

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) Docket No. CWA-07-2009-0006
)
UPLAND WINGS, INC.)
)
Respondent) FINDINGS OF VIOLATION
) AND AMENDED ORDER FOR
) COMPLIANCE ON CONSENT
)
Proceedings under Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 1319(a)(3))
_____)

I. Preliminary Statement

1. The FINDINGS OF VIOLATION are made and the amended ORDER FOR COMPLIANCE ON CONSENT (“Order”) 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 (hereafter "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 (hereafter the "Property"). 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 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.

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 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

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 Reports to MDNR during the same time period in which a discharge was observed during 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 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 Monitoring Reports to MDNR for Outfall 001, as required by Respondent's NPDES permit, for the third quarter of 2008.

26. 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

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. 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.

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" 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).

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 CONSENTS TO and is hereby ORDERED to take the actions described below.

38. Respondent's "NPDES Standard Operating Procedure," submitted to EPA on July 31, 2009 to ensure compliance with the sampling, monitoring and reporting requirements of Respondent's NPDES permit, is incorporated by reference and fully enforceable under the terms of this Order.

39. *Work Plan for Restoration of Impacted Sites.* Within thirty (30) days of receipt of this Order, Respondent shall submit a Work Plan to EPA for review and approval that shall propose the work required to restore the impacted sites described in Paragraphs 31 and 36. The Work Plan shall include the following:

- a. A provision requiring removal of all unauthorized fill material within the impacted site described in Paragraph 31 within five (5) months of the effective date of this Order for Compliance.

b. A provision requiring that additional restoration work shall begin no later than five (5) months after the effective date of this Order and shall be completed no later than twenty four (24) months after the issuance of a Section 404 permit.

c. A description of the projected work and materials necessary to restore the site or mitigate for lost wetlands and/or stream functions, including characterization of the soil, plant, and hydric conditions; the projected cost of the work; the projected deadline(s) for completing the work, a proposal for the legal protection of the restored area; and a monitoring plan to maintain and document proper wetland and/or stream functions, pursuant to Paragraph 44 below.

40. *Sampling, Analysis, Recordkeeping, and Reporting During Removal of Fill Material.*

- a. Respondent shall conduct sampling at Outfall # 1 on the third day after removal of fill material, as described in Paragraph 39, commences.
- b. The sampling shall comply with all conditions specified in its NPDES permit, 40 C.F.R. Part 136 ("Guidelines Establishing Test Procedures for the Analysis of Pollutants"), and Respondent's "NPDES Standard Operating Procedure," as referenced in Paragraph 38.
- c. Respondent shall provide a split sample of Respondent's effluent sample from Outfall # 1 to an onsite EPA and/or MDNR representative on the day of sampling.
- d. Respondent shall continue to sample Outfall # 1 and provide monthly sampling data to EPA and MDNR for one year after the effective date of this Order for Compliance.

41. If Respondent is unable to comply with effluent limits pursuant to its NPDES permit, Respondent agrees to immediately cease dredge operations upon first discovery that Respondent is unable to comply with its permitted effluent limits.

42. *Work Plan for Eliminating Effluent Violations.* If Respondent is unable to comply with the effluent limits listed in its NPDES permit at any time after the restoration work described in paragraph 39 has begun, Respondent shall submit a work plan describing how Respondent will eliminate future effluent violations. The work plan shall include, at a minimum, implementation and completion dates, design specifications, and shall be certified by a licensed wastewater engineer. The work plan shall be submitted to EPA within thirty (30) days of Respondent's first discovery that it was unable to meet effluent limits. The completion date for implementation of WWTF improvements shall not exceed twelve (12) months from the effective date of this Order for Compliance.

43. Once the restoration work identified in Paragraph 39 has been completed, Respondent shall submit photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete.

44. Respondent shall submit annual monitoring reports to EPA, beginning one year after the completion of the Work Plan, for a period of five years. These reports shall include photos of the site, a description of the status of the site, and any corrective actions, if any, that will be taken to correct the deficiencies to maintain proper wetland and/or stream functions.

45. *Approval of Work Plan Submissions to EPA.*

- a. Upon EPA approval of either or both of the Work Plans described in Paragraphs 39 and 42, it/they shall be incorporated by reference and fully enforceable under the terms of this Order, and implemented according to the schedule set forth in the Work Plan(s).
- c. If EPA does not approve the Work Plan(s), Respondent shall address the comments and resubmit the Work Plan(s) for review within thirty (30) days of receipt of EPA's disapproval.
- d. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan(s), or if EPA determines that the Work Plan(s) do/does not adequately address the comments provided by EPA, EPA may unilaterally modify the Work Plan(s) and will provide Respondent with a copy of the Work Plan(s) as modified. Respondent shall implement the modified Work Plan(s) according to the schedule contained therein.

46. *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

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

Raju Kakarlapudi
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

48. 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

49. 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.

50. 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

51. 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

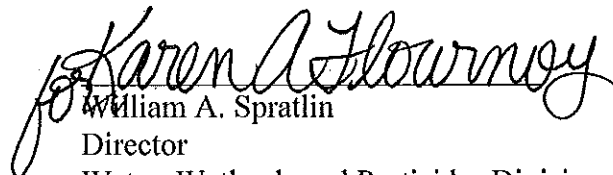
52. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

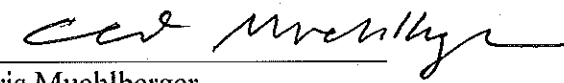
Effective Date

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

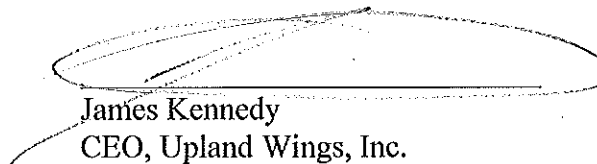
Issued this 1st day of March, 2010.

FOR COMPLAINANT:


William A. Spratlin
Director
Water, Wetlands and Pesticides Division


Chris Muehlberger
Assistant Regional Counsel

FOR RESPONDENT:



James Kennedy
CEO, Upland Wings, Inc.