

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	Docket No.
	)	
	)	CWA-07-2016-0091
	)	
UNION PACIFIC RAILROAD COMPANY	)	COMPLAINT AND
Herington, Kansas	)	CONSENT AGREEMENT/
	)	FINAL ORDER
Respondent	)	
	)	
	)	
	)	

**CONSENT AGREEMENT AND FINAL ORDER**

The United States Environmental Protection Agency, Region 7 (“EPA”) and Union Pacific Railroad Company (“Respondent”) have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2). Public notice and the opportunity for comment of this Consent Agreement and Final Order (“CAFO”) is required pursuant to Section 311(b)(6)(C) of the CWA, 33 U.S.C. § 1321(b)(6)(C), and 40 C.F.R. § 22.45.

**ALLEGATIONS**

Jurisdiction

1. This is a “Class II” administrative action for the assessment of civil penalties initiated pursuant to Section 311(b)(6) of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(b)(6), and in accordance with the Consolidated Rules, 40 C.F.R. Part 22. This CAFO serves as notice that EPA has reached settlement for Respondent’s alleged violations of Section 311(b)(3) of the CWA, 33 U.S.C. §§ 1321(b)(3).

Parties

2. The authority to take action under Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6) is vested in the Administrator of the EPA. The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Air and Waste Management Division of EPA, Region 7.

3. Respondent is the Union Pacific Railroad Company (UPRR), a corporation authorized to do business within the state of Kansas.

Statutory and Regulatory Requirements

Section 311 of the CWA

4. Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3), prohibits the discharge of oil or hazardous substances into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States.

5. Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), defines “discharge” to include “any spilling, leaking, pumping, pouring, emitting, emptying or dumping....”

6. Pursuant to Section 311(b)(4) of the CWA, 33 U.S.C. 5 1321 (b)(4), discharges of a hazardous substance in such quantities that have been determined may be harmful and thereby prohibited under Section 311(b)(3), 33 U.S.C. 5 1321 (b)(3), are discharges of hazardous substances identified in 40 C.F.R. Part 116 in excess of the corresponding reportable quantity listed in 40 C.F.R. Part 117.

7. Sulfuric acid is designated as a hazardous substance at 40 C.F.R. § 116.4, with a reportable quantity of 1,000 pounds, as listed in 40 C.F.R. § 117.3.

8. In accordance with Section 311(b)(6)(A)(ii) of the CWA, 33 U.S.C. § 1321(b)(6)(A)(ii), EPA may assess a civil penalty to any owner or operator in charge of any onshore facility who violates Section 311(b)(3) of CWA, 33 U.S.C. § 1321(b)(3) of up to \$16,000 per day that the violation continues.

General Factual Allegations

9. Respondent is a corporation organized under the laws of Kansas and is a “person” within the meaning of Sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5), and 40 C.F.R. § 112.2.

10. Respondent is the “owner” and/or “operator” within the meaning of Section 311(a)(6) of the Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. § 112.2, of a railcar switching yard known as the Herington Railyard (“Herington facility”, or “facility”), addressed at 501 N. 5<sup>th</sup> Street, Herington, Kansas 67449.
11. Respondent’s Herington facility is located adjacent to Lime Creek with surface drainage directly towards Lime Creek. Lime Creek is a navigable water of the United States within the meaning of 40 C.F.R. § 112.2 and Section 502(7) of the Act, 33 U.S.C. § 1362(7).
12. The Herington facility is an onshore facility within the meaning of Section 311(a)(10) of the Act, 33 U.S.C. § 1321(a)(10), and 40 C.F.R. § 112.2.
13. On or about January 8, 2012, two railroad tank cars within the Herington facility collided, causing a rupture in the bottom of one tank car which contained sulfuric acid. This resulted in an estimated release of 11,000 gallons of sulfuric acid from the tank car. Approximately 1,500 gallons were contained in a ditch flowing overland from the facility into an adjoining ditch and discharging into the adjacent Lime Creek. The discharge impacted an estimated two (2) miles of Lime Creek and resulted in a fish kill.
14. Respondent UPRR’s response actions commenced on January 8, 2012 and lasted until at least January 22, 2012, and included building two dams within Lime Creek and the addition to and mixing of neutralizing agents within Lime Creek in order to raise and normalize the pH within the water.
15. The discharge and presence of sulfuric acid greater than the reportable quantity within Lime Creek continued for no less than six days, and as many as fifteen days.
16. By settlement dated August 19, 2013, Respondent UPRR previously paid the state of Kansas \$155,300 for restitution for damage to the state’s natural resources.
17. The parties commenced negotiations to resolve this matter in May 2016 which have resulted in this Consent Agreement and Final Order.

Alleged Violations

**Prohibited Discharge of Sulfuric Acid**

18. The facts alleged above are hereby incorporated by reference.
19. Respondent's discharge of sulfuric acid that commenced on January 8, 2012 from the Herington facility into Lime Creek was in a quantity that has been determined to be harmful under 40 C.F.R § 117.3, and therefore violated the prohibition of Section 311(b)(3) of the Act, 33 U.S.C. § 1321(b)(3).

**CONSENT AGREEMENT**

20. Respondent and EPA agree to the terms of this Consent Agreement/Final Order.
21. Respondent admits the jurisdictional allegations set forth in this Complaint and Consent Agreement/Final Order, and agrees not to contest EPA's jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of this Consent Agreement/Final Order.
22. Respondent neither admits nor denies the factual allegations and legal conclusions set forth in this Complaint and Consent Agreement/Final Order.
23. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal this Consent Agreement/Final Order.
24. Respondent and EPA agree to resolve the matters set forth in this Complaint and Consent Agreement/Final Order without the necessity of a formal hearing and agree to bear their own costs and attorney's fees incurred as a result of this action.
25. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Agreement/Final Order and to execute and legally bind Respondent to it.
26. Respondent understands and agrees that this Consent Agreement/Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement/Final Order.
27. Respondent UPRR certifies by signing this Consent Agreement/Final Order that, to the best of its knowledge, Respondent's Herington facility is no longer in violation of Section 311(b)(3) of the CWA.
28. Respondent agrees to undertake the Supplemental Environmental Project ("SEP"), identified in Attachment A to this Order, which is hereby incorporated into this Consent Agreement/Final Order. The parties agree that performance of the SEP, as set forth in Attachment A, which is herein incorporated by reference, is intended to secure significant environmental restoration and protection by installing earthen berms and Jersey Barriers (depending on locations), supplemented by manually operated drop gates and control structures that are designed and intended to minimize and prevent surface runoff and releases from the Herington facility from reaching the adjoining Lime Creek. The SEP shall be completed no later than eighteen (18) months from the effective date of the Final Order.

29. The total expenditure for the SEPs shall be no less than Three Hundred Thirty Eight Thousand, Dollars (\$338,100), in accordance with the specifications set forth in Attachment A. All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

30. Within sixty (60) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA as follows:

- a. The SEP Completion Report shall contain the following:
  - i. a detailed description of the SEP as implemented;
  - ii. itemized costs, documented by copies of purchase orders, receipts, or canceled checks;
  - iii. a description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible); and
  - iv. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement/Final Order.

- b. Respondent shall submit all notices and reports required by this Consent Agreement/Final Order by first class mail to the following:

Eduardo Ortiz  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

- c. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

31. Respondent shall pay stipulated penalties in the following circumstances:

- a. In the event Respondent fails to comply with any of the terms or provisions of this Consent Agreement relating to the performance of the SEP as set forth in Paragraph 28 of this Consent Agreement/Final Order and/or to the extent that the

actual expenditures of the SEP do not equal or exceed the cost of the SEPs described in Paragraph 29 of this Consent Agreement/Final Order, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

- i. Except as provided in subparagraph a.ii. and a.iii. of this paragraph, if the SEP is not completed satisfactorily and timely pursuant to the agreement set forth in Paragraph 28 of this Consent Agreement/Final Order, Respondent shall be liable for and shall pay a stipulated penalty to the United States in the amount of Ninety Three Thousand Dollars (\$93,000).
- ii. If Respondent fails to timely and completely submit the SEP Completion Report required by Paragraph 30, Respondent shall be liable for and shall pay a stipulated penalty in the amount of Two Hundred and Fifty Dollars (\$250) per day. This stipulated penalty shall begin to accrue on the first day after the SEP Completion Report is due and continue to accrue through the day the SEP Completion report is submitted.
- iii. If the SEPs are not completed in accordance with Paragraphs 28 and 29 of this Consent Agreement/Final Order, but EPA determines that the Respondent: (a) made good faith and timely efforts to complete the project; and (b) certifies, with supporting documentation, that at least 90% of the amount of money which was required to be spent was expended on the SEPs, Respondent shall not be liable for any stipulated penalty.

32. Payment of the stipulated penalties as specified in Paragraph 31 above shall be immediately due and payable upon notice by EPA to Respondent, and shall be made in accordance with the Payment Procedures specified in Paragraphs 35 and 36, below.

33. Respondent hereby certifies that, as of the date of this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEP by any federal, state or local law or regulation; nor is Respondent required to perform or develop the SEP by agreement, grant, or as injunctive relief in any other enforcement action or in compliance with state or local requirements. Respondent further certifies that Respondent has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

34. EPA and its authorized representatives shall have access to the property Respondent owns that is the location of the SEP at all reasonable times to monitor Respondent's implementation of the SEP. Respondent shall use its best efforts to obtain for EPA access to property not owned by Respondent that is the location of a SEP at all reasonable times to monitor Respondent's implementation of the SEP. Best efforts shall include payment of reasonable costs to obtain access. Nothing herein shall be construed to limit EPA's access authority under EPCRA or any other law.

Penalty Payment

35. Respondent UPRR agrees that, in settlement of the claims for violations of Section 311(b)(3) of the CWA alleged in this Complaint and Consent Agreement/Final Order, and pursuant to Section 311(b)(6) of the CWA, Respondent shall pay Twenty-Four Thousand Dollars (\$24,000) within thirty calendar days of the effective date of this Final Order. Payment shall be by cashier's or certified check made payable to the "Environmental Protection Agency – OSLTF-311" and remitted to:

U.S. EPA  
Fines and Penalties  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

36. On the payment, Respondent shall reference the Docket Number CWA-07-2016-0091 and **In the Matter of Union Pacific Railroad Company** on the check. A copy of each check shall also be mailed to:

Regional Hearing Clerk  
United States Environmental Protection Agency  
Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

and

Howard Bunch  
Office of Regional Counsel  
United States Environmental Protection Agency  
Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219.

37. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement/Final Order shall be claimed by any Respondent as a deduction for federal, state, or local income tax purposes.

38. Late Payment Provisions. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the date required. Interest will be assessed at a rate of the United States Treasury tax and loan rate in accordance with 31 C.F.R. § 901.9(b). A charge will be

assessed to cover the costs of the debt collection, including processing and handling costs and attorneys' fees. In addition, a non-payment penalty charge of six (6) percent per year, compounded annually, will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid. 31 C.F.R. §§ 901.9(c) and (d).

Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection.

#### Effect of Settlement and Reservation of Rights

39. This Consent Agreement/Final Order resolves all civil and administrative claims for the CWA violations alleged in this Complaint and Consent Agreement/Final Order. Complainant reserves the right to take enforcement action with respect to any other violations of CWA or other applicable law.

40. The effect of settlement described in Paragraph 39 is conditional upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 27 of this Consent Agreement/Final Order.

41. Nothing in this Consent Agreement/Final Order shall be construed as a release from any other action under law and/or regulation administered by EPA, nor shall it alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

#### General Provisions

42. The executed Complaint and Consent Agreement/Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

43. Pursuant to 40 C.F.R. § 22.31(b), the effective date of this Consent Agreement/Final Order shall be the date on which it is filed. All time periods herein shall be calculated therefrom in calendar days unless otherwise provided in this Consent Agreement/Final Order.

44. The headings in this Consent Agreement/Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement/Final Order.



45. Respondent and Complainant agree that this Consent Agreement/Final Order may be signed in part and counterpart.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date \_\_\_\_\_

\_\_\_\_\_  
Rebecca Weber  
Director, Air and Waste Management Division  
U.S. Environmental Protection Agency  
Region 7


Date \_\_\_\_\_

\_\_\_\_\_  
Howard C. Bunch  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7

RESPONDENT:  
UNION PACIFIC RAILROAD COMPANY

Date Oct. 26, 2016

David P. Young  
Name

  
Signature

AVP  
Title

**FINAL ORDER**

Pursuant to Section 311(b)(6) of the CWA, 33 U.S.C. § 1321(b)(6), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

\_\_\_\_\_  
Date

**CERTIFICATE OF SERVICE**

I certify that on the date below, I hand delivered the original and one true copy of this Complaint and Consent Agreement/Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219. I further certify that on the date below I sent by certified mail, return receipt requested, a true and correct copy of the original Complaint and Consent Agreement/Final Order to the following:

John Voorhees, Esq.  
Greenberg Traurig, LLP  
1200 17th Street, Suite 2400  
Denver, CO 80202

Dated this \_\_\_\_\_th day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Name

ATTACHMENT A:

**Proposal for a Supplemental Environmental Project**

**Submitted by: Union Pacific Railroad Company**

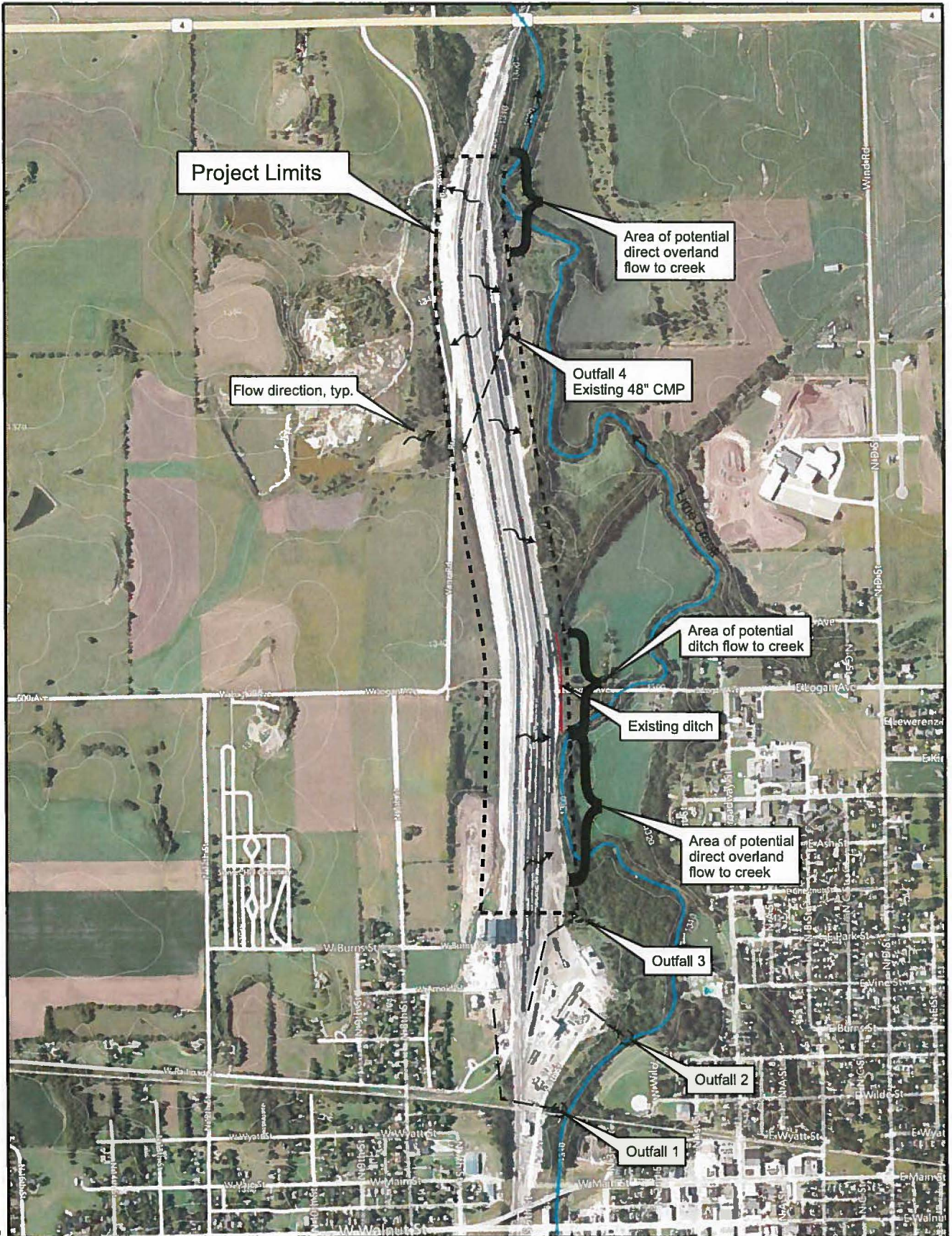
Location: Union Pacific Railroad Company, Herington Yard, Herington, KS

Site Description: See Figure 1 - Site Map UPRR Herington, KS Classification Yard; and Figure 2. Herington Yard Area 2A and 2B (attached).

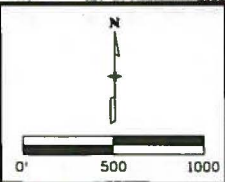
Description of Project: Union Pacific will construct a physical barrier system consisting of earthen berms and Jersey Barriers (depending on locations), supplemented by manually operated drop gates and control structures. The project will involve the following:

- Installation of 800 linear feet (LF) of pre-cast Jersey Barrier with two stormwater drop gates in Area 2A, on the east side of the yard service road;
- Installation of 1650 LF of lined earthen berm barrier with four stormwater drop gates in Area 2B, on the east side of the yard service road; and
- Installation of one flow control structure on the western inlet to the existing 48" CMP beneath the yard.

Estimated Cost: \$338,100 to \$724,500.



File Name: Figure-L.dgn  
 Print Date: 7/8/2013



**Figure 1 - Site Map**  
 UPRR Herington, KS Classification Yard

