



OFFICE OF THE
HARRIS COUNTY ATTORNEY
CHRISTIAN D. MENELEE

July 27, 2022

Via Certified Mail, Return Receipt Requested
No. 7020 2450 0000 4924 0113

Mr. Lance Fritz
Chairman, President, and Chief Executive
Officer
Union Pacific Railroad
1400 Douglas Street
Omaha, Nebraska 68179

Via Certified Mail, Return Receipt Requested
No. 7020 2450 0000 4924 0144

Mr. Michael Regan
Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
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Washington, D.C. 20460

Via Certified Mail, Return Receipt Requested
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Ms. Earthea Nance, PhD, PE
Regional Administrator
Environmental Protection Agency Region 6
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Via Certified Mail, Return Receipt Requested
No. 7020 2450 0000 4924 0151

Honorable Merrick Garland
Attorney General of the United States
U.S. Department of Justice
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Washington, D.C. 20530

Via Certified Mail, Return Receipt Requested
No. 7020 2450 0000 4924 0137

Mr. Toby Baker
Executive Director
Texas Commission on Environmental Quality
MC-109
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Austin, Texas 78711-3987

Via Certified Mail, Return Receipt Requested
No. 7020 2450 0000 4924 0168

CT Corporation System
Registered Agent for Union Pacific Railroad
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Dallas, Texas 75201-3136

Re: 90-Day Notice of Intent to Sue under the Resource Conservation & Recovery Act

Dear Mr. Fritz,

Pursuant to the citizen suit provisions of the 1976 Amendments to the Solid Waste Disposal Act (hereinafter the "Resource Conservation and Recovery Act" or "RCRA"), 42 U.S.C. § 6972(a)(1)(B), Harris County, Texas ("Harris County" or the "County"), a local subdivision of the State of Texas, hereby notifies you that on or after the 90th day from the date of your receipt of this notice, Harris County intends to initiate a citizen suit in United States District Court for the Southern District of Texas against Union Pacific Railroad Company ("UPRR") regarding the storage and/or disposal of hazardous waste at the UPRR's Houston Wood Preserving Works

facility (the “Facility”), which presents or may present an imminent and substantial endangerment to health and the environment.

Historical operations at the Facility, including creosote processing and waste disposal, have resulted in health and environmental effects to areas in and around the historically African-American Fifth Ward and Kashmere Gardens neighborhoods. As described further below, Southern Pacific Railroad—UPRR’s predecessor in interest—processed and disposed of creosote and other waste materials in on-site solid-waste management units up to the mid-1980s. By the 1970s, contamination attributable to operations at the Facility had reached the groundwater and migrated to the Kashmere Gardens neighborhood and the surrounding area. That contamination has only continued to expand and affect the neighborhood. In 2019, the Texas Department of Health and Human Services concluded that lung and bronchus, esophagus, and larynx cancers were significantly greater than expected in the Fifth Ward and Kashmere Gardens, and other increased rates of cancer have also been identified. In addition to affecting the residents and families of one of Houston’s historic neighborhoods, the contamination impacts Harris County facility management, permit compliance, Harris County Pollution Control Department operations, and property tax revenues.

Although it is clear that contamination from the Facility persists and continues to migrate throughout areas in and around the Fifth Ward and Kashmere Gardens, this contamination has been neither fully characterized nor properly abated to prevent or mitigate future health and environmental impacts. Therefore, Harris County intends to file suit under RCRA against UPRR to seek an order requiring, among other things, that contamination attributable to former Facility operations be fully characterized and addressed. Harris County recognizes that the costs of litigating this imminent and substantial endangerment to a final order will require significant resources from both UPRR and Harris County, and that those resources could be better directed towards addressing contamination plumes and making residents of the affected Fifth Ward and Kashmere Gardens whole. Harris County therefore invites UPRR to engage in discussions on actions that will address the legacy of environmental contamination at the Facility and concrete steps to make environmental justice a reality for the residents of the Fifth Ward and Kashmere Gardens.

Historical Uses of the Facility Have Led to Off-Site Human Health & Environmental Endangerment

History of the Houston Wood Preserving Works

The Facility, located at 4910 Liberty Road, Houston, Texas, was established and operated by the Southern Pacific Railroad Company between 1911 and 1984 as a wood treatment facility. Southern Pacific treated railroad ties with creosote and possibly pentachlorophenol to prevent rotting. On information and belief, we also understand that the Facility handled and used “creosote extenders” composed of industrial chemical wastes, including chlorinated materials, received from providers such as Dixie Oil Processors and Motco. Other hazardous chemicals used at the Facility for wood treatment included naphtha, bunker C (a heavy fuel oil), styrene tar, and diesel fuel. Treatment processes generated a waste stream consisting of liquid creosote wastes and potentially other solid and hazardous wastes. This waste stream was initially managed in two solid waste management

units until the mid-1970s, when Southern Pacific began to manage the stream first in a wood-lined drainage ditch and then in a surface impoundment. Other solid waste management units may have been used historically to manage these and other wastes.

In addition to wood preservation operations at the Facility, UPRR and its predecessor entity used the Englewood Intermodal Yard as part of their activities. The Englewood Intermodal Yard is south of the former wood preserving Facility, separated by the UPRR mainline rail and currently used for the transfer of box containers between rail cars and truck trailers. Historic uses of the Englewood Intermodal Yard included a wastewater lagoon and aboveground storage tanks, both of which contributed to contamination at the site.

Through a series of mergers, UPRR acquired Southern Pacific Transportation Company in the late 1990s, assuming liabilities stemming from Southern Pacific's prior operations. UPRR is also directly liable for ongoing contamination as owner and operator of the Facility. UPRR has represented that Southern Pacific began and UPRR continues to implement cleanup operations according to site remediation programs administered by the Texas Commission on Environmental Quality ("TCEQ").

The Facility Is Contaminated as a Result of Prior Uses, and the Contamination has Migrated to Residential Areas

Due to prior uses of the Facility, including waste generation, management, and disposal, the Facility and surrounding properties are contaminated with a variety of hazardous substances. These substances include a variety of non-aqueous phase liquids ("NAPL") that remain present in the soils and groundwater at the facility above Texas Risk Reduction Program ("TRRP") Protective Concentration Levels ("PCLs"), the state standards for environmental cleanups. Although certain cleanup plans exist for the site, including multi-phase extraction and a slurry wall, Harris County believes that additional site investigation and characterization efforts are necessary to identify and remedy on-site and off-site conditions. This belief is confirmed by the relatively recent appearance of tar-like seeps that have emerged from the asphalt cap overlaying the Englewood Intermodal Yard. UPRR has attempted to manage these seeps through weekly inspections and recovery efforts and attributes the emergence of this contamination to the former use of aboveground storage tanks and wastewater lagoons in the vicinity of the Englewood Intermodal Yard. Additional work should be performed to more fully characterize these contaminants and any other contaminants that may be present on the site and to remove all identified waste, including NAPL.

Despite cleanup efforts undertaken by UPRR and its predecessors, off-site migration of NAPL and other hazardous wastes has occurred and may still be occurring, resulting in adverse environmental and health effects in and around the Kashmere Gardens and Fifth Ward neighborhoods. Recent detections of dioxins in off-site soils near the Facility add to these concerns. Plumes of NAPL, associated dissolved/chlorinated wastes, and possibly other groundwater contamination extend north and northeast of the Facility. Groundwater contamination has been insufficiently characterized off-site and it is not clear that proposed control measures will stem the flow or adequately remedy contaminated groundwater in Kashmere Gardens. Furthermore, observed and threatened discharges of NAPL and other hazardous wastes off-site cause or contribute to nuisance

conditions in the surrounding neighborhoods, which have not been investigated or mitigated by UPRR.

Kashmere Gardens and Fifth Ward Area Residents Have Suffered Adverse Health Impacts Consistent with Contamination

As UPRR is aware, a cancer cluster has been identified in Houston's Fifth Ward and Kashmere Gardens neighborhoods. In November of 2019, a cancer cluster analysis identified statistically significant greater-than-expected cancer rates. Existing information about cancer rates suggests that observed cancers are consistent with long-term exposure to the kinds of contaminants present at and emanating from the Facility.

TCEQ Permit Proceedings Are No Substitute for Prompt Action

Harris County has requested a contested case hearing in connection with UPRR's RCRA permit for the Facility, but the permit amendment process is unlikely to sufficiently address many of the key remedies Harris County seeks to obtain through the noticed citizen suit. As proposed, the amended RCRA permit would not require sufficient additional investigation of the Facility, appropriate efforts to verify a now-30-year-old document that UPRR relies on to characterize the Facility, or aggressive removal and treatment of on-site and off-site contamination and source control. The proposed permit also fails to establish any meaningful timeframe to complete contamination removal activities.

Harris County Is an Appropriate Plaintiff to Bring This Suit

Harris County residents in the Fifth Ward and the Kashmere Gardens neighborhoods clearly suffer the most significant harms resulting from the persistent contamination. In addition to harming the health and property interests of the residents of Houston's Fifth Ward and Kashmere Gardens areas, the contamination attributable to the Facility also impacts Harris County. Harris County faces serious fiscal, compliance, and logistical implications as a result of the contamination at the Facility—impacts that would be mitigated or eliminated through a court order requiring UPRR to fully assess and abate the existing contamination at and around the Facility.

UPRR's failure to comply with legal requirements to fully assess on-site and off-site contamination and take appropriate action has fiscal implications for Harris County. Harris County Pollution Control Services (Pollution Control) is the Harris County Department designated to inspect facilities in the County for compliance with environmental quality laws and regulations, including RCRA. In response to community concern, Pollution Control has dedicated a significant amount of staff time and expended considerable funds to investigate the release of hazardous waste from the Facility into the surrounding communities. The County's investigation is on-going, but these investigation costs should be borne by UPRR, not local government.

UPRR's failure to fully investigate, delineate, and characterize off-site contamination attributable to the Facility impacts the County's operation and maintenance of a public park, a mere 0.1 miles from the Facility. The close proximity of the park to the Facility raises questions about whether the park is contaminated and if the eventual Facility remediation will cause further impacts,

including by wind dispersion of contaminated soil. These concerns pose logistical, operational, and fiscal hurdles for the maintenance of park amenities by Harris County staff, and raise questions about the health and welfare of Harris County residents and staff that visit the park. Until UPRR fully investigates these potential impacts, Harris County operations remain affected.

The existing imminent and substantial endangerment from the Facility also presents permit compliance challenges for the Storm Water Management Joint Task Force (“JTF”), comprised of the City of Houston (the “City”), Harris County, and the Harris County Flood Control District. The members of the JTF are co-permittees under a TCEQ Texas Pollutant Discharge Elimination System (“TPDES”) Permit, which authorizes the discharge of stormwater from all portions of the JTF Municipal Separate Storm Sewer System (“MS4”),¹ referred to as the JTF MS4 Permit. The JTF Permit requires the co-permittees to prohibit non-stormwater discharges. Water from the Facility discharges into the JTF MS4 and is believed to be discharging pollutants or allowing the infiltration of pollutants into the JTF MS4 operated by the City, which is prohibited under the terms of the JTF MS4 Permit. Harris County has a vested interest in ensuring that the UPRR Facility is prohibited from discharging into the MS4 because it impacts compliance with its JTF MS4 Permit.

Finally, the uninvestigated and unremediated pollution in and around the UPRR Facility has devalued the surrounding property, impacting the County property tax base. Public awareness and concern over the environmental contamination from the Facility and its impacts on human health and the environment has resulted in a loss of value and stigmatized the surrounding properties when compared to a property that isn’t above a known contaminated groundwater plume or adjacent to a site that continues to ooze tar like seeps.

In sum, the continued presence of contamination in, under, and migrating from the Facility continues to harm and threaten the health of residents, negatively impact the environment, and compromise Harris County infrastructure, operations obligations, and tax revenues. Thus, Harris County’s interests are being harmed by contamination that is known to be connected to and caused by historical operations at the Facility. Although significant investigation work remains to be done at the Facility, it is beyond question that certain health and environmental impacts at the Facility and in the surrounding areas were caused by historical operations at the Facility. Given the lack of full characterization of both contamination at the Facility and contamination that has already migrated from the Facility, the County notes that additional impacts may be discovered and observed as the result of further investigation.

Congress authorized federal courts to issue orders to abate imminent and substantial dangers to human health and the environment and these injuries may be redressed by judicial action. In an imminent and substantial endangerment RCRA citizen suit, courts have the power “to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph

¹ The MS4 is defined as “the conveyance, or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) owned or operated by the city, county or other public body that is designed for collecting or conveying stormwater, which is not combined with sewer and is not part of a POTW.” JTF MS4 Permit, Part V(A)(1).

(1)(B), to order such person *to take such other action as may be necessary*, or both”² The Supreme Court has recognized that Section (1)(B) of the RCRA citizen suit provision authorizes a political subdivision to seek, and a court to order, “a mandatory injunction, *i.e.*, one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste.”³ Thus, federal courts will have the discretion to craft an appropriate remedy that will help to relieve the burdens suffered by the residents of Fifth Ward, the Kashmere Gardens neighborhood, and Harris County, and alleviate other environmental and health impacts resulting from continued contamination at, under, and migrating from the Facility. Accordingly, Harris County will commence a lawsuit to protect the environment, and the health and welfare of Harris County and its citizens.

Facility-Related Contamination Is Presently an Imminent and Substantial Endangerment

The contamination described in this notice of intent to sue (and several other documents available in connection with the regulatory and community engagement surrounding the Facility) meets the criteria of “imminent and substantial endangerment.” RCRA only requires that that the solid or hazardous wastes at issue “may present” an imminent and substantial endangerment.⁴ Although wood treatment activities at the Facility have ceased, legacy contamination continues to exist throughout the Facility and its surroundings. Threats to human health and the environment thus are “present now, although the impact of the threat[s] may not be felt until later.”⁵ Finally, if those threats are “serious,” they qualify as “substantial.”⁶

The harms described in this notice, in EPA’s September 2021 letter to UPRR, and in other materials concerning the Houston Fifth Ward cancer cluster demonstrate that the contamination present at the Facility may present an imminent and substantial endangerment to the residents of the Fifth Ward and Kashmere Gardens, the City, Harris County, and to the environment. To address that endangerment, and to obtain all lawful relief, Harris County intends to pursue its RCRA citizen suit after 90 days following your receipt of this letter.

Requested Relief

In its suit to abate the imminent and substantial endangerment posed by legacy contamination at the Facility, including contamination that has migrated into residential neighborhoods, Harris County intends to seek all relevant relief necessary to achieve environmental justice. As noted above, courts have broad discretion to issue mandatory injunctions to respond to environmental conditions that endanger human health and the environment. Therefore, Harris County will seek an order that, among other actions, requires UPRR to:

- Fully investigate, delineate, and characterize the on-site contamination attributable to the operation of the Houston Wood Preservation Works site;

² 42 U.S.C. § 6972(a).

³ *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996)

⁴ *See Cox v. City of Dallas*, 256 F.3d 281, 299 (5th Cir. 2001).

⁵ *Id.*

⁶ *Id.*

- Fully investigate, delineate, and characterize off-site contaminants, which have likely migrated from the Houston Wood Preservation Works site;
- Reexamine and validate the conceptual site model on which understandings of migration have been based to ensure investigation and remedial efforts are based on sound current science;
- Evaluate whether all Solid Waste Management Units associated with the Facility have been identified, defined, investigated, and closed including without limitation areas of impact at the Englewood Intermodal Yard;
- Fully investigate, remove, and properly dispose of NAPL, creosote, chlorinated compounds and any contaminated soils in the Englewood Intermodal Yard and in other areas where soil contamination exceeds applicable cleanup standards—complete removal wherever technically feasible to better provide for source control;
- Complete risk assessments for all potentially affected residential areas including (a) expanded soil sampling at residential properties and (b) comprehensive soil gas surveys and actual indoor air monitoring, all of which shall be designed to detect the presence of any constituents potentially associated with the Facility including without limitation NAPL, dioxins, furans, mercury, hexavalent chromium, PCBs, arsenic, chlorinated compounds, PFAS, and any other creosote related compound;
- Ensure that all soil and groundwater sampling on-site and off-site have been performed to include all potentially present parameters based on latest information;
- Provide for and agree to ongoing access to the Facility and UPRR property for purposes of any additional investigations Harris County may wish to perform;
- In light of comprehensive site data, evaluate the full range of potential remedial options and implement measures designed to provide maximum protection to the neighboring community and local government assets;
- Provide a fully detailed engineering report related to the final remedy selection and implementation;
- Design all technically practicable remediation and control measures, and fully implement such measures for remaining on-site contamination to prevent off-site migration of all contaminants discovered during the investigation phase including without limitation a properly designed slurry wall that will adequately contain all NAPL and other known contaminants and that provides for extraction of material from behind the wall;
- Provide for excavation and clean fill remedies and Texas Risk Reduction Program regulation Tier 1 residential cleanup standards for any areas of soil contamination identified off-site;
- Provide for active groundwater remediation in areas of off-site impact to residential properties instead of engineering controls, institutional controls, or monitoring, or natural attenuation-based remedies;
- Fully fund the closure of the former City of Houston storm sewer infrastructure present on-site at the Facility and permanently prevent discharges from that infrastructure to existing City utilities;
- Fully assess all utilities and utility corridors adjacent to the Facility or near identified areas of contamination and clean, repair, and protect City storm sewers and other utilities and actively remediate or remove contaminated media from utility corridors to facilitate future maintenance work, construction, and expansions;

- Provide for appropriate dust suppression in connection with any remediation, excavation, or other activities at or about the Facility that may liberate contaminated soils or dusts;
- Provide for air monitoring in the neighboring community on a periodic basis and continuously during any remediation, excavation, or other activities that may cause the discharge of pollutants into the air;
- Create a fund to provide grants to community non-profit organizations including those that focus on education, health (air quality boxes similar to midtown, fitness center, water filtration devices), and beautification;
- Make aesthetic improvements in and around the site including a wooden fence with historic images of the Fifth Ward and Kashmere Gardens, landscaping, new sidewalks and streets, and noise reduction barriers near trains;
- Identify and implement any other relief necessary to fully address existing contamination including any previously unidentified contamination discovered during additional investigations;
- Provide access to health care and early diagnostic screening for any persons whose health may have been adversely affected by contamination from the Facility;
- Indemnify local government for any investigatory costs in assessing on-site or off-site contamination from the Facility;
- Provide buyout and relocation funding and assistance in cooperation with relevant authorities to make whole residents of Kashmere Gardens and Fifth Ward area neighborhoods whose properties have been affected by the off-site migration of contaminants from the Facility and who wish to move, with acquired properties being repurposed for community use and benefit; and
- Provide funding for temporary relocation of residents who wish to relocate during investigation and remediation activities.

In sum, Harris County intends to seek all relief available under RCRA to abate the imminent and substantial endangerment presented by the contamination at the Facility, including any additional responsive actions necessary to address conditions that are not known at the time of this notice of intent but may be discovered during efforts to fully investigate and characterize the site.

Conclusion

It is beyond dispute that soils and groundwater at the Houston Wood Preservation Works site are contaminated, and the Facility has released contamination into Fifth Ward and Kashmere Gardens neighborhoods. It is also beyond dispute that contaminants at the Facility have exceeded state-based cleanup standards and that a complete characterization of on-site and off-site contamination has not yet occurred. Residents of areas in and around Fifth Ward and Kashmere Gardens suffer from higher incidence of a variety of cancers consistent with exposure to contamination at the Facility, and Harris County bears and will continue to bear costs associated with this legacy contamination for which UPRR is responsible. This contamination presents an imminent and substantial endangerment to health and the environment, actionable under the citizen suit provision of RCRA.

For these reasons, Harris County intends to file suit 90 days after your receipt of this notice of intent. Although Harris County intends to pursue available remedies in court, the County is

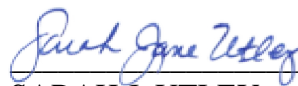
committed to achieving environmental justice for the residents of Kashmere Gardens and the Fifth Ward—and protecting health, the environment, and infrastructure within the County—by the most effective means. Therefore, Harris County invites UPRR to propose concrete next steps that it guarantees will address historical contamination and make the County and our affected residents whole.

Sincerely,

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