

OCT 29 2012

FILED
OCT 25 2012
Office of Administrative Hearings

COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
DIVISION OF ENFORCEMENT
CASE NO. DOW 110191

IN RE: Department of Energy-Paducah Gaseous Diffusion Plant
5600 Hobbs Road
Paducah, Kentucky 42001
Agency Interest No. 3059
Activity ID No.ERF20110001

AGREED ORDER

WHEREAS, the parties to this Agreed Order, the Energy and Environment Cabinet (hereinafter "Cabinet") and the Permittees, the United States Department of Energy (hereinafter "DOE"), LATA Environmental Services of Kentucky, LLC (hereinafter "LATA Kentucky"), and Babcock & Wilcox Conversion Services, LLC (hereinafter "BWCS") state:

STATEMENTS OF FACT

1. The Cabinet is charged with the statutory duty of enforcing KRS Chapter 224 and the regulations promulgated pursuant thereto.
2. DOE is the owner of the Paducah Gaseous Diffusion Plant (hereinafter "DOE-PGDP"), a uranium enrichment facility located near Paducah in McCracken County, Kentucky. The DOE-PGDP is a facility as that term is defined in 401 KAR 5:002, Section 1(47)(b). The DOE is also the owner of the Depleted Uranium Hexafluoride Conversion Facility (hereinafter "DUF6 Facility") located at DOE-PGDP.
3. DOE, LATA Kentucky, and BWCS, are currently co-permittees on Kentucky Pollutant Discharge Elimination System (KPDES) Permit No.KY0004049, issued by the Cabinet's Division of Water effective November 1, 2006, and modified August 27, 2010 to

include LATA Kentucky, as the operator for outfalls 001, 015, 019, and 020, and modified on May 30, 2012 to add BWCS as a co-permittee on Outfall 017.

4. KPDES Permit No. KY0004049 has been administratively continued since its expiration on October 31, 2011.

5. Until March 29, 2011 Uranium Disposition Services, LLC (UDS) operated the DUF6 Facility at DOE-PGDP for the DOE and was a co-permittee on KPDES Permit No. KY0004049 with responsibility for Outfall 017. (Permit, Part II, Section C, Responsible Parties). By letter dated March 16, 2011 BWCS informed the Cabinet that, as of March 29, 2011, UDS would no longer serve as the contractor at the DUF6 Facility for permit Outfall 017 (the only outfall for which UDS had responsibility), and that DOE has contracted with BWCS for operation of the DUF6 Facility, effective March 29, 2011. By letter to the Surface Water Permits Branch dated May 25, 2011, the DOE submitted the permit renewal application for KPDES permit KY0004049. The application included separate Form 1s for DOE, LATA Kentucky, and BWCS.

6. By letter dated July 18, 2011, LATA Kentucky notified the Cabinet that LATA Kentucky has contracted with DOE for services at Outfall 017 and requested that LATA Kentucky be included as a permittee for that outfall. This letter also requested that BWCS be added to the permit as co-permittee for Outfall 017.

7. The Cabinet has issued Notices of Violations (NOVs) for the following violations of KRS Chapter 224 and the regulations promulgated pursuant thereto:

- On February 20, 2008, for 401 KAR 5:065, Section 1(1)(a) – failure to comply with the permit limit for pH concentration at Outfall 015 during the month of November 2007. A Corrective Action Plan was submitted to the Cabinet in response to the NOV on March 11, 2008.

- On June 4, 2009, for 401 KAR 5:065, Section 1(1)(a) – failure to comply with the permit limit for Oil and Grease at Outfall 017 during the month of October 2008. A Corrective Action Plan was submitted to the Cabinet in response to the NOV on July 7, 2009.
- On May 19, 2010, for KRS 224.70-110 – failure to comply with the permit limit for Total Suspended Solids (TSS) at Outfall 020 during the month of January 2010.
- On November 19, 2010, for KRS 224.70-110 – failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 during the month of August 2010. A Corrective Action Plan was submitted to the Cabinet in response to the NOV on September 27, 2010.
- On February 15, 2011, for KRS 224.70-110 – failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 during the month of December 2010. A Corrective Action Plan was submitted to the Cabinet in response to the NOV on January 25, 2011.
- On April 8, 2011, for KRS 224.70-110 – failure to comply with the permit limit for Whole Effluent Toxicity (WET) during 1st Quarter 2011 and for KRS 224.70-110 - failure to comply with the testing protocol for WET during 1st Quarter 2011.
- On June 10, 2011, for KRS 224.70-110 – failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 during the months of January and February 2011 and KRS 224.70-110 – failure to comply with the permit limit for Total Suspended Solids (TSS) at Outfall 001 during the months of February and March 2011.

- On August 19, 2011, for KRS 224.70-110 – failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 during the month of April 2011.
- On March 1, 2012, for KRS 224.70-110 – failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 during the month of November 2011 and 401 KAR 5:065, which cites 40 C.F.R. 122.41 (a) – failure to comply with the permit limit for pH at Outfall 001 during the month of October 2011.
- In addition to the violations alleged above, the Cabinet alleges that Discharge Monitoring Reports submitted document a failure to comply with the permit limit for Total Recoverable Zinc (Zn) at Outfall 017 in the month of April, 2012, and for Total Suspended Solids (TSS) at Outfall 001 in the month of May, 2012.

8. Representatives of DOE, UDS, LATA Kentucky, and BWCS attended an administrative conference at the Cabinet's Division of Enforcement (DENF) in Frankfort, Kentucky on November 18, 2011, and neither admitted nor denied the violations described above. DOE, LATA Kentucky and BWCS agree to the entry of this Agreed Order and UDS agrees to the payment of a civil penalty to resolve the allegations herein.

NOW THEREFORE, in the interest of settling all civil claims and controversies involving the violations described above, the parties hereby consent to the entry of this Agreed Order and agree as follows:

9. The term "Permittees" in the following paragraphs includes DOE, BWCS and LATA Kentucky and any additional or subsequent permittees until such time as this agreement is terminated.

REMEDIAL MEASURES

10. The Permittees shall perform the following remedial measures by the dates specified herein:

- A. At all times the Permittees at the DOE-PGDP shall report to the Cabinet all spills, bypass discharges, upset condition discharges or the releases of substances from the DUF6 Facility which would result in or contribute to the pollution of the waters of the Commonwealth, including emergency and accidental releases, in accordance with KRS 224.01-400, 401 KAR 5:015, and 401 KAR 5:065. The Permittees shall make their initial report of the above discharges or releases to the DOW Paducah Regional Office, 270-898-8468, during normal work hours or the Cabinet's 24-hour notification number, 800-928-2380 or 502-564-2380;
- B. On January 31, 2012, the Permittees submitted to DENF for review and acceptance, a written Corrective Action Plan (CAP) to effect permit compliance at Outfall No. 017. The CAP included an identification of actions that shall be implemented to ensure compliance with permit requirements, and a schedule for the completion of each action to bring Outfall No. 017 into compliance with its permit limit for Total Recoverable Zinc (Zn) and Whole Effluent Toxicity (WET). The Parties acknowledge that DENF's written acceptance of the CAP was received by the Permittees on June 7, 2012.
- C. The Permittees at the DUF6 Facility shall continue to implement the Toxicity Reduction Evaluation (TRE) Plan at the facility until such time that the Kentucky Division of Water gives its approval for termination;

- D. The Permittees shall be in compliance with the CAP, with KPDES Permit No. KY0004049, and this Agreed Order no later than June 7, 2013.

MISCELLANEOUS PROVISIONS

11. The Cabinet agrees to allow the performance of the above listed remedial measures and payment of civil penalty by UDS to satisfy the obligations of UDS, DOE, LATA Kentucky, and BWCS, to the Cabinet with respect to the violations addressed in this Agreed Order including (a) the notices of violations addressed in paragraph 7 above, and (b) for any future violations of Total Recoverable Zinc and Whole Effluent Toxicity at Outfall 017 until the completion of the remedial measures required by this Agreed Order, so long as the Permittees are in compliance with the Agreed Order.

12. So long as the Permittees are in compliance with the terms of this Agreed Order, the Cabinet will hold in abeyance enforcement action for failure to meet the permit limits for Total Recoverable Zinc (Zn) and Whole Effluent Toxicity. DENF reserves its rights to take enforcement action regarding all other violations. The Permittees shall comply with all other requirements of KRS Chapter 224 and the regulations promulgated pursuant thereto, KPDES permit number KY0004049, and this Agreed Order.

13. Except as otherwise provided herein, this Agreed Order shall stand in lieu of any administrative or legal actions that the Cabinet may bring against the Permittees for the violations addressed herein. This Agreed Order addresses only those violations specifically described above. Other than those matters resolved by entry of this Agreed Order nothing contained herein shall be construed to waive or to limit any remedy or cause of action by the Cabinet based on statutes or regulations under its jurisdiction and the Permittees reserve their defenses thereto. The Cabinet expressly reserves its right at any time to issue administrative

orders and to take any other action it deems necessary that is not inconsistent with this Agreed Order, including the right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred, and the Permittees reserve their defenses thereto.

14. This Agreed Order shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to the Permittees or to DOE, LATA Kentucky, or BWCS individually. DOE, LATA Kentucky, and BWCS reserve their defenses thereto, except that DOE, LATA Kentucky, and BWCS shall not use this Agreed Order as a defense.

15. The Permittees waive their rights to any hearing on the matters addressed herein. The Permittees expressly reserve their rights to administrative and judicial review of final determinations of the Cabinet related to this Agreed Order, in accordance with applicable law. Failure by the Permittees to comply strictly with any or all of the terms of this Agreed Order shall be grounds for the Cabinet to seek enforcement of this Agreed Order in accordance with applicable law and to pursue any other appropriate administrative or judicial action under KRS Chapter 224 and the regulations promulgated pursuant thereto. The Permittees reserve their defenses thereto.

16. The Agreed Order may not be amended except by a written order of the Cabinet's Secretary or his designee. The Permittees may request an amendment by writing the Director of the Division of Enforcement at 300 Fair Oaks Lane, Frankfort, Kentucky 40601 and stating the reasons for the request. If granted, the amended Agreed Order shall not affect any provision of this Agreed Order unless expressly provided in the amended Agreed Order.

17. The Cabinet does not, by its consent to the entry of this Agreed Order, warrant or aver in any manner that the Permittees' complete compliance with this Agreed Order will result

in compliance with the provisions of KRS Chapter 224 and the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review and approval of any plans formulated pursuant to this Agreed Order, the Permittees shall remain solely responsible for compliance with the terms of KRS Chapter 224, the regulations promulgated pursuant thereto, this Agreed Order and any permit and compliance schedule requirements.

18. DOE shall give notice of this Agreed Order to any purchaser, lessee or successor in interest prior to the transfer of ownership and/or operation of any part of its now-existing facility occurring prior to termination of this Agreed Order, shall notify the Cabinet that such notice has been given, and shall follow all statutory and regulatory requirements for a transfer.

19. It is the Cabinet's position that it is DOE's obligation to obtain the funding necessary to comply with all the requirements in this Agreed Order.

20. It is DOE's position that any requirement for the payment or obligation of funds by DOE established by the terms of the Agreed Order is subject to the availability of appropriated funds, and that the Agreed Order shall not be interpreted to require the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. Section 1341.

21. If appropriated funds are not available to fulfill DOE's obligations under the Agreed Order, DOE shall nevertheless make a good faith effort to comply with this Agreed Order. If DOE's good faith efforts fail, DOE shall meet promptly with the Cabinet to discuss whether the parties can reach an accommodation on adjustments to deadlines that require the payment or obligation of such funds. If no agreement can be reached, then the Cabinet and DOE agree that the Cabinet may initiate an action to enforce any provision of the Agreed Order, and DOE may raise as a defense that its delay was caused by the unavailability of appropriated funds. The Cabinet disagrees that the lack of appropriations or funding is a valid defense. It is the Cabinet's position that the federal Anti-Deficiency Act, 31 U.S.C. Section 1341, does not apply

to any obligation set forth under this Agreed Order. However, the Cabinet and DOE agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.

22. This Agreed Order shall be of no force and effect unless and until it is entered by the Secretary or his designee as evidenced by his signature thereon. If this Agreed Order contains any date by which the Permittees are to take any action or cease any activity, and the Secretary enters the Agreed Order after that date, then the Permittees are nonetheless obligated to have taken the action or ceased the activity by the date contained in this Agreed Order.

23. All submittals by DOE, LATA Kentucky, or BWCS required by this Agreed Order shall be submitted to:

Division of Enforcement
Attention: Director
300 Fair Oaks Lane
Frankfort, KY 40601

CIVIL PENALTY

24. The Cabinet has assessed a civil penalty for the violations addressed in this Agreed Order in the amount of twelve thousand five hundred (\$12,500.00) dollars.

25. The Cabinet acknowledges that the civil penalty has been paid in full by check submitted by UDS, LLC on June 22, 2012.

FORCE MAJEURE

26. The Permittees shall perform the requirements of this Agreed Order within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a force majeure, in which event the delay in performance shall be excused and no performance or stipulated penalty shall be assessed. A force majeure is defined as any event arising from causes not reasonably foreseeable and beyond the control of the

Permittees, which could not be overcome by due diligence and which delays or prevents performance by a date required by this Agreed Order. Force majeure events do not include unanticipated or increased costs of performance, changed economic or financial conditions, normal precipitation events, the failure by a contractor to perform, or the failure by a supplier to deliver unless such failure is itself caused by a force majeure event.

27. The Permittees shall notify the Director of DENF by telephone by the end of the next business day and in writing within ten (10) business days after it becomes aware of events which it knows or should know constitute a force majeure. The notice shall estimate the anticipated length of delay, including necessary demobilization and remobilization, its cause, measures taken or to be taken to minimize the delay and an estimated timetable for implementation of these measures. The Cabinet will respond in writing to any written notice received. Failure to comply with the notice provision of this section may be grounds for the Cabinet to deny an extension of time for performance.

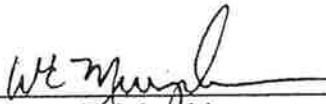
28. If the Permittees demonstrate to the Cabinet's satisfaction that the delay has been or will be caused by a force majeure event, the Cabinet will extend the time for performance for that element of the Agreed Order for a period at least equal to the delay resulting from such circumstances. This shall be accomplished through an Agreed Order amending this Agreed Order. The amended Agreed Order may alter the schedule for performance or completion of other tasks required by this Agreed Order.

TERMINATION

29. This Agreed Order shall terminate upon the Permittees' completion of all remedial measures described in Paragraph 10, Sections B, C, and D of this Agreed Order. The Permittees may submit written notice to the Cabinet when they believe this Agreed Order should

be terminated. The Cabinet will notify the Permittees in writing of whether it intends to agree with or object to termination. The Cabinet reserves its right to enforce this Agreed Order, and the Permittees reserve their right to file a petition for hearing pursuant to KRS 224.10-420(2) contesting the Cabinet's determination.

AGREED TO BY:

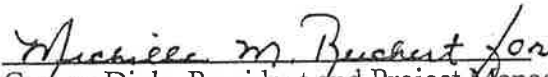


William E. Murphie
Manager, Portsmouth/ Paducah Project Office
Department Of Energy

8/27/12
Date

Mark Duff, Paducah Project Manager
LATA Environmental Services of Kentucky, LLC


Date



George Dials, President and Project Manager
Babcock & Wilcox Conversion Services, LLC


8-27-12
Date

APPROVAL RECOMMENDED BY:




Jeffrey A. Cummins, Assistant Director
Division of Enforcement

10/4/2012
Date



Mary Stephens, Attorney Manager
Environmental Protection Legal Division
Water Legal Section

10-8-12
Date



C. Michael Haines, General Counsel
Energy and Environment Cabinet

10.16.12
Date

AGREED TO BY:

William E. Murphie
Manager, Portsmouth/ Paducah Project Office
Department Of Energy

Date



Mark Duff, Paducah Project Manager
LATA Environmental Services of Kentucky, LLC

8-16-12

Date

George Dials, President and Project Manager
Babcock & Wilcox Conversion Services, LLC

Date

APPROVAL RECOMMENDED BY:

Jeffrey A. Cummins, Assistant Director
Division of Enforcement

Date

Mary Stephens, Attorney Manager
Environmental Protection Legal Division
Water Legal Section

Date

C. Michael Haines, General Counsel
Energy and Environment Cabinet

Date

ORDER

Wherefore, the foregoing Agreed Order is entered as the final Order of the Energy and Environment Cabinet this 25th day of October, 2012.

ENERGY AND ENVIRONMENT CABINET



LEONARD K. PETERS, SECRETARY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **AGREED ORDER** was mailed, postage prepaid, to the following this 25th day of October, 2012

Dept. of Energy-Portsmouth/Paducah Project Office
Attention: Jack Zimmerman
1017 Majestic Drive, Suite 200
Lexington, KY 40513

Laura Roenker
Dept. of Energy-Portsmouth/Paducah Project Office
1017 Majestic Drive, Suite 200
Lexington, KY 40513

COUNSEL FOR DEPARTMENT OF ENERGY – PORTSMOUTH/PADUCAH PROJECT OFFICE

Babcock and Wilcox Conversion Services, LLC
1020 Monarch Street Suite 100
Lexington, Kentucky 40513
Attention: Michelle Reichert

Rebekah Young
Y-12 National Security Complex
P.O. Box 2009
Oak Ridge, Tennessee 37831-8014

COUNSEL FOR BABCOCK AND WILCOX CONVERSION SERVICES, LLC

LATA Environmental Services of Kentucky, LLC
761 Veterans Avenue
Kevil, Kentucky 42053
Attention: Mark Duff

Ann Gough
LATA Environmental Services of Kentucky, LLC
761 Veterans Avenue
Kevil, Kentucky 42053

COUNSEL FOR LATA ENVIRONMENTAL SERVICES OF KENTUCKY, LLC

and mailed, messenger to:

Jeffrey A Cummins, Assistant Director
Division of Enforcement
300 Fair Oaks Lane
Frankfort, Kentucky 40601

Mary Stephens, Attorney Manager
Environmental Protection Legal Division
200 Fair Oaks Lane, First Floor
Frankfort, Kentucky 40601

COUNSEL FOR ENERGY AND ENVIRONMENT CABINET


DOCKET COORDINATOR

BGD

SH

FBT

LTS

BB