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HEARINGS CLERK
EPA -- REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)
) DOCKET NO. CWA-10-2011-0003
)
)
Usibelli Coal Mine, Inc.,)
Healy, Alaska) **CONSENT AGREEMENT AND**
) **FINAL ORDER**
)
Respondent.)

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order (“CAFO”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 309(g)(2)(B) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CAFO to the Regional Administrator of EPA Region 10, who has re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(1) and (g)(2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22, EPA issues, and Usibelli Coal Mine, Inc. (“Respondent”) agrees to issuance of the Final Order contained in Part V of this CAFO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CAFO commences this proceeding, which will conclude when the Final Order contained in Part V of this CAFO becomes effective.

2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), to sign consent agreements between EPA and the party against whom a Class II penalty is proposed to be assessed.

2.3. Part III of this CAFO contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Each discharge of pollutants from a point source that is not authorized by such a permit constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.2. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “waters of the United States.” 40 C.F.R. § 122.2 defines “waters of the United States” to include waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; all interstate waters; and tributaries to those waters.

3.3. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, dredged spoil, rock, sand, biological materials, and industrial waste.

3.4. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties against any person who has violated Section 301 of the CWA, 33 U.S.C. § 1311, or a condition of an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

3.5. Usibelli Coal Mine, Inc. is a “person” as defined under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

3.6. At all times relevant to this CAFO, Respondent was the owner and/or operator of the Usibelli Coal Mine (“Facility”). The Facility is a coal mine located near Healy, Alaska.

3.7. The water bodies alleged to have received discharges of pollutants from the Facility are the Nenana River, Hoseanna Creek, Sanderson Creek, and Francis Creek. These receiving waters are “navigable waters” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and are “waters of the United States” as defined in 40 C.F.R. § 122.2.

3.8. The stormwater and mine drainage discharged from the Facility contains “pollutants” as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6), including suspended solids and dissolved metals.

A. Discharge Without an NPDES Permit

3.9. Between April 2008 and July 2010, Respondent had 11 unpermitted discharges of stormwater or mine drainage into surface waters as shown in Table 1 below. Most of these discharges occurred when berms of settling ponds or other containment structures were overwhelmed or breached during intense storm events. There were also two instances where stormwater or mine drainage was accidentally pumped into ditches that lead to receiving waters, instead of into settling ponds.

Table 1. Unpermitted Discharges at Usibelli Mine

| Date | Description | Surface Water |
|-----------------|--|----------------|
| 4/6/07-4/7/07 | Unpermitted discharge from lower yard due to breach in berm during late spring breakup | Nenana River |
| 4/13/07-4/14/07 | Unpermitted discharge as 8400 g water was accidentally pumped from the lower yard to culvert to Hoseanna | Hoseanna Creek |
| 7/17/07 | Unpermitted discharge for 5 minutes when Poker Pond 1 was breached during rain event | Hoseanna Creek |
| 7/27/07 | Unpermitted discharge near Poker Pond 1 or 3 during intense rainfall event | Hoseanna Creek |

| Date | Description | Surface Water |
|---------|---|-----------------|
| 8/5/07 | Unpermitted discharge near Poker Pond 1 due to rain event | Hoseanna Creek |
| 9/15/07 | Unpermitted discharge near Poker Pond 1 due to rain event | Hoseanna Creek |
| 6/17/09 | Unpermitted discharge from road drainage ditch at Gold Run Pass caused by a breach near Outfall 002 | Sanderson Creek |
| 6/19/09 | Unpermitted discharge when intermediate mine water sump was breached | Francis Creek |
| 6/24/09 | Unpermitted discharge due to accidental pumping of mine water into discharge ditch | Hoseanna Creek |
| 6/9/10 | Unpermitted discharge due to failure of pond water diversion ditch in Poker Flats area | Hoseanna Creek |
| 7/6/10 | Unpermitted discharge indicated by breach in a berm used to direct water from disturbed ground to the mining area | Francis Creek |

3.10. The ditches that conveyed the stormwater or mine drainage to the receiving waters constitute “point sources” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), and 40 C.F.R. § 122.2.

3.11. By discharging stormwater or mine drainage into waters of the United States, Respondent engaged in the “discharge of pollutants” from a point source within the meaning of Sections 301(a) and 502(12) of the CWA, 33 U.S.C. §§ 1311(a) and 1362(12).

3.12. The discharges of stormwater or mine drainage were not authorized by an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Therefore, EPA alleges that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

3.13. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continues, up to a maximum amount of \$157,500 for violations on or before January 12, 2009, and not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum amount of \$177,500 for violations on or after January 13, 2009.

B. NPDES Permit Violations

3.14. The Facility is authorized to discharge storm water and mine drainage through nine outfalls into Sanderson Creek, Hoseanna Creek, and Gravel Ponds near the tippie area along the Nenana River pursuant to the conditions and limitations set forth in NPDES Permit Number AK-004038-0 (Permit), that became fully effective November 2, 1998. The Permit expired on November 3, 2003, but has been administratively extended, because a complete application to re-apply for the permit was timely received by EPA on April 23, 2003.

3.15. The nine outfalls into Sanderson Creek, Hoseanna Creek, and Nenana River are “point sources” within the meaning of 40 C.F.R. § 122.2.

3.16. Part I.A.1 of the Permit establishes effluent limits for discharges from the permitted outfalls. These effluent limits include, but are not limited to, total recoverable iron and total suspended solids (“TSS”).

3.17. When a permittee exceeds a monthly average effluent limit, the permittee is deemed to be in violation of the effluent limits each of the days of the month in which the violation occurred. When a permittee exceeds a maximum daily effluent limit, the exceedance is counted as one violation.

3.18. In August 2008, Respondent discharged effluent from Outfall 004 a total of four days. The violations are set forth in Table 2 below.

Table 2. Effluent Limit Violations in August 2008

| Date | Outfall | Parameter | Limit | Sample | Type |
|---------|---------|-----------|---------|-------------|------------------|
| 8/28/08 | 004 | TSS | 70 mg/l | 17,700 mg/l | Daily |
| August | 004 | TSS | 35 mg/l | 17,700 mg/l | Monthly (4 days) |
| 8/28/08 | 004 | Iron | 6 mg/l | 202 mg/l | Daily |
| August | 004 | Iron | 3 mg/l | 202 mg/l | Monthly (4 days) |

3.19. Part I.A.1. of the Permit requires sampling within 24 hours of the beginning of a discharge event. Respondent failed to take the required sampling during a wet weather discharge on July 23, 2007.

3.20. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part 19, Respondent is liable for civil penalties not to exceed \$11,000 per day for each day during which the violation continues, up to a maximum amount of \$157,500 for violations on or before January 12, 2009.

IV. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in paragraphs 3.1 through 3.8 of Part III of this CAFO.

4.2. Respondent neither admits nor denies the specific factual allegations contained in Sections A and B of Part III of this CAFO.

4.3. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent's economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$60,000 ("the Assessed Penalty").

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within (thirty) 30 days of the effective date of the Final Order.

4.5. Payment under this CAFO must be made by cashier's check or certified check payable to the order of "Treasurer, United States of America" and delivered via United States mail to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must deliver via United States mail a photocopy of the check described in Paragraph 4.5 to the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Mail Stop ORC-158
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Eva DeMaria
U.S. Environmental Protection Agency
Region 10, Mail Stop OCE-133
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

4.7. If Respondent fails to pay the Assessed Penalty in full by the due date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the Assessed Penalty under the CWA, together with interest, fees, costs, and additional penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.

§ 1319(g)(9), any unpaid portion of the Assessed Penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest

shall be payable on any portion of the Assessed Penalty that is paid within 30 days of the effective date of the Final Order.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay the Assessed Penalty on a timely basis, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The Assessed Penalty, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

4.9. The undersigned representative of Respondent certifies that he or she is authorized to enter into the terms and conditions of this CAFO and to bind Respondent to this document.

4.10. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.11. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order set forth in Part V.

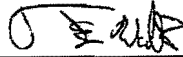
4.12. The provisions of this CAFO shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.13. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

DATED:

FOR RESPONDENT:

NOVEMBER 24, 2010



Signature

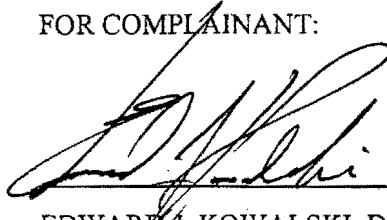
Print Name: FRED WALLIS

Title: V.P. ENGINEERING

DATED:

FOR COMPLAINANT:

1/13/2011



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

5.2. This CAFO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CAFO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CAFO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Alaska Department of Environmental Conservation has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondent. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 19th day of January, ~~2010~~ ²⁰¹¹ Jan



THOMAS M. JAHNKE
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Usibelli Coal Mine, Inc., DOCKET NO.: CWA-10-2011-0003** was filed with the Regional Hearing Clerk on January 19, 2011.


On January 19, 2011, the undersigned certifies that a true and correct copy of the document was delivered to:

Jennifer Byrne, Esq.
U.S. EPA
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on January 19, 2011, to:

Fred Wallis, Vice President Engineering
Usibelli Coal Mine, Inc.
P.O. Box 1000
Healy, AK 99743

DATED this 19th day of January 2011.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10