and the MWRDC conducted an inspection of the Facility and confirmed that a diesel fuel release had indeed occurred.

ANSWER: Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10 and, on that basis, denies the same.

11. On February 22, 2006 (“February 22nd Inspection”), representatives of the Illinois EPA and the MWRDC returned to the Facility and met with a representative for the Respondent.

ANSWER: Union Pacific admits that on or about February 22, 2006 its employee, Lee Hammond, met with Allen Andersen and Donald Klopke of the Illinois

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Environmental Protection Agency and Joseph Salerno of the Metropolitan Water Reclamation District of Greater Chicago at Global II and the Proviso Yard.

Union Pacific denies any remaining allegations of Paragraph 11.

12. During the February 22nd Inspection, Respondent's representative informed the Illinois EPA and MWRDC representatives that one of Respondent's contractors had caused the fuel release when a fuel line on one of the Respondent's contractor's trucks ruptured, discharging diesel fuel into a storm sewer inlet at the Facility.

ANSWER: Union Pacific denies that its "representative informed Illinois EPA and MWRDC representatives that one of [its] contractors had caused the fuel release." Union Pacific admits that its employee, Lee Hammond, informed certain representatives of the Illinois Environmental Protection Agency and the Metropolitan Water Reclamation District of Greater Chicago that a non-railroad, third-party contractor spilled diesel fuel at Global II on or about February 19, 2006. Union Pacific denies any remaining allegations of Paragraph 12.

13. During the February 22nd Inspection, the Illinois EPA and the MWRDC representatives determined that at least some of the diesel fuel which had been released as a result of the rupture to the fuel line had flowed through the Facility's Separator and had subsequently been discharged into Mud Creek.

ANSWER: Union Pacific is without knowledge sufficient to form a belief as to the truth of the remaining allegations of Paragraph 13 and, on that basis, denies the same.

14. Section 12(a) of the Act, 415 ILCS 5/12(a)(2006), provides as follows:

No person shall:

- (a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

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ANSWER: To the extent that the allegations in Paragraph 14 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

15. Section 3.315 of the Act, 415 ILCS 5/3.315, (2006), provides the following definition:

“Person” is any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

ANSWER: To the extent that the allegations in Paragraph 15 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

16. Respondent, a Delaware corporation, is a “person,” as that term is defined in Section 3.315 of the Act.

ANSWER: To the extent that the allegations in Paragraph 16 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 16 consist of opinion, argument and/or legal conclusions, no response is required. To the extent that any response is required, Union Pacific admits that it is a Delaware corporation.

17. Section 3.165 of the Act, 415 ILCS 5/3.165 (2006), provides the following definition:

“Contaminant” is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

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ANSWER: To the extent that the allegations in Paragraph 17 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

18. The rainbow and silver colored fuel oil sheen that was observed on the water discharging into Mud Creek is a “contaminant,” as that term is defined by Section 3.165 of the Act.

ANSWER: To the extent that the allegations in Paragraph 18 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 18 consist of opinion, argument and/or legal conclusions, no response is required. To the extent that any response is required, Union Pacific denies any remaining allegations of Paragraph 18.

19. Section 3.545 of the Act, 415 ILCS 5/3.545 (2006), provides the following definition:

“Water pollution” is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety, or welfare, or domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

ANSWER: To the extent that the allegations in Paragraph 19 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

20. The rainbow and silver colored fuel oil release observed in Mud Creek during the November 23, 2005 Inspection constitutes “water pollution,” as that term is defined by Section 3.545 of the Act, 415 ILCS 5/3.545 (2006).

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ANSWER: To the extent that the allegations in Paragraph 20 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 20 consist of opinion, argument and/or legal conclusions, no response is required. To the extent that any response is required, Union Pacific denies any remaining allegations of Paragraph 20.

21. The diesel fuel released on or about February 19, 2006 constitutes “water pollution,” as that term is defined by Section 3.545 of the Act, 415 ILCS 5/3.545 (2006).

ANSWER: To the extent that the allegations in Paragraph 21 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 21 consist of opinion, argument and/or legal conclusions, no response is required. To the extent that any response is required, Union Pacific denies any remaining allegations of Paragraph 21.

22. Section 3.550 of the Act, 415 ILCS 5/3.550 (2006), provides the following definition:

“Waters” means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon the State.

ANSWER: To the extent that the allegations in Paragraph 22 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

23. The water in the Separator at the Facility, as well as in Mud Creek, constitute “waters,” as that term is defined in Section 3.550 of the Act.

ANSWER: To the extent that the allegations in Paragraph 23 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required. To the extent that the allegations in Paragraph 23 consist of opinion, argument and/or legal conclusions, no response is required.

24. By causing, threatening or allowing the rainbow and silver colored fuel oil sheen to discharge from the Separator into Mud Creek, as well as by allowing the diesel fuel release at the Facility into Mud Creek, Respondent caused, threatened or allowed the discharge of a contaminant into the environment.

ANSWER: Deny.

25. By causing, threatening or allowing the discharge of the rainbow and silver colored fuel oil sheen and the diesel fuel, both of which are "contaminants," to discharge into Mud Creek, a water of the State, Respondent caused, threatened or allowed water pollution in Illinois, in violation of Section 12(a) of the Act, 415 ILCS 5/12(a)(2006).

ANSWER: Deny.

Count II

Causing, Threatening or Allowing Water Pollution

1-13. Complainant realleges and incorporates by reference herein paragraphs 1 through 13 of Count I as paragraphs 1 through 13 of this Count II.

ANSWER: Paragraphs 1-13 of Count II incorporate and re-allege preceding paragraphs; no response is required. Union Pacific affirmatively incorporates and re-alleges its answers to paragraphs 1-13 of Count I.

14. Section 12(d) of the Act, 415 ILCS 5/12(d)(2006), provides as follows:

No person shall:

* * * *

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

ANSWER: To the extent that the allegations in Paragraph 14 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

15. On at least two occasions, Respondent deposited petroleum products, which are contaminants, onto the land in such place and manner as to create a water pollution hazard, in violation of Section 12(d) of the Act, 415 ILCS 5/12(d)(2006).

ANSWER: Deny.

Count III

Failure to Comply with the Terms and Conditions of the NPDES Permit

1-13. Complainant realleges and incorporates by reference herein paragraphs 1 through 13 of Count I as paragraphs 1 through 13 of this Count III.

ANSWER: Paragraphs 1-13 of Count III incorporate and re-allege preceding paragraphs; no response is required. Union Pacific affirmatively incorporates and re-alleges its answers to paragraphs 1-13 of Count I.

14. Section 12(f) of the Act, 415 ILCS 5/12(f)(2006), provides as follows:

No person shall:

* * * *

(f) Cause, threaten, or allow the discharge of any contaminant into the waters of the State, as defined herein, including but not limited to, any waters to any sewage works, or into any well or from any point source within the State, without an NPDES permit for point source discharges issued by the Agency under section 39(b) of this Act, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board with respect to the NPDES program.

ANSWER: To the extent that the allegations in Paragraph 14 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

15. Section 309.102(a) of the Illinois Pollution Control Board Water Pollution regulations (“Board Water Pollution Regulations”), 35 Ill. Adm. Code 309.102(a), provides as follows:

- a. Except as in compliance with the provisions of the Act, Board regulations and the CWA, and the provisions and conditions of the NPDES permit issued to the discharger, the discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well shall be unlawful.

ANSWER: To the extent that the allegations in Paragraph 15 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

16. The discharge of petroleum products from the Separator into Mud Creek is a violation of Respondent’s NPDES Permit and is therefore a violation of Section 309.102(a) of the Board Water Pollution Regulations, 35 Ill. Adm. Code 309.102(a).

ANSWER: Deny.

17. By violating Section 309.102(a) of the Board Water Pollution regulations, 35 Ill. Adm. Code 309.102(a), Respondent thereby, also violated Section 12(f) of the Act, 415 ILCS 5/12(f)(2006).

ANSWER: Deny.

Count IV

Violation of Water Quality and Effluent Standards

1-14. Complainant realleges and incorporates by reference herein paragraphs 1 through 14 of Count I as paragraphs 1 through 14 of this Count IV.

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ANSWER: Paragraphs 1-14 of Count IV incorporate and re-allege preceding paragraphs; no response is required. Union Pacific affirmatively incorporates and re-alleges its answers to paragraphs 1-14 of Count I.

15. Section 302.203 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203, provides as follows:

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin ...

ANSWER: To the extent that the allegations in Paragraph 15 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

16. Section 304.105 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.105, provides as follows:

In addition to the other requirements of this Part, no effluent shall, alone or in combination with other sources, cause a violation of any applicable water quality standard . . .

ANSWER: To the extent that the allegations in Paragraph 16 purport to describe or cite statutory provisions, such provisions speak for themselves and no response is required.

17. On November 23, 2005, and on February 19, 2006, or on dates better known to the Respondent, Respondent caused or allowed petroleum products to leave the Separator at the Facility and to enter Mud Creek.

ANSWER: Deny.

18. By allowing the petroleum products to enter Mud Creek, Respondent thereby violated the water quality standard found in Sections 302.203 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203.

ANSWER: Deny.

19. Through its violation of Section 302.203 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203, Respondent thereby violated Section 304.105 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 304.105.

ANSWER: Deny.

20. By violating Sections 302.203 and 304.105 of the Board Water Pollution Regulations, 35 Ill. Adm. Code 302.203 and 304.105, Respondent thereby, also violated Section 12(a) of the Act, 415 ILCS 5/12(a)(2006).

ANSWER: Deny.

Amended Affirmative and Additional Defenses

In addition to the foregoing denials, Union Pacific asserts the following Amended Affirmative and Additional Defenses.

Common Allegations

A. Background Facts

1. Union Pacific acquired the former Chicago & Northwestern Railway Company (“CNW”) in 1995. The CNW formerly operated the Proviso Yard and Global II.

2. The Proviso Yard is located at 5050 W. Lake Street in Melrose Park, Illinois. It is a rail classification yard. Union Pacific services locomotives and divides railroad cars onto different tracks at the Proviso Yard.

3. Global II is located at 301 W. Lake Street in Northlake, Illinois. Global II is an intermodal facility staffed by non-railroad contractors that serves as a staging ground to exchange shipping products between rail and truck.

B. Initial Investigation And Improvements

4. Since its acquisition of the CNW, Union Pacific has used structural and non-structural activities to mitigate storm water impacts at the Proviso Yard and Global II, including the effects of off-site and/or residual subsurface pollution.

5. In 1998, Patrick Engineering on behalf of Union Pacific conducted a storm water drainage, sanitary sewer and industrial sewer location study of the Proviso Yard. The study showed that the Proviso Yard is located at the downstream end of a regional storm water drainage basin and receives substantial storm water flows from off-site sources including other industry.

6. In 2001-2002, Union Pacific made various initial structural improvements to the storm water management system at the Proviso Yard. Among other things, these improvements segregated storm water discharges from flows to the Proviso Yard's wastewater treatment plant and abated groundwater infiltration into the industrial sewer.

C. Entry Into Illinois EPA's Voluntary Site Remediation Program

7. In June 2003, Union Pacific entered the Proviso Yard into the Illinois EPA's voluntary Site Remediation Program (SRP # 0311865222) to address issues associated with storm water and residual subsurface contamination at the site.

8. In May 2004, TRC Environmental submitted a Remedial Investigation Report for the Proviso Locomotive Facility Area to the Illinois EPA on Union Pacific's behalf. This report analyzed storm water flows through the Proviso Yard and recommended additional investigation activity and engineering feasibility study to support a remedial design solution.

9. In August 2004, TRC Environmental advised Illinois EPA regarding planned construction activities at the Proviso Yard by Union Pacific intended to improve the storm water

sewer adjacent to the Proviso Yard Diesel Shop and abate a potential pathway for subsurface free-phase hydrocarbons (“FPHs”).

10. In November 2004, TRC Environmental completed a Conceptual Design/Storm Water Flow Segregation and Weir Design for the Proviso Yard. The report evaluated alternatives for segregating storm water flows from certain adjacent industrial facilities (BFI/Onyx). BFI/Onyx’s storm water discharges were estimated to account for 25-40% of the flows passing through the Proviso Yard’s then-existing weir structure at the outfall to Mud Creek. TRC Environmental also evaluated design alternatives for replacement/installation of a new weir structure.

11. In summer 2005, Union Pacific completed improvements on the storm sewer adjacent to the Diesel Shop. These improvements replaced or slip-lined approximately 1,500 feet of underground corrugated metal pipe. At the same time, Union Pacific installed a remediation trench beneath the Diesel Shop fueling area to collect residual FPH.

12. In connection with these improvements, Union Pacific also constructed a new outdoor fueling facility at the Diesel Shop to replace the existing one. The improvements to the fueling facility included a PVC secondary containment liner beneath a new concrete slab, new track pans and a new inspection pit. The Diesel Shop fueling upgrade was completed by summer 2006.

D. Replacement Of The Weir Structure

13. In August 2005, TRC Environmental completed a Feasibility Study of Storm Water Flow Segregation and First Flush Storm Water Treatment. The study presented feasibility level design and cost estimates for further managing storm water discharge at the Proviso Yard. The TRC Environmental study specifically addressed the segregation of storm water discharges

from the adjacent BFI/Onyx facilities from the Proviso Yard's storm water flows and evaluated possible alternatives for replacement of the then-existing weir structure.

14. Prior to its replacement, Union Pacific maintained and monitored the former weir structure at the outflow to Mud Creek on a periodic basis, including daily inspections. The outflow was sampled quarterly. Historical sampling events at the weir showed that the then-existing weir was efficient in removing oils and greases to levels below 15 ppm as required by the applicable NPDES permit (No. IL0002127).

15. In January 2006, TRC Environmental advised Illinois EPA on behalf of Union Pacific of additional planned storm water improvements at the Proviso Yard and Global II. These included plans to: (1) segregate the off-site BFI/Onyx storm water flows; (2) demolish the then-existing weir structure and replace it with a new oil-water separator; (3) install an oil-water separator at the Global II tractor fueling containment area; and (4) install an oil-water separator at the Global II crane wash pad.

16. The oil-water separator Union Pacific identified for Illinois EPA as part of the additional improvements was a Vortechs Model 16000 unit. This technology was chosen as a best practice to manage sediment and hydrocarbon loads in storm water.

17. Construction began on replacement of the weir structure in November 2006. The new oil-water separator at the outfall to Mud Creek was operational by May 2007. Union Pacific provided Illinois EPA with written confirmation of the start and completion of construction on the weir replacement project in December 2006 and June 2007, respectively.

18. In 2008, storm water from the two maintenance areas at Global II (the tractor fueling area and crane wash pad) was segregated from clean storm water flows by installing new oil-water separators at each location. This work was completed in 2009.

19. In total, including work performed under Illinois EPA's voluntary site remediation program (SRP # 0311865222), Union Pacific has invested approximately \$10 million in storm water management improvements at the Proviso Yard and Global II.

E. Additional Activities

20. Union Pacific has prepared separate Storm Water Pollution Prevention Plans ("SWPPPs") for the Proviso Yard, dated August 25, 1999, and Global II, dated December 17, 1999. These SWPPPs have been updated from time to time as changes have occurred at the Proviso Yard and Global II, *e.g.*, removal and installation of ASTs, removal and installation of storm water treatment structures, construction of containment structures, changes to facility personnel, and permit updates.

21. Union Pacific has prepared separate Spill Prevention, Control and Countermeasure plans ("SPCCs") for the Proviso Yard and Global II, each dated April 27, 2005. These SPCCs have been modified or revised from time to time, including updating the contact list, removing and adding ASTs as required, revising the figures as needed, and changing the plan to match current environmental regulations.

22. Union Pacific also has completed various SPCC projects including: the replacement of small single-wall tanks at the Proviso Yard and Global II with double wall tanks, the construction of unload and loading pads for delivery and pickup of petroleum products, and the installation of concrete containments for large ASTs.

23. With respect to non-structural activities, Union Pacific began annual training in storm water and spill prevention issues in 1995 after the acquisition of CNW. Course material was developed by Union Pacific's environmental group and has been taught by the different departments of the railroad. Storm water training has included subject areas in good housekeeping, preventative maintenance, spill prevention, storm water management, sediment and erosion prevention. Spill prevention training has included subject areas in initial observer actions, notification requirements, spill prevention activities, spill plans and safety. Safety meetings and daily job briefings have supplemented this training.

F. The Alleged November 2005 Release

24. The State's Complaint contains two separate and unrelated sets of allegations as to alleged fuel oil releases at the Proviso Yard or Global II.

25. In the first instance, on or about November 23, 2005, the State's Complaint does not allege that any fuel oil release actually occurred. Instead, the Complaint alleges that Illinois EPA was notified by MWRD on November 23, 2005 of an alleged "recent fuel oil release" by an unknown party from an unidentified source at an indeterminate location.

26. The Complaint further alleges that on November 23, 2005 the Illinois EPA inspected the Proviso Yard and allegedly observed "a rainbow and silver colored sheen" extending from a storm culvert at the Diesel Shop fueling facility, through a drainage ditch, into the former weir structure and ultimately over the weir structure into Mud Creek.

27. Union Pacific has denied knowledge of the November 23, 2005 fuel oil release as alleged in the State's Complaint. Union Pacific has identified no fuel oil spills at the Diesel Shop fueling facility in or around November 23, 2005. Moreover, the fueling facility area was (and is) connected to an onsite wastewater treatment plant, which would have prevented any

spilled product at that location from being released to the drainage ditch, as alleged in the Complaint.

28. The only fuel oil release that occurred at the Proviso Yard in or around November 23, 2005 took place on November 22, 2005 in the yard at a location downstream of the then-existing weir structure. Union Pacific notified Illinois EPA of this accidental release on the date it occurred. Based on its location, the November 22, 2005 incident could not have caused the violations alleged in the State's Complaint.

29. The State has not alleged and Union Pacific denies that any fuel oil release occurred at Global II on or about November 23, 2005.

G. The Alleged February 19, 2006 Release

30. In the second instance, the State's Complaint alleges that a diesel fuel spill occurred on or about February 19, 2006 at Global II when a fuel line ruptured on a truck and discharged diesel fuel into a storm sewer inlet. The Complaint alleges that "at least some of the diesel fuel" spilled subsequently was discharged over the former weir structure at the downstream Proviso Yard into Mud Creek.

31. Union Pacific has admitted that a non-railroad, third-party contractor inadvertently spilled diesel fuel at Global II on or about February 19, 2006.

32. However, all trucks, trailers and containers entering Global II pass through an inspection gate before entering the property. At the gate, the condition of the vehicle and equipment is evaluated. Operating personnel are specifically trained to identify potential conditions that may cause environmental problems while at Global II. No such problems were or could have been identified as to the truck operated by the non-railroad, third-party contractor identified in the State's Complaint.

First Defense—Mootness

33. Union Pacific repeats and incorporates by reference the allegations of paragraphs 1-32 of its Amended Affirmative and Additional Defenses part of this First Defense.

34. In Counts I-IV of the Complaint, the State seeks injunctive relief against Union Pacific. Specifically, the Complaint asks the Board to order Union Pacific to cease and desist from “any further violations” of the statutory and regulatory provisions underlying Counts I-IV of the Complaint.

35. Union Pacific denies that the State can prove the violations alleged in Counts I-IV. Absent such proof injunctive relief is unavailable.

36. However, even if the State could prove any of the violations alleged in Counts I-IV, which Union Pacific denies, the State has not alleged nor could the State prove that the isolated and unrelated alleged November 2005 and/or February 2006 releases addressed in the Complaint are likely to reoccur.

37. Furthermore, to the extent that events similar to those alleged in the Complaint did reoccur, and Union Pacific denies that they occurred as alleged in the Complaint in the first place, the extensive improvements to storm water management at the Proviso Yard and Global II implemented by Union Pacific render any future discharge of diesel fuel to Mud Creek from the Proviso Yard unlikely.

38. Finally, to the extent, the State bases its request for injunctive relief on any alleged inadequacy in the former weir structure at the outfall to Mud Creek, Union Pacific completely replaced the former weir structure more than three years ago.

39. Accordingly, the State’s claims for injunctive relief are moot.

Second Defense—No Capability to Control

40. Union Pacific repeats and incorporates by reference the allegations of paragraphs 1-39 of its Amended Affirmative and Additional Defenses part of this Second Defense.

41. The State's Complaint does not allege the cause or source or even any alleged facts supporting the existence of any diesel fuel release at the Proviso Yard on or about November 23, 2005.

42. Union Pacific has denied knowledge of any release at the Diesel Shop fueling facility in or around November 23, 2005. Union Pacific further has alleged that the fueling facility area was at the time (and is) connected to an onsite wastewater treatment plant, which would have prevented any spilled product from being released to the downstream drainage ditch and eventually the weir, as alleged in the Complaint.

43. The Proviso Yard is located at the downstream end of a regional storm water drainage basin and receives substantial storm water flows from off-site sources including other industries. To the extent the "rainbow and silver colored sheen" allegedly observed by Illinois EPA on November 23, 2005 originated from a source outside of Union Pacific's property, Union Pacific lacked the capability to control the source of the alleged pollution.

44. To the extent the "rainbow and silver colored sheen" allegedly observed by Illinois EPA on November 23, 2005 originated from residual subsurface contamination, which was not deposited by Union Pacific at the Proviso Yard, Union Pacific lacked the capability to control the source of the alleged pollution.

45. Regarding the alleged February 19, 2006 release at Global II, the source of the alleged release was a non-railroad, third-party contractor who inadvertently spilled diesel fuel at the property due to an apparent equipment failure.

46. The third-party contractor's vehicle and equipment was not operated by Union Pacific but it was evaluated by operating personnel prior to entering Global II to identify potential conditions that could cause environmental problems. No such problems were or could have been identified.

47. The Illinois Environmental Protection Act is not a strict liability statute and does not prohibit the mere existence of pollution.

48. Union Pacific lacked the capability to control the source of the alleged November 2005 and February 2006 releases, which are the subject matter of the State's Complaint and, therefore, did not cause or allow or threaten the alleged releases in violation of the Illinois Environmental Protection Act or other law.

Third Defense—Extensive Precautions

49. Union Pacific repeats and incorporates by reference the allegations of paragraphs 1-48 of its Amended Affirmative and Additional Defenses part of this Third Defense.

50. Union Pacific undertook extensive precautions to prevent the intervening causes of the alleged November 2005 and February 2006 releases, which are the subject matter of the State's Complaint and, therefore, did not cause or allow or threaten the alleged release of diesel fuel in violation of the Illinois Environmental Protection Act or other law.

WHEREFORE, Union Pacific Railroad Company prays for judgment as follows:

1. That the Complaint be dismissed with prejudice;
2. That judgment be entered in Union Pacific's favor;
3. That Union Pacific be awarded costs incurred in this action; and
4. For such other and further relief as is just and proper.

Dated: _____

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY

By: _____

Thomas A. Andreoli
Its Attorney

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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, an attorney, hereby certify that I caused a copy of Union Pacific Railroad Company's Opposition to the State's Motion to Strike and Dismiss Union Pacific's Affirmative Defenses along with Notice of Filing and Certificate of Service to be served upon the following persons on August 27, 2010, by regular mail and email.

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Thomas A. Andreoli

Answer:

Lee Hammond, Manager Environmental Field Operations, Union Pacific

Rob Kennedy, WWTP Operator, Proviso Yard, Union Pacific

Edwin Honig, Jr., Manager Site Remediation, Union Pacific (Retired)

Martina Schlauch Jones, Arcadis (Materials related to SRP # 0311865222)

Interrogatory No. 2

Identify each person who has managed or otherwise overseen the Respondent's operations at the Facility from January 1, 2003 up to the present time.

Answer:

Objection. As used in this interrogatory, the term "Facility" is contrary to the facts as known. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific identifies persons who managed or oversaw operations at the Proviso Yard and Global II, respectively, during the time period addressed in the Complaint.

Proviso Yard

- David Barnes (October 1998 to December 2005)
- Tom Lisher (December 2005 to June 2006)
- Rod Richardson (July 2006 to June 2009)

Global II

- Don Gates (prior to January 2003 to March 2005) (Retired)
- Charles Bishop (March 2005 to June 2009) (Retired)

Interrogatory No. 3

Identify by name, address, telephone number, title, and job responsibilities each person who is or was responsible for knowing, being aware of, complying with, and/or making company decisions on behalf of UPRC regarding compliance with Federal, State and/or local stormwater regulations.

Answer:

Objection. Overly broad.

Interrogatory No. 4

Identify all persons who oversee or manage the locomotive refueling pad/maintenance area at the Facility.

Answer:

Objection. The interrogatory identifies no time period. As used in this interrogatory, the term "Facility" also is contrary to the facts as known. Subject to and without waiving these objections, Union Pacific identifies persons who oversaw or managed the referenced area at the Proviso Yard during the time period addressed in the Complaint.

- Joe McCrow (prior to 2003 through June 2005)
- Richard Jacobs (June 2005 through August 2009)

Interrogatory No. 5

Identify all measures UPRC utilizes to mitigate stormwater runoff at the Facility.

Answer:

Objection. The interrogatory identifies no time period. As used in this interrogatory, the term "Facility" also is contrary to the facts as known. Union Pacific will answer as to the Proviso Yard and Global II, respectively. Union Pacific also objects to the extent this interrogatory seeks to impose requirements other than those imposed by the Board's General Rules and applicable law, *i.e.*, to the extent it seeks a narrative response.

Subject to and without waiving these objections, Union Pacific refers you to the separate Storm Water Pollution Prevention Plans ("SWPPPs") and Spill Prevention, Control, and Countermeasure Plans ("SPCCs") in place for the Proviso Yard and Global II. *See* Responses to Production Requests Nos. 11-12. In addition, Union Pacific refers you to the attached Exhibit A (UP 000001) which details capital improvements for storm water management implemented at the Proviso Yard and Global II from approximately 2001-2009. Union Pacific invested more than \$9.9 million in storm water management improvements at the Proviso Yard and Global II during this time period. Union Pacific further answers as follows:

Union Pacific has used structural and non-structural activities to mitigate stormwater impacts at the Proviso Yard and Global II since its acquisition of the former Chicago & Northwestern Railway Company (“CNW”) in 1995. The CNW formerly operated the Proviso Yard and Global II.

In 1998, Patrick Engineering on behalf of Union Pacific conducted a storm water drainage, sanitary sewer and industrial sewer location study of the Proviso Yard. The study showed that the Proviso Yard is located at the downstream end of a regional storm water drainage basin and receives substantial storm water flows from off-site sources including other industry.

In 2001-2002, Union Pacific made structural improvements to the Proviso Yard’s storm water management system. These improvements, among other things, segregated storm water discharges from flows to the Proviso Yard’s waste water treatment plant and abated groundwater infiltration into the industrial sewer. These improvements also included construction of a storm water overflow structure for one of the Proviso Yard’s detention ponds.

In June 2003, Union Pacific entered the Proviso Yard into the IEPA’s voluntary Site Remediation Program (SRP # 0311865222) to address issues associated with storm water and residual subsurface contamination at the site.

In May 2004, TRC Environmental submitted a Remedial Investigation Report for the Proviso Locomotive Facility Area to the IEPA on behalf of Union Pacific. This report analyzed storm water flows through the Proviso Yard and recommended additional investigation activity and engineering feasibility study to support a remedial design solution.

In August 2004, TRC Environmental on behalf of Union Pacific advised IEPA regarding planned construction activities at the Proviso Yard intended to improve the storm water sewer adjacent to the Diesel Shop and abate a potential pathway for subsurface FPHs.

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In November 2004, TRC Environmental completed a Conceptual Design/Storm Water Flow Segregation and Weir Design for the Proviso Yard on behalf of Union Pacific. TRC Environmental evaluated alternatives for segregating storm water flows from adjacent industrial facilities (BFI/Onyx) whose storm water discharges were estimated to account for 25-40% of the flows passing through the former weir structure. TRC Environmental also evaluated design alternatives for replacement/installation of a new weir structure.

In summer 2005, Union Pacific completed improvements on the storm sewer adjacent to the Diesel Shop by replacing or slip-lining approximately 1,500 feet of underground corrugated metal pipe. At the same time, Union Pacific installed a remediation trench beneath the Diesel Shop fueling area to collect residual FPH. In connection with these improvements, Union Pacific also constructed a new outdoor fueling facility at the Diesel Shop to replace the existing one. The improvements to the fueling facility included a PVC secondary containment liner beneath a new concrete slab, new track pans and a new inspection pit. The Diesel Shop fueling upgrade was completed by summer 2006.

In August 2005, TRC Environmental completed a Feasibility Study of Storm Water Flow Segregation and First Flush Storm Water Treatment. The study presented feasibility level design and cost estimates for further managing storm water discharge at the Proviso Yard. The TRC Environmental study specifically addressed the segregation of storm water discharges from BFI/Onyx from the Proviso Yard's storm water flows and evaluated possible alternatives for replacement of the former weir structure.

In January 2006, TRC Environmental advised IEPA of additional planned storm water management improvements at the Proviso Yard and Global II. These included plans to:

- (1) segregate the BFI/Onyx storm water flows;
- (2) demolish the former weir structure and replace it with an oil-water separator;
- (3) install an oil-water separator at the Global II tractor

fueling containment area; and (4) install an oil-water separator at the Global II crane wash pad. Construction began on replacement of the former weir structure in November 2006 and the new oil-water separator at the outfall to Mud Creek was operational by May 2007.

In 2008, storm water from the two maintenance areas at Global II (the tractor fueling area and crane wash pad) was segregated from clean storm water flows by installing new oil-water separators at each location. This work was completed in 2009.

Union Pacific also completed various SPCC projects during the 2001-2006 time period. These included replacing small single-wall tanks at the Proviso Yard and Global II with double wall tanks, constructing truck unload and loading pads for delivery and pickup of petroleum products, and constructing concrete containments for large ASTs.

With respect to non-structural activities, Union Pacific began annual training in storm water and spill prevention issues in 1995 after the acquisition of CNW. Course material was developed by Union Pacific's environmental group and has been taught by the different departments of the railroad. Stormwater training includes subject areas in good housekeeping, preventative maintenance, spill prevention, stormwater management, sediment and erosion prevention. Spill prevention training includes subject areas in initial observer actions, notification requirements, spill prevention activities, spill plans and safety. This training is supplemented by discussions held in safety meetings and daily job briefings.

See Responses to Production Requests, Nos. 1, 3, 7, 8, 11, 12 and 13. Union Pacific reserves the right to supplement this Answer.

Interrogatory No. 6

Identify all studies of stormwater runoff issues which have been performed or proposed for the Facility.

Answer:

Objection. As used in this interrogatory, the term "Facility" is contrary to the facts as known. Subject to and without waiving this objection, Union Pacific answers as follows:

- Patrick Engineering (1998)
- TRC Environmental, Remediation Investigation Report (2004)

See Answer to Interrogatory No. 5.

Interrogatory No. 7

Identify all maintenance and monitoring activities which have been performed for the weir structure by UPRC, its employees, contractors, agents or any other person, between January 1, 2005, and the present date.

Answer:

Union Pacific objects to the referenced time period which is overly broad. Subject to and without waiving this objection, Union Pacific answers that the former weir structure was maintained and monitored on a periodic basis. The outflow was sampled quarterly. *See Answer to Interrogatory No. 14.* The weir structure that existed as of January 1, 2005 has been replaced. Union Pacific will produce copies of the logbook of maintenance and monitoring activities for the 2005-2006 time period. *See Response to Production Request No. 7.*

Interrogatory No. 8

Identify all persons who manage, are employed at or otherwise work at the Facility who have received or attended any training or instruction regarding stormwater runoff prevention, reduction or elimination measures to be performed at the Facility.

Answer:

Objection. Overly broad.

Interrogatory No. 9

Identify all persons who provided any of the training or instruction referenced in Interrogatory No. 8, above.

Answer:

Objection. Overly broad.

Interrogatory No. 10

Identify each and every communication between or involving UPRC's agents, employees, representatives, Maintenance Providers, Contractors and/or Consultants which relate to any Release at or from the Facility which occurred between November 2005 and February 2006.

Answer:

Objection. The term "Release," as defined, calls for a legal conclusion. As used in this interrogatory, the term "Facility" also is contrary to the facts as known. Subject to and without waiving this objection, *see* Response to Production Request No. 13.

Interrogatory No. 11

Identify all efforts which were taken by UPRC to comply with the terms and conditions of its NPDES Permit.

Answer:

Objection. Overly broad. The interrogatory identifies no time period. Subject to and without waiving this objection, *see* Answers to Interrogatory Nos. 5, 7, 14, 16, 18, 19, 20, 22.

Interrogatory No. 12

Identify and describe in detail the training in stormwater prevention and spill containment procedures which UPRC provides its employees, as otherwise described on page three of Lee Hammond's January 30, 2006 letter to Beverly Booker, at Illinois EPA.

Answer:

See Response to Production Request No. 18.

Interrogatory No. 13

What inspections are required under Special Condition 6 of UPRC's NPDES permit? Include in this answer how often such inspections are conducted and the procedures that govern how such inspections are to be conducted.

Answer:

Objection. The referenced document speaks for itself.

Interrogatory No. 14

What procedures does UPRC have in place relating to capturing the quarterly samples of specified parameters included in the relevant NPDES permit relating to the Facility? Include in this answer who captures the samples for the period from January 1, 2002 until the present date.

Answer:

Objection. The referenced time period is overly broad. As used in this interrogatory, the term "Facility" also is contrary to the facts as known. Subject to and without waiving these objections, Union Pacific answers that water samples are taken at the weir outfall by the onsite WWTP operator, placed on ice and sent to an outside lab under chain of custody documentation. Samples can be taken anytime during the quarter but from a practical standpoint are taken during non-frozen months or the middle month of the quarter to allow for lab turnaround. WWTP operators have included: Robert Johnson, Jose Ceballos, David Murgatroyd, Robert Kennedy, Tony Adams, Laurentio Howard, and Wade Gallery.

Interrogatory No. 15

Identify all spills of oil and petroleum products from January 1, 2005 until the present date which occurred at the Facility, including, but not limited to, any spills that resulted from the locomotive refueling pad area.

Answer:

Objection. The time period stated is overly broad. As used in this interrogatory, the term "Facility" also is contrary to the facts as known. Subject to and without waiving these objections, Union Pacific states that the locomotive refueling pad area at the Proviso Yard was/is connected to the onsite WWTP. There is no responsive information available related to that area. Union Pacific will produce responsive documents for the Proviso Yard and Global II for the 2005-2006 time period. *See* Response to Production Request No. 13.

Interrogatory No. 16

When was the Stormwater Pollution Prevention Plan (“SWPPP”) referenced in Lee Hammond's January 30, 2006 and June 6, 2006 letters to Beverly Booker, Illinois EPA first put into effect at the Facility?

Answer:

Objection. As used in this interrogatory, the term “Facility” is contrary to the facts as known. The separate SWPPPs for the Proviso Yard and Global II are dated August 25, 1999 and December 17, 1999, respectively. *See* Response to Production Request No. 11.

Interrogatory No. 17

Identify in detail the provisions of the SWPPP referenced in Interrogatory No. 16.

Answer:

Objection. It is unclear what “provisions” Interrogatory No. 17 intends to reference. Subject to and without waiving this objection, Union Pacific will produce responsive documents. *See* Answer to Interrogatory No. 16.

Interrogatory No. 18

Identify all modifications or revisions which you have made to the SWPPP since the date that it was initially put into effect at the Facility.

Answer:

Objection. As used in this interrogatory, the term “Facility” is contrary to the facts as known. Subject to and without waiving this objection, Union Pacific answers that SWPPPs identified in the Answer to Interrogatory No. 16 been updated from time to time as changes have occurred at the Proviso Yard and Global II, respectively, *e.g.*, removal and installation of ASTs, removal and installation of stormwater treatment structures, construction of containment structures, changes to facility personnel, permit updates.

Interrogatory No. 19

Identify all of UPRC's “best management practices” which are referenced in Lee Hammond's June 6, 2006 letter to Beverly Booker.

Answer:

The best management practices fall into five areas of stormwater management:

GOOD HOUSEKEEPING BMP's:

- Minimize and recycle non-usable materials.
- Pick up and dispose of loose materials, scrap, trash.
- Use waste collection containers for non-regulated wastes.
- Sweep or mop paved areas periodically.
- Keep outdoor equipment clean.
- Clean up areas spills or leaks.
- Use dry materials for clean up of liquids.
- Properly dispose of waste waters.
- Perform maintenance under roof or other cover (when possible).
- Use drip pans to collect fluids during changes/dripping equipment.
- Maintain strict records of fuel usage and storage.
- Instruct employees on proper fueling.
- Modify locomotive oil retention tanks to reduce leakage of oil from parked locomotives.
- Store drums properly (bungs in, tilted, under roof, etc.).
- Dispose of old, unused, or excess drums and containers.
- Use appropriate ways to store materials.
- Use appropriate sand cleanup techniques.
- Provide good housekeeping training/incentives.

PREVENTIVE MAINTENANCE BMP'S:

- Repair leaks from vehicles, machines, tanks, piping, etc. - use drip pans.
- Maintain aisle space for service equipment and machines.
- Inspect storm water drop inlets, sumps, catch basins etc. - clean as needed.
- Inspect berms, dikes, curbs, tanks and other retention devices.

SPILL PREVENTION AND RESPONSE BMP's:

- Develop and maintain SPCC Plan.
- Provide containment around potential spill sources.
- Divert spills from storm water drains/inlets.
- Keep spills and cleanup materials available and dispose after use.
- Provide training in SPCC procedures.

STORM WATER MANAGEMENT PRACTICES BMP'S:

- Inspect, maintain, and upgrade existing storm water sewers.
- Inspect storm water pathways for nonstorm water discharges.
- Provide sumps and clean out periodically.
- Use drip pans or other collection devices in heavily used areas.

- Use containment methods on above ground storage tanks.
- Review new construction plans for storm water protection and drainage system effects.

SEDIMENT AND EROSION BMP'S:

- Reduce erosion in unpaved areas.
- Reduce erosion in earthen channels.
- Control sedimentation.
- Minimize erosion during new construction.
- Maintain vegetation buffers to prevent erosion.

Interrogatory No. 20

When was the Spill Prevention, Control and Countermeasure (“SPCC”) Plan referenced in Lee Hammond’s January 30, 2006 and June 6, 2006 letters to Beverly Booker, Illinois EPA first put into effect at the Facility?

Answer:

Objection. As used in this interrogatory, the term “Facility” is contrary to the facts as known. Subject to and without waiving this objection: April 27, 2005. *See* Response to Production Request No. 12.

Interrogatory No. 21

Identify in detail the provisions of the SPCC Plan referenced in Interrogatory No. 20.

Answer:

Objection. It is unclear what “provisions” Interrogatory No. 21 intends to reference. Subject to and without waiving this objection, Union Pacific will produce responsive documents. *See* Answer to Interrogatory No. 20.

Interrogatory No. 22

Identify all modifications or revisions which you have made to the SPCC Plan since the date that it was initially put into effect at the Facility.

Answer:

Objection. As used in this interrogatory, the term “Facility” is contrary to the facts as known. The SPCC plans identified in the Answer to Interrogatory No. 20 have been modified or revised from time to time, including updating the contact list, removing and adding ASTs as

required, revising the figures as needed, and changing the plan to match current environmental regulations. *See* Response to Production Request No. 12.

INTERROGATORY NO 23

State all basis, facts, and assumptions supporting Affirmative and/or Additional Defense 1 identified in the “Affirmative and Additional Defenses” section of Union Pacific Railroad Company’s Answer and Affirmative and Additional Defenses where UPRC alleges that the claims for injunctive relief are moot.

Answer:

See Answer to Interrogatory No. 5.

Interrogatory No. 24

State all basis, facts, and assumptions supporting Affirmative and/or Additional Defense 2 identified in the “Affirmative and Additional Defenses” section of Union Pacific Railroad Company’s Answer and Affirmative and Additional Defenses where UPRC alleges it lacked the capability of control over the alleged releases.

Answer:

The Complaint contains two separate and unrelated sets of allegations as to alleged releases at the Proviso Yard or Global II. In the first instance, the Complaint does not allege that any release actually occurred. *See* Answer, ¶ 6. Instead, the Complaint merely alleges that IEPA was notified by MWRD on November 23, 2005 of a “recent fuel oil release” by an unknown party from an unidentified source at an indeterminate location. The only fuel oil release at the Proviso Yard in or around November 23, 2005 (on November 22, 2005) occurred downstream of the former weir structure and, therefore, could not have caused the alleged violation. *See* Response to Production Request No. 13. Union Pacific has no knowledge of any fuel oil release at Global II on or about November 23, 2005. In the second instance, a non-railroad, third-party contractor inadvertently spilled diesel fuel at Global II on or about February 19, 2006. *See* Answer, ¶¶ 9-12. All trucks, trailers and containers entering Global II pass through an inspection gate where the condition of the vehicle and equipment is evaluated. Operating personnel are trained to identify

potential conditions that may cause environmental problems while on UP property. Union Pacific reserves the right to supplement this Answer.

Interrogatory No. 25

State all basis, facts, assumptions supporting Affirmative and/or Additional Defense 3 identified in the “Affirmative and Additional Defenses” section of Union Pacific Railroad Company’s Answer and Affirmative and Additional Defenses where UPRC alleges that it undertook extensive precautions to prevent the intervening causes of the alleged release.

Answer:

See Answers to Interrogatories Nos. 5 and 24. Union Pacific reserves the right to supplement this Answer.

Interrogatory No. 26

Identify describe in detail the scope and status of each of the three stormwater capital improvement projects referenced on page 2 of Lee Hammond’s January 30, 2006 letter to Beverly Booker, Illinois EPA.

Answer:

See Answer to Interrogatory No. 5.

Interrogatory No. 27

Identify all non-testifying experts retained by UPRC in relation to this Case.

Answer:

Objection. The requested information is privileged.

Interrogatory No. 28

Identify each person whom UPRC plans to call as a witness in this Case. With respect to such witnesses, including expert witnesses:

- a. State the subject matter on which each witness is expected to testify;
- b. State the substance of the testimony expected from each witness;
- c. Identify any documents produced in this action that each witness is able to authenticate; and
- d. Identify any and all exhibits that you anticipate will be introduced through the testimony of each witness at trial.

Answer:

Union Pacific has not yet identified the persons it expects to call as witnesses, including expert witnesses. Union Pacific reserves the right to supplement this Answer.

Dated: May 14, 2010

Respectfully submitted,

ROONEY RIPPKE & RATNASWAMY, LLP



By:

Attorneys for Union Pacific Railroad Company

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STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

AFFIDAVIT OF RAMI S. HANASH

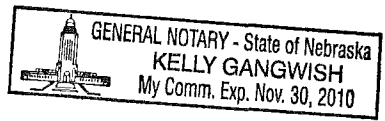
I, Rami S. Hanash, being first duly sworn, state as follows:

1. That Affiant is Regional Environmental Counsel for the Union Pacific Railroad Company upon which the attached Interrogatories were served and upon whose belief Affiant makes this declaration.
2. That Affiant is authorized on behalf of Union Pacific Railroad Company to make this declaration and that Affiant has read the foregoing Answers to Interrogatories.
3. That the Interrogatories seek information from Union Pacific Railroad Company, and that no one individual employee of this company has personal knowledge of the information so as to permit that one individual fully and completely respond to all subjects addressed within these Interrogatories.
4. That while Affiant does not have personal knowledge of the facts cited therein, the information was collected and the answers were made only after a reasonable search for information relating to the subject Interrogatories.
5. Therefore, on information and belief, Affiant believes the attached Answers to Interrogatories to be complete and accurate to the best of Affiant's knowledge, based upon information available at this time.


On behalf of Union Pacific Railroad Company

Signed and sworn to before me
this 14th day of May, 2010


Notary Public



Electronic Filing - Received, Clerk's Office, August 27, 2010

Proviso and Global 2 Expenditures

AFE Year	Work Order	Program	Description	Expenditure	Project Date Range	Budget Source
2001	4321	SPCC	Install 5 AST	\$ 29,200.00	6/01-2/04	Environmental PI
2002	27090	SWPPP	Storm Water Separation from Sewers	\$ 726,000.00	6/01 - 11/02	Environmental PI
2003	42783	SPCC	Oil Recovery System and WWTP and ASTs	\$ 176,000.00	2/04 - 9/05	Environmental PI
	9770	SPCC	MofW Fueling Pad and AST	\$ 154,200.00	2/04 - 9/05	Environmental PI
	9771	SPCC	Used Oil Truck Pad @ Diesel Shop	\$ 41,400.00	2/04 - 9/05	Environmental PI
2004	46684	SPCC	Drip Pans and Fueling Facility	\$ 3,321,000.00	3/04 - 7/06	Environmental PI
	55075	SPCC	Track Work for Drip Pan Project	\$ 159,000.00	8/05 - 7/06	Environmental PI
2006	85423	SWPPP	Global 2 Tractor Fueling & Crane Wash Pad	\$ 1,132,000.00	9/07 - 6/09	Environmental PI
	6415	SWPPP	Weir Project, Storm Sewer	\$ 1,559,000.00	9/06 - 1/08	Environmental PI
	6415	SWPPP	Weir Project, Storm Sewer	\$ 100,000.00	9/06 - 1/08	Environmental Operating
Site Remediation	CAN 92076	SWPPP	Fuel Track Clean UP	\$ 2,515,000.00	03/04 - 07/06	Environmental Reserve
Subtotal SPCC				\$ 3,880,800.00		
Subtotal SWPPP				\$ 6,032,000.00		
Total				\$ 9,912,800.00		

CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, an attorney, hereby certify that I caused true and correct copies of the foregoing to be served via email in .PDF format on May 14, 2010 upon:

Evan McGinley
Zemheret Bereket-Ab
Office of the Illinois Attorney General
Environmental Bureau North
69 West Washington Street, Suite 1800
Chicago, IL 60602
emcginley@atg.state.il.us
ZBereket-Ab@atg.state.il.us

A handwritten signature in black ink, appearing to read 'T. Andreoli', is positioned above a horizontal line.

Thomas A. Andreoli

**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.)	

**UNION PACIFIC RAILROAD COMPANY'S
RESPONSE TO THE FIRST REQUEST FOR PRODUCTION
BY THE PEOPLE OF STATE OF ILLINOIS**

Union Pacific Railroad Company ("Union Pacific") hereby responds to the First Request for Production by the People of the State of Illinois (the "People"). Union Pacific objects to Sections I, II and III of the Production Requests ("I. Instructions," "II. Claims of Privilege," and "III. Definitions") to the extent these sections seek to impose requirements other than those established under the General Rules of the Illinois Pollution Control Board (the "Board") and other applicable law. Union Pacific will respond to the Production Requests in a manner consistent with the Board's General Rules and applicable law.

Production Request No. 1

Produce all documents that confirm that the new oil/water separator referenced on page 3 of the June 6, 2006, letter serving as a proposed Compliance Commitment Agreement that was sent to the Illinois EPA by Lee Hammond was installed in the 3rd quarter of 2006 as asserted in the letter.

RESPONSE:

Union Pacific will produce responsive materials. *See* UP 000002 – UP 000007.

Production Request No. 2

Produce copies of all documents, objects and tangible things that UPRC will introduce into evidence at a hearing in this Case.

RESPONSE:

Objection. Union Pacific has not yet identified the documents, objects and tangible things that it will introduce at hearing. Union Pacific reserves the right to supplement this Response.

Production Request No. 3

Produce all documents, objects and tangible things that UPRC relies on and/or references in "Union Pacific Railroad Company's Answer and Affirmative and Additional Defenses."

RESPONSE:

Union Pacific will produce responsive materials. Union Pacific reserves the right to supplement this Response. *See* UP 000008 – UP 000046.

Production Request No. 4

Produce copies of all documents referenced in, relied on, or referred to in UPRC's Answers to Plaintiff's First Set of Interrogatories.

RESPONSE:

Union Pacific will produce responsive materials. Union Pacific reserves the right to supplement this Response.

Production Request No. 5

Produce all documents, objects and tangible things which UPRC contends either contradict or tend to contradict any of the factual allegations contained in the Complaint filed by the Plaintiff in this Case and include the specific factual allegation you claim each document, object, and tangible thing contradicts or disproves.

RESPONSE:

Union Pacific objects to this request to the extent it seeks to impose requirements other than those established by the Board's General Rules and applicable law, *i.e.*, to the extent it seeks a narrative response. Subject to and without waiving this objection, Union Pacific will produce responsive materials. Union Pacific reserves the right to supplement this Response.

Production Request No. 6

Produce any and all documents for the period between January 1, 2004 and the present date relating to any malfunctions, break-downs, or other occurrences in which the Weir structure ceased to operate as designed or required repair or maintenance, including any documents related to the cause of each such occurrence. This request includes, but is not limited to, documents related to any analysis of, and response to, such occurrences.

RESPONSE:

Objection. The phrase “any malfunctions, breakdowns, or other occurrences in which the Weir structure ceased to operate as designed or required repair or maintenance” is compound and vague and ambiguous. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific will produce responsive materials, if any, for the 2005-2006 time period. *See* Response to Production Request No. 8 below.

Production Request No. 7

Produce the originals of any and all documents for the period beginning January 1, 2004 and continuing through the present date, including manuals, materials, instructions, written protocols, policies, procedures, and training documents, relating to or discussing the operation, maintenance, repair, or analysis of UPRC’s Weir structure.

RESPONSE:

Objection. The request for “all documents ... including manuals, materials, instructions, written protocols, policies, procedures, and training documents, relating to or discussing the operation, maintenance, repair or analysis” of the subject weir structure is cumulative of other requests and compound. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific will produce responsive materials for the 2005-2006 time period. *See* UP 000047 – UP 000140. Union Pacific will produce copies of the responsive materials. Upon request, Union Pacific also will make “originals” of these materials available for inspection at a mutually agreeable time and place.

Production Request No. 8

Produce the originals of any and all inspection and maintenance records, including daily inspection records, at the Site from January 1, 2004 to the present date.

RESPONSE:

Objection. As used in this request, the term “Site” is contrary to the facts as known. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific will produce responsive materials for the 2005-2006 time period. *See* UP 000141 – UP 000201. Union Pacific will produce copies of the responsive materials. Upon request, Union Pacific also will make “originals” of these materials available for inspection at a mutually agreeable time and place.

Production Request No. 9

Produce any and all operation and maintenance plans related to the Site, as well as all documents related thereto.

RESPONSE:

Objection. Overly broad. As used in this request, the term “Site” also is contrary to the facts as known. Subject to and without waiving these objections, Union Pacific refers you to its Responses to Production Requests Nos. 11-12.

Production Request No. 10

Produce any and all documents related to the services provided by any Consultant or Maintenance Provider relating to environmental issues, pollution control equipment, or the Weir structure at the Site January 1, 2004 to the present date. This request includes, but is not limited to, any reports, analysis, or recommendations, as well as any communications between UPRC and any Consultant or Maintenance Provider.

RESPONSE:

Objection. Cumulative and compound. As used in this request, the term “Site” is contrary to the facts as known. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific will produce responsive materials for the 2005-2006 time period.

Production Request No. 11

Produce any and all documents related to UPRC's Stormwater Pollution Prevention Plan for the Facility and any revisions or modification thereto.

RESPONSE:

Objection. As used in this request, the term "Facility" is contrary to the facts as known.

Union Pacific will produce responsive materials for the Proviso Yard and Global II, respectively.

See UP 000202 – UP 000333.

Production Request No. 12

Produce any and all documents Spill Prevention, Control and Countermeasure Plan for the Facility and any revisions or modifications thereto.

RESPONSE:

Objection. As used in this request, the term "Facility" is contrary to the facts as known.

Union Pacific will produce responsive materials for the Proviso Yard and Global II, respectively.

See UP 000334 – UP 000655.

Production Request No. 13

Produce any and all documents related to any Release at or from the Site.

RESPONSE:

Objection. Overly broad and unduly burdensome. The term "Release," as defined, calls for a legal conclusion. As used in this request, the term "Site" also is contrary to the facts as known.

Subject to and without waiving these objections, Union Pacific will produce documents related to the 2005-2006 time period. *See* UP 000656 – UP 000731.

Production Request No. 14

Produce any and all documents, including letters, citations, and complaints, issued or filed by any governmental entity relating to any alleged non-compliance by UPRC with, or violation of, any environmental statute or regulation from January 1, 2004 to the present date.

RESPONSE:

Objection. Overly broad and unduly burdensome. Irrelevant.

Production Request No. 15

Produce any and all documents related to any record-keeping policies or practices related to stormwater runoff prevention equipment, structures, and practices at the Site.

RESPONSE:

Objection. Cumulative and compound. The request identifies no time period. As used in this request, the term "Site" also is contrary to the facts as known. Union Pacific refers you to NPDES Permit No. IL0002127 and General NPDES Permit No. ILR003013, copies of which already are in your custody and control. Subject to and without waiving these objections, Union Pacific will produce responsive materials.

Production Request No. 16

Produce any and all reports submitted to any governmental agency related to stormwater runoff prevention at the Site.

RESPONSE:

Objection. Overly broad and unduly burdensome. The request identifies no "governmental agency" or time period. As used in this request, the term "Site" also is contrary to the facts as known.

Production Request No. 17

Produce any and all documents related to the testing of any stormwater runoff prevention equipment or structures, including, but not limited to, the Weir structure, at the Site between January 1, 2004 and the present date. This request includes, but is not limited to, any documents related to both past and current effectiveness of the pollution control equipment.

RESPONSE:

Objection. As used in this request, the term "Site" is contrary to the facts as known. The referenced time period also is overly broad. Subject to and without waiving these objections, Union Pacific refers the People to its quarterly discharge monitoring reports submitted pursuant to NPDES Permit No. IL0002127, copies of which already are in your custody and control.

Production Request No. 18

Produce any and all documents related to any training provided to UPRC's managers, employees, contractors, agents or any other person regarding stormwater prevention, reduction and elimination at the Facility.

RESPONSE:

Objection. As used in this request, the term "Facility" is contrary to the facts as known.

Subject to and without waiving this objection, Union Pacific will produce copies of responsive documents and materials on recorded media. *See* UP 000732 – UP 000759.

Production Request No. 19

Produce any and all documents which UPRC relied upon or otherwise base their affirmative defenses.

RESPONSE:

Objection. Asked and answered. *See* response to Production Request No. 3.

Dated: May 14, 2010

Respectfully submitted,

ROONEY RIPPY & RATNASWAMY LLP



By:

Attorneys for Union Pacific Railroad Company

Thomas A. Andreoli
Rooney Rippie & Ratnaswamy LLP
350 W. Hubbard Street
Suite 430
Chicago, Illinois 60654
(312) 447-2800
thomas.andreoli@r3law.com

CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, an attorney, hereby certify that I caused true and correct copies of the foregoing to be served via email in .PDF format on May 14, 2010 upon:

Zemeheret Bereket-Ab
Evan McGinley
Office of the Illinois Attorney General
Environmental Bureau North
69 West Washington Street, Suite 1800
Chicago, IL 60602
ZBereket-Ab@atg.state.il.us
emcginley@atg.state.il.us

A handwritten signature in black ink, appearing to read 'T. Andreoli', is positioned above a horizontal line.

Thomas A. Andreoli