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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ENVIRONMENTAL PROTECTION AGENCY-REGION VII REGIONAL HEARING CLERK  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
UPLAND WINGS, INC.	)	Docket No. CWA-07-2010-0052
	)	
	)	
Respondent	)	CONSENT AGREEMENT/ FINAL ORDER
	)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	)	
_____	)	

The United States Environmental Protection Agency, Region 7 (EPA) and Upland Wings, Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Section 22.13(b) and 22.18(b)(2) and (3) 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. Part 22.

**COMPLAINT**

Jurisdiction

1. This Consent Agreement/Final Order (CA/FO) is being filed under the authority vested in the Administrator of EPA, pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g) and in accordance with 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, 40 C.F.R. Part 22.

2. This CA/FO alleges that the Respondent discharged pollutants into waters of the United States in violation of Sections 301, 402, and 404 of the CWA, 33 U.S.C. §§ 1311, 1342 and 1344.

Parties

3. Complainant, by delegation from the Administrator of EPA to the Regional Administrator, EPA, Region 7, and re-delegation is the Director of Region 7's Water, Wetlands and Pesticides Division.

4. 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. Respondent has a mailing address of 10685 Wings Lake Drive, Sullivan, Missouri 63080.

**II. Jurisdiction and Findings of Fact**

5. 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.

6. 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.

7. 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.

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

9. 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.

10. Mary's Creek flows through Respondent's tailings pond and discharges, among other things, heavy metals through a Parshall flume back into Mary's Creek. Therefore, Respondent's facility is a "point source" that "discharges pollutants" into a "water of the United States," as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

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

12. 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 authorizes Respondent to discharge from outfalls specified in the permit.
- b. 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.
- c. Section A requires monitoring and reporting for flow on a daily basis within a 24-hour period.
- d. Section C.2 requires all outfalls to be clearly marked in the field.
- e. 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**

13. 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.

14. During the inspection identified in Paragraph 13, the EPA inspector observed that Respondent's facility continuously discharges through the Parshall flume, identified as Outfall 001 on Respondent's NPDES permit.

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

16. 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**

17. During the inspection identified in Paragraph 13, the EPA inspector observed that that Respondent had not clearly marked Outfall 001 or Outfall 002, as required by Respondent’s NPDES permit.

18. 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**

19. During the inspection identified in Paragraph 13, 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.

20. 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**

21. 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

22. 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**

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

24. 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**

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

26. 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**

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

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

**Count 8**

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

30. 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**

31. 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.

32. 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**

33. 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. On November 12, 2009, EPA conducted a site visit and documented that, in addition to the above-mentioned fill material, an additional three acres of fill was discharged by Respondent into wetlands upstream of the original fill. Respondent's dredge and fill operations were performed without obtaining a Section 404 permit and impacted approximately 18 acres of wetlands.

34. 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).

35. 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).

36. 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" into a "water of the United States" within the meaning of Section 502(12) and (7) of the CWA, 33 U.S.C. § 1362(12) and (7).

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.

#### **Count 11**

38. 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.

39. 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.

#### **CONSENT AGREEMENT**

40. Respondent admits the jurisdictional allegations of this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Final Order.

41. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

42. Respondent waives any right to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement.

43. Respondent and Complainant each agree to bear their own costs and attorney's fees.

44. Nothing contained in the Final Order shall alter or otherwise affect Respondent's obligations to comply with all applicable federal, state and local environmental statutes and regulations and applicable permits.

45. The undersigned representative of Respondent certifies that it is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

46. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent's facility is in compliance with all requirements of Sections 301 and 404 of the CWA, and scheduled to be in compliance with the Amended Compliance Order for Compliance on Consent, Docket No. CWA-07-2009-0006.

47. The effect of settlement is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in Paragraph 46 above, of this CA/FO.

48. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty in the amount of \$138,016.

49. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Findings of Violations.

#### Reservation of Rights

50. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

51. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

#### FINAL ORDER

IT IS HEREBY AGREED BY THE PARTIES, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), it is ORDERED that:

1. Respondent shall pay a civil penalty of One Hundred Thirty Eight Thousand and Sixteen Dollars (\$138,016). The penalty shall be paid in full within thirty (30) days following receipt by Respondent of a fully executed copy of this CA/FO. Respondent shall pay the penalty by certified or cashier's check payable to "Treasurer, United States of America" and shall deliver it, with a transmittal that identifies the case name and docket number to:

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

The check must also be annotated with the docket number CWA-07-2010-0052 and with the name of the case. Copies of the transmittal letter and the check shall be simultaneously sent to:



Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and

Chris Muehlberger  
Office of Regional Counsel  
U.S. Environmental Protection Agency - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.

Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

2. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### Parties Bound

3. This Final Order shall apply to and be binding upon the Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this CA/FO.

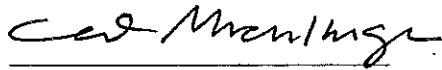
#### Effective Date

4. This Final Order shall become effective upon receipt by Respondent of a fully executed copy hereof. All time periods herein shall be calculated therefrom unless otherwise provided in this Final Order.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

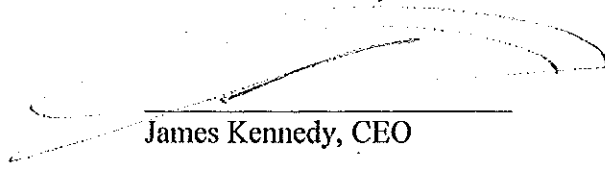
March 1, 2010  
Date

  
Chris Muehlberger  
Assistant Regional Counsel

3.1.10  
Date

*In the matter of Upland Wings, Inc.  
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RESPONDENT:  
UPLAND WINGS, INC.



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James Kennedy, CEO

02-24-10  
\_\_\_\_\_  
Date

*In the matter of Upland Wings, Inc.  
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IT IS SO ORDERED.

Sept. 28, 2010  
Date

Robert L. Patrick  
Robert L. Patrick  
Regional Judicial Officer

IN THE MATTER OF Upland Wings, Inc., Respondent  
Docket No. CWA-07-2010-0052

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement/Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to  
Attorney for Complainant:

Chris Muehlberger  
Assistant Regional Counsel  
Region 7  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

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

and

Bob Neimeier  
Alberici Contractors  
8800 Page Avenue  
St. Louis, Missouri 63114

Dated: 4/28/10



Kathy Robinson  
Hearing Clerk, Region 7