

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)
)
UPLAND WINGS, INC.)
)
Respondent)
)
Proceedings under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))
_____)

Docket No. CWA-07-2009-0006

FINDINGS OF VIOLATION
AND ORDER FOR COMPLIANCE

I. Preliminary Statement

1. The FINDINGS OF VIOLATION are made and the ORDER FOR COMPLIANCE is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA"), by Section 309(a)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3), as delegated by the Administrator to the Regional Administrator, EPA, Region 7, and further delegated to the Director, Water, Wetlands and Pesticides Division, EPA, Region 7.

2. Respondent, Upland Wings, Inc. (hereafter "Respondent") operates an iron ore recovery operation at the former Pea Ridge mining facility near Sullivan, Missouri and is incorporated under the laws of Missouri.

II. Jurisdiction and Findings of Fact

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, inter alia, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

5. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter "Corps"), for any discharge of "dredged or fill material" into the "navigable waters" of the United States.

6. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

7. At all times relevant, Respondent owned, operated, or otherwise controlled an iron ore recovery operation located at 10685 Wings Lake Drive, Sullivan, Missouri 63080. The

property includes portions of Mary's Creek and adjacent wetlands, located in Section 3, Township 39 North, Range 01 East, Washington County, Missouri.

8. Mary's Creek flows through Respondent's tailings pond and further discharges through a Parshall flume. Respondent's facility is a "point source" that "discharges pollutants" into Mary's Creek. Mary's Creek and adjacent wetlands are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2 and 33 C.F.R. Part 328.

9. Respondent's discharge of pollutants requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

10. On or about December 8, 2006, the Missouri Department of Natural Resources ("MDNR") issued NPDES permit No. MO-0000574 (hereafter "NPDES permit") to Respondent for discharges from its facility to Mary's Creek, identified as Outfalls 001 and 002, subject to compliance with conditions and limitations set forth in the NPDES permit. On April 3, 2009, MDNR issued a modified permit to Respondent, which will expire December 7, 2011. Respondent's NPDES permit, including Respondent's modified permit, contain the following provisions:

- a. Section A sets daily maximum and monthly average interim effluent limitations for, among other parameters, oil and grease, iron, lead, chromium, cadmium, and copper; and requires monitoring and reporting for these parameters at least quarterly using a grab sample collected within a 24-hour period.
- b. Section A requires monitoring and reporting for flow on a daily basis within a 24-hour period.
- c. Section C.2 requires all outfalls to be clearly marked in the field.
- d. Section C.8 requires Respondent to perform a Whole Effluent Toxicity ("WET") test on Respondent's Outfall 001 once a year and report the findings to MDNR.

III. Findings of Violation

Section 402 Violations

Count 1

11. On March 5-7, 2007, EPA performed an inspection of the Upland Wings facility under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a), to evaluate the facility's compliance with its NPDES permit and the CWA.

12. During the inspection identified in Paragraph 11, the EPA inspector observed that Respondent's facility continuously discharges through the Parshall flume, identified as Outfall 001 on Respondent's NPDES permit.

13. Between January 1, 2007, and March 31, 2008, Respondent reported "no discharge" from Outfall 001 in its Monitoring Reports to MDNR.

14. Respondent violated Section A of its NPDES permit by claiming "no discharge" in its Monitoring Report to MDNR during the same time period in which a discharge was observed by the EPA inspection referenced in Paragraph 11. As such, Respondent violated Section 402 of the CWA.

Count 2

15. During the inspection identified in Paragraph 11, the EPA inspector observed that Respondent had not clearly marked Outfall 001 or Outfall 002, as required by Respondent's NPDES permit.

16. Respondent violated Section C.2 of its NPDES permit by failing to clearly mark its outfalls in the field. As such, Respondent violated Section 402 of the CWA.

Count 3

17. During the inspection identified in Paragraph 11, the EPA inspector took samples of Respondent's effluent from Outfall 001. Sample results indicated violations of Respondent's effluent limits, pursuant to its NPDES permit, for oil and grease: EPA's sample results for oil and grease measured 86 mg/L on March 7, 2007 and 18.3 mg/L on March 8, 2007. Respondent's NPDES permit's daily average effluent limit for oil and grease is 15 mg/L.

18. Respondent violated Section A of its NPDES permit by discharging levels of oil and grease in excess of its permit limits. As such, Respondent violated Section 402 of the CWA.

Count 4

19. Pursuant to the reporting requirements in Respondent's NPDES permit, Respondent reported to MDNR the following discharges from Outfall 001 on July 21, 2008:

	Total Copper	Total Chromium	Total Cadmium	Total Iron	Total Lead	Total Suspended Solids
Sample result (mg/L)	9.30	1.00	0.36	5,400	3.80	47,824
Permit limit (mg/L)	.029	.042	.013	2.00	.020	30

20. Respondent violated Section A of its NPDES permit by discharging levels of copper, chromium, cadmium, iron, lead and total suspended solids in excess of its permit limits. As such, Respondent violated Section 402 of the CWA.

Count 5

21. Respondent failed to provide flow data to MDNR, as required by Respondent's NPDES permit, for 2007 and 2008.

22. Respondent violated Section A of its NPDES permit by failing to provide flow data in its Monitoring Reports. As such, Respondent violated Section 402 of the CWA.

Count 6

23. Respondent failed to provide WET tests to MDNR, as required by Respondent's NPDES permit, for 2007 and 2008.

24. Respondent violated Section C.8 of its NPDES permit by failing to provide WET test results to MDNR. As such, Respondent violated Section 402 of the CWA.

Count 7

25. Respondent failed to submit a Monitoring Reports to MDNR for Outfall 001, as required by Respondent's NPDES permit, for third quarter 2008.

26. Respondent violated Section A of its NPDES permit by failing to provide a Monitoring Report to MDNR for third quarter 2008. As such, Respondent violated Section 402 of the CWA.

Count 8

27. Respondent failed to submit Monitoring Reports to MDNR for Outfall 002, as required by Respondent's NPDES permit, for 2007 and 2008.

28. Respondent violated Section A of its NPDES permit by failing to provide Monitoring Reports to MDNR for Outfall 002 for 2007 and 2008. As such, Respondent violated Section 402 of the CWA.

Count 9

29. Between January 6 and 8, 2009, an EPA official conducted an inspection of Respondent's facility. The inspector identified that Respondent was pumping water from a settling pond and discharging into Mary's Creek at a location not identified in Respondent's NPDES permit.

30. The flow of wastewater from Respondent's Facility into Mary's Creek at a location not authorized by Respondent's NPDES permit constitutes unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Respondent's NPDES permit and a violation of Sections 301 and 402 of the CWA.

Section 404 Violations

Count 10

31. On August 20, 2008, officials from EPA and the Corps conducted a site visit at Respondent's Property. Inspectors learned that, beginning in 2007, Respondent and/or persons acting on its behalf, discharged dredged or fill material including dirt, spoil, rock, and sand at Respondent's Property into wetlands and waters of the United States. Specifically, Respondent used earth moving equipment to dredge iron ore tailings from settling ponds and placed the dredged material in Mary's Creek and adjacent wetlands. Respondent's dredge and fill operations were performed without obtaining a Section 404 permit and impacted approximately 15 acres of wetlands.

32. The dredged and/or fill materials discharged by Respondent into Mary's Creek and adjacent wetlands include spoil, rock, sand and dirt, and are "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

33. The earth moving equipment referenced in Paragraph 29 above, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

34. The discharge of the dredged and/or fill material into Mary's Creek and adjacent wetlands at the Property, as described in Paragraph 31 above, constitutes the "discharge of a pollutant" within the meaning of Section 501(12) of the CWA, 33 U.S.C. § 1362(12).

35. Respondent's discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and therefore these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

Count 11

36. In January 2009, EPA officials identified that Respondent, using earth moving equipment, channelized approximately 300 linear feet of Mary's Creek and placed dredged material into adjacent wetlands. Respondent's dredge and fill operations were performed without obtaining a Section 404 permit.

37. Respondent's discharge of pollutants from a point source into waters of the United States was performed without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344 and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

IV. Order for Compliance

Based on the Findings of Fact and Findings of Violation set forth above, and pursuant to Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described below.

38. Within fifteen (15) days of the effective date of this Order, Respondent shall provide to EPA a certified statement that it is currently in compliance with its NPDES permit or, in the alternative, provide a statement that Respondent will take actions necessary to comply with its NPDES permit.

39. If Respondent is unable to certify its immediate compliance with its NPDES permit, Respondent shall, within sixty (60) days of the effective date of this Order, provide to EPA a proposed Compliance Plan, for EPA's review and approval, which shall provide, in detail, how Respondent will comply with all requirements of its NPDES permit and the CWA. At a minimum, the proposed Compliance Plan shall include:

- a. A description of treatment installations or modifications Respondent proposes to implement to eliminate violations of Respondent's permit limits;
- b. Engineering plans, including capital and operating costs, for implementing such installations or modifications; and
- c. A detailed schedule for implementing the Compliance Plan to be completed as expeditiously as possible.

40. *Sampling, Analysis, Recordkeeping, and Reporting.* Beginning immediately upon receipt of this Order, Respondent shall comply with all sampling, analysis, recordkeeping and reporting requirements of its NPDES permit, including but not limited to the following:

- a. Properly conduct sampling and analysis for all parameters specified in the NPDES permit, including, but not limited to, flow data. The sampling and analysis shall be performed using EPA-approved methods for water and wastewater.
- b. Record all data required to be documented when sampling and analyzing samples, including but not limited to date, time and exact place of sampling or measurement, the individual(s) who performed the sampling measurement, the individual(s) who performed the analyses and the analytical techniques or methods used for all samples, in accordance with the Standard Conditions for NPDES Permits, incorporated in Section B of Respondent's NPDES permit.
- c. Provide a copy of the facility's DMRs and all associated sampling data and analysis, as specified in subparagraphs a and b above, plus any supporting documentation (e.g., bench lab sheets) on a monthly basis to EPA beginning immediately upon receipt of this Order and by the 28th of each month for a period of twelve (12) months.

- d. Provide to EPA third quarter sampling results prepared by Ozark Testing from August 2008.

41. Within thirty (30) days after receipt of this Order, Respondent shall submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed restoration of the impacted Site described in Paragraphs 31 and 36 above. If restoration is deemed not feasible, Respondent shall submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed mitigation of no less than fifteen (15) acres of wetlands and 300 linear feet of stream. Determining the feasibility of the site's restoration shall be conducted in consultation with the Corps. The restoration or mitigation work shall be completed within twelve (12) months in accordance with the specifications set forth in the Work Plan.

42. *Certification.* Each submittal to EPA pursuant to the requirements of this Order shall include a written statement by Respondent signed by a principal executive officer or a ranking elected official, or by a duly authorized representative of that person, that contain the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Submissions

43. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Raju Karkalapudi
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101

44. A copy of documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Kevin Mohammadi
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102-0176

and

Gary Gaines, Director
Southeast Regional Office
Missouri Department of Natural Resources
2155 North Westwood Boulevard
Poplar Bluff, Missouri 63901

VI. General Provisions

Effect of Compliance with the Terms of this Order for Compliance

45. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from, initiating an administrative or judicial enforcement action to correct the violations described above, including but not limited to actions to protect the health or welfare of persons or the environment, or to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

46. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d), or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d), or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

Access and Requests for Information

47. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

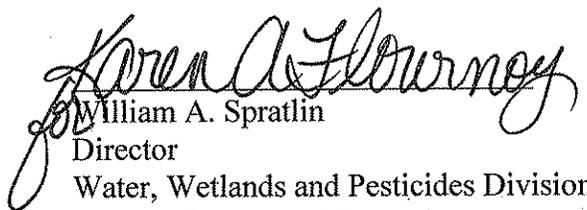
Severability

48. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

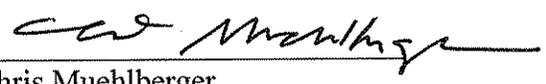
Effective Date

49. This Order shall be effective upon receipt by Respondent. All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

Issued this 4th day of June, 2009.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101



Chris Muehlberger
Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, Kansas 66101

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Administrative Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

James Kennedy
Upland Wings, Inc.
1185 Ross Road
St. Louis, Missouri 63146

Kevin Mohammadi
Chief
Water Pollution Compliance and Enforcement Section
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

Gary Gaines
Director
Southeast Regional Office
Missouri Department of Natural Resources
2155 North Westwood Boulevard
Poplar Bluff, Missouri 63901

6/5/09
Date

Kathy Robinson