

September 27, 2011

By Certified Mail – Return Receipt Requested

Oliver Smith, III
Manager
Mine Road Properties, LLC
7216 Wellington Dr.
Knoxville, TN 37919

Tracking # 7009-2820-0002-2080-7144

RE: **Mascot Zinc Tailings Site**
60-Day Notice of Intent to Sue Pursuant to Section 505(b)(1)(A) of the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A)

Dear Mr. Smith:

The purpose of this letter is to notify Mine Road Properties, LLC, as well as the state and federal agencies listed below, of ongoing violations of the Clean Water Act (“CWA”) at the approximately 117.95-acre site located at 0 Mine Road, Mascot, Tennessee 37806 (“Mine Road Site”). The entire Mine Road Site is a point source because of its historic industrial use and the continued open storage of industrial waste. The site routinely discharges stormwater containing pollutants to waters of the United States, but does not have a National Pollutant Discharge Elimination System (“NPDES”) permit as required by the CWA. The Tennessee Clean Water Network (“TCWN”) is prepared to file suit in the United States District Court for the Eastern District of Tennessee pursuant to Section 505(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), after sixty days if these violations are not resolved.

I. BACKGROUND

The Mine Road Site has a long history of industrial use related to zinc mining and processing. The American Zinc Company purchased the Mine Road Site for use as part of its zinc ore smelting and processing facility in 1912. The American Zinc Company mined zinc sulphide from four mines in Mascot and several additional mines near Jefferson City.

The American Zinc Company concentrated the zinc from these mines at the former Mascot Mill, located just across Flat Creek from the Mine Road Site. After grinding the limestone and extracting some of the zinc through flotation, the remaining tailings were conveyed to tailings ponds at the Mine Road Site. Some of these flotation tailings were further processed into various sizes and sold as limestone that was transported to customers by train and truck.

Documents indicate that American Zinc sold the Mine Road Site to American Smelting and Refining Company (“ASARCO”) in 1971. ASARCO then sold the land to East Properties, LLC in 1988, which then conveyed the property to Mine Road Properties, LLC in 2004. However, as

clearly visible from the railroad and in satellite images (see Exhibit A), the area has never been remediated and vast areas of these flotation tailings remain on the Mine Road Site. United States Geological Survey maps of the site indicate a large area of “Tailings Ponds.”

The Tennessee Department of Environment and Conservation (“TDEC”) Division of Remediation conducted an inspection of the site on June 17, 2003. The inspection report indentifies two waste areas of approximately 100 acres each, one to the west of Flat Creek (which appears to have been cleaned up since that time), and the Mine Road Site on the east side of Flat Creek. Key findings of the TDEC inspection report include:

1. “Storage was observed to be on the ground, and not in tanks, containers, buildings, or on pads.”
2. “Evidence of an excessive release of material from the east area to Flat Creek was observed.”
3. “NPDES permits do not exist for either of these facilities, and both facilities are, apparently, unregulated.”

Despite these damning observations, TCWN’s review of TDEC files has found no evidence that anything has been done in the last eight years to require cleanup, a NPDES permit, or the installation of stormwater controls at the Mine Road Site.

I. VIOLATIONS OF THE CLEAN WATER ACT

Mine Road Properties, LLC is in violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311(a) & 1342, because it discharges pollutants without a NPDES permit. Mine Road Properties, LLC maintains the remnants of a large zinc tailings pond at the Mine Road Site that is left over from the previous industrial use of the property. These zinc tailings are comprised primarily of crushed limestone, which is laced with metals. These pollutants are discharged to Flat Creek in stormwater.

The impact on Flat Creek is significant, visible, chronic, and well-known to local residents. This photograph, taken from the Mascot Road bridge over Flat Creek, depicts the heavy pollution caused by the Mine Road Site’s discharges after a rain event on October 25, 2010:



A. UNPERMITTED DISCHARGES OF POLLUTANTS FROM A POINT SOURCE

Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Although it does not appear that Mine Road Properties, LLC is the entity that created the zinc tailings ponds, the Clean Water Act's "language does not exempt successor landowners from liability under Sections 301(a) and 402 for point source discharges occurring on their land." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1144 (10th Cir. 2005); *see also* 40 C.F.R. § 122.2 (defining "addition of any pollutant" as "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances *owned by a ... person* which do not lead to treatment works").

i. Pollutants

The stormwater discharged from the site carries a substantial load of pollutants resulting from the site's industrial use. TCWN has documented the discharge of stormwater from the site for more than a year. The discharge is often a bizarre milky white, as shown in the photograph. The unique color comes from the crushed limestone in the tailings ponds (see Exhibit A).



TCWN has also tested samples of water. On October 25, 2010, sampling of the wastewater discharged from the site found measurable levels of arsenic, cadmium, chromium, copper, lead, and zinc. Informal sampling has also indicated significant amounts of settleable solids.

The suspended & settleable solids, arsenic, and various metals in the stormwater discharges from the site are all pollutants.

ii. Point Source

The entire Mine Road Site is a point source pursuant to the Clean Water Act, and there are also several discrete point sources on the site. The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Industrial stormwater sites, and specific conveyances at such sites, are point sources. "Storm water discharge associated with industrial activity...includes, but is not limited to, storm water discharges from ... areas where industrial activity has taken place in the past and significant

materials remain and are exposed to storm water.” 40 C.F.R. § 122.26(b)(14). An entire tract of land subject to EPA regulation of stormwater related to industrial activity is a point source. *North Carolina Shellfish Growers*, 278 F. Supp. 2d 654 (E.D.N.C. 2003). While not all stormwater runoff is subject to NPDES permitting, runoff that comes from piles of industrial waste and reaches surface waters is a point source. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004). Moreover, ditches that “serve to channel and collect stormwater and other pollutants that are subsequently discharged into waters of the United States” are also point sources. *North Carolina Shellfish Growers*, 278 F. Supp. 2d at 679.

The entire Mine Road Site is a point source. The site was used for storing, processing, and conveying crushed limestone, much of which remains in large, open piles exposed to rain and snow. Pollutants from this past industrial use are discharged to Flat Creek in stormwater during and after precipitation events.

In addition, there are several discrete conveyances at the Mine Road Site through which pollutants are discharged, including, but not limited to, the following:

1. One of these discharge locations is just upstream from the large concrete flume in Flat Creek north of the Mascot Road bridge. A steep ravine on the site empties stormwater from the tailings ponds into Flat Creek via a small tributary. There may be culverts and/or pipes that channelize this discharge into the ravine and to Flat Creek. These discharges cause significant discoloration of Flat Creek visible through the flume. The approximate location of this discharge point is marked on a satellite image of the site, attached hereto as Exhibit A and incorporated by reference herein.
2. Another clearly-defined, artificial discharge channel was constructed near the southwest corner of the Mine Road Site. The artificial channel funnels polluted stormwater from the tailings ponds at the Mine Road Site through a series of pipes, culverts, concrete conveyances, and ditches under Limestone Lane to Flat Creek. The approximate location of this discharge is marked on a satellite image of the site, attached hereto as Exhibit A and incorporated by reference herein.

iii. Waters of the United States

The Mine Road Site discharges to Flat Creek, and to a small tributary of Flat Creek. Flat Creek is a continuously flowing stream with a defined bed and bank that supports aquatic life. The Mine Road Site is approximately .5 miles from the confluence with the Holston River, a navigable-in-fact river. TDEC designates Flat Creek for the following uses: fish and aquatic life, industrial water supply, irrigation, livestock watering and wildlife, and recreation.

Flat Creek and its tributary/tributaries at the Mine Road site are waters of the United States and also waters of the state, subject to full protection of the Clean Water Act.

B. LOCATION OF THE VIOLATIONS

The unpermitted discharges of pollutants alleged herein take place at the Mine Road Site. The Mine Road Site lies north of the Southern Railroad, west of Mine Road, east of Mascot Road, and south of the property of Jarnagin. Its street address is 0 Mine Road, Mascot, TN 37806. The Mine Road Site is identified as Knox County Parcel Number 04219509, and is more particularly described in Exhibit B. Several of the specific discharge points are described above and marked on Exhibit A.

C. DATES OF VIOLATION

Each day on which Mine Road Properties, LLC discharges pollutants to Flat Creek constitutes a separate violation of the Clean Water Act. Mine Road Properties has likely discharged pollutants each day when it has rained .25 inches or more since at least September 27, 2006. This rainfall data is measured by the National Oceanic and Atmospheric Administration's National Climate Data Center station for Knoxville, TN, which can be found at <http://www4.ncdc.noaa.gov/cgi-win/wwcgi.dll?WWDI~StnSrch>, or equivalent data source.

TCWN has documented the illegal discharge of pollutants through photographs and/or samples on at least the following specific dates during this time:

7-20-10
7-31-10
9-11-10
9-22-10
9-27-10
9-28-10
10-25-10
10-26-10
11-16-10
11-23-10
11-26-10
11-29-10
11-30-10
1-1-11
2-28-11
3-5-11
3-6-11
3-9-11
3-10-11
4-4-11
5-23-11
6-15-11
9-5-11

These discharges are ongoing and intermittent, and are likely to occur every time there is rainfall at the site of .25 inches or more.

II. PERSONS RESPONSIBLE FOR VIOLATIONS

Mine Road Properties, LLC, a Tennessee limited liability corporation, is the owner and operator of the Mine Road Site and is responsible for the CWA violations alleged herein. Oliver Smith, III is the manager and registered agent of Mine Road Properties, LLC.

III. PERSON GIVING NOTICE

The Tennessee Clean Water Network is a Tennessee nonprofit corporation. TCWN empowers Tennesseans to claim their right to clean water and healthy communities by fostering civic engagement, building coalitions and advancing water policy for a sustainable future. TCWN is a membership organization, and has members who are injured by the unpermitted discharge of pollutants from the Mine Road Site to Flat Creek and the Holston River. The name, address, and phone number of the person giving notice are:

Renée Victoria Hoyos
Executive Director
Tennessee Clean Water Network
625 Market St., 8th Floor
Knoxville, TN 37902
865-522-7007 x 100

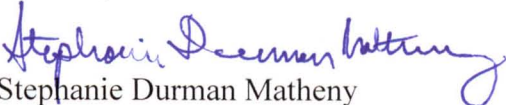
Earlier this year, Ms. Hoyos attempted to contact Mr. Smith of Mine Road Properties, LLC to discuss TCWN's concerns about the property. She received a return call from someone who worked for Mr. Smith, and explained the problem TCWN had observed, but never heard back from Mr. Smith or any other representative of Mine Road Properties, LLC.

Nonetheless, TCWN believes this matter could most effectively be resolved through a voluntary settlement, enforceable through a consent decree, detailing a schedule of actions to bring the Mine Road Site into compliance with the CWA either through NPDES permitting or remediation of the site.

However, TCWN is prepared to file suit in the United States District Court for the Eastern District of Tennessee pursuant to Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), after sixty days unless a satisfactory settlement is imminent. This lawsuit would seek injunctive relief, an appropriate monetary penalty, fees & costs of litigation, and such other relief as the Court deems appropriate.

Thank you for your prompt attention to this matter. If you believe any of the above information is in error, or if you have questions, please contact me at 865-522-7007 x 102.

Sincerely,



Stephanie Durman Matheny
Staff Attorney

Attachments:

cc: (by certified mail, return receipt requested)

Commissioner Robert Martineau

Tracking # 7009-2820-0002-2080-6468

Tennessee Department of Environment and Conservation
First Floor, L&C Annex
401 Church Street
Nashville, TN 37243-1534

Ms. Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Tracking # 7009-2820-0002-2080-6475

Gwendolyn Keyes, Regional Administrator
U.S. Environmental Protection Agency
Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Tracking # 7009-2820-0002-2080-6482

cc: (via email)

Patrick Parker, TDEC Division of Water Pollution Control, Enforcement

Paul Schmierbach, TDEC Division of Water Pollution Control, Knoxville Field Office

Chris Granju, Knox County Dept. of Engineering & Public Works, Stormwater Management

Exhibit A - Site and Approximate Discharge Locations

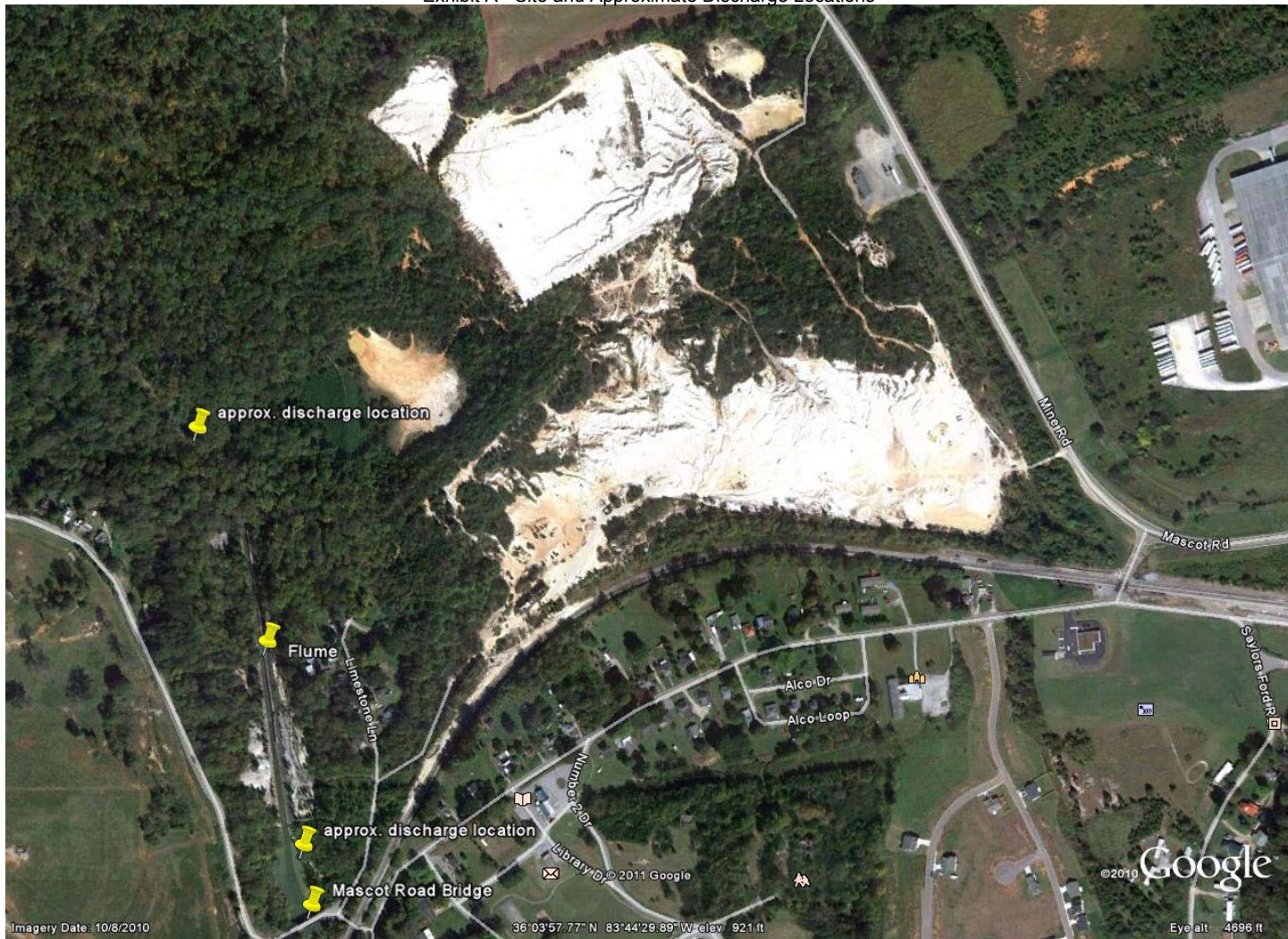


Exhibit B
Mine Road Site Legal Description

SITUATE in the Eighth (8th) Civil District of Knox County, Tennessee, in the community of Mascot, being bounded on the north by lands of Jarnagin, on the east of Mine Road, on the south by the Southern Railroad, and on the west in part by Mascot Road, containing 117.95 acres, more or less, and being as shown upon map dated March 15, 1988, prepared by James C. Quarrels, Surveyor, and more particularly bounded and described as follows:

BEGINNING at an iron pin in the northern right-of-way line of Southern Railroad where the same is intersected by the west right-of-way line of Mine Road (which beginning point marks the southeastern corner of the tract of land being herein conveyed);

Thence along the northern right-of-way line of Southern Railroad, eight courses, as follows:

North 83 deg. 02 min. 10 sec. West, 215.86 feet to an iron pin; North 23 deg. 02 min. 10 sec. West, 242.26 feet to an iron pin; South 36 deg. 57 min. 50 sec. West, 242.26 feet to an iron pin; North 83 deg. 02 min. 10 sec. West, 661.78 feet to an iron pin; South 6 deg. 57 min. West, 20 feet to a point; Thence on a curve to the left, the radius of which is 1171.75 feet, an arc distance of 1413.13 feet to an iron pin; North 62 deg. 08 min. West, 20 feet to an iron pin; and South 27 deg. 51 min. 50 sec. West, 500 feet to an iron pin in the east line of Cedar Hill Lane;

Thence with the line of said lane, North 5 deg. 47 min. East, 244.17 feet to an iron pin; Thence North 1 deg. 36 min. West, 67.83 feet to an iron pin; Thence North 39 deg. 22 min. 40 sec. East, 190.92 feet to an iron pin; Thence North 21 deg. 08 min. 20 sec. West, 609.84 feet to an iron pin; Thence South 68 deg. 50 min. 40 sec. West, 170 feet to an iron pin; Thence South 21 deg. 08 min. 20 sec. East, 204.17 feet to an iron pin;

Thence following the line of a cul de sac in a southerly direction, 136.50 feet to an iron pin; Thence South 68 deg. 50 min. 40 sec. West, 150 feet to an iron pin; Thence South 21 deg. 08 min. 20 sec. East, 447.54 feet to an iron pin; Thence North 68 deg. 50 min. 40 sec. East, 104.60 feet to an iron pin in the west line of Cedar Hill Lane;

Thence with the line of said lane three courses, as follows:

South 5 deg. 47 min. West, 241.52 feet to an iron pin; South 12 deg. 01 min. West, 95.60 feet to an iron pin; South 27 deg. 52 min. West, 130 feet to an iron pin in the northern right-of-way line of Mascot Road;

Thence with the right-of-way line of Mascot Road four courses, as follows:

South 61 deg. 07 min. 50 sec. West, 283.08 feet to an iron pin; North 29 deg. 29 min. West, 100.98 feet to an iron pin; North 14 deg. 21 min. 30 sec. West, 334.35 feet to an iron pin; and North 22 deg. 02 min. West, 707.98 feet to an iron pin;

Thence leaving Mascot Road, North 68 deg. 05 min. East, 140 feet to an iron pin; Thence North 21 deg. 55 min. West, 110 feet to an iron pin; Thence North 25 deg. 38 min. West, 79.48 feet to

an iron pin; Thence North 34 deg. 37 min. West, 112.54 feet to an iron pin; Thence North 45 deg. 09 min. West, 112.54 feet to an iron pin; Thence North 39 deg. 40 min. 10 sec. East 275.45 feet to a point in the center of Flat Creek;

Thence, following the center of Flat Creek three courses, as follows:

North 34 deg. 09 min. West, 307.14 feet to a point; North 36 deg. 43 min. West, 272.35 feet to a point; and North 20 deg. 34 min. West, 45.29 feet to a point;

Thence, leaving the creek and along the line of Jarnagin four courses, as follows:

North 55 deg. 51 min. East, 1610.84 feet to an iron pin; South 10 deg. 18 min. 20 sec. East, 328.15 feet to an iron pin; North 61 deg. 51 min. 40 sec. East, 447.51 feet to an iron pin; and North 73 deg. 22 min. 50 sec. East, 709.84 feet to an iron pin in the west right-of-way line of Mine Road;

Thence with the west right-of-way line of Mine Road five courses, as follows:

South 36 deg. 12 min. 40 sec. East, 237.06 feet to a right-of-way marker; South 59 deg. 40 min. West, 10 feet along the right of way marker; South 30 deg. 19 min. 20 sec. East, 349.68 feet to a right-of-way marker; North 59 deg. 40 min. East, 10 feet along the right-of-way marker; and South 29 deg. 23 min. East, 1632.58 feet, more or less, to the place of BEGINNING.

BEING THE SAME property conveyed to East Properties, LTD., by Warranty Deed dated April 22, 1988, of record in Deed Book 1945, page 930, and also referenced as Instrument No. 198805060019188, in the Register's Office for Knox County, Tennessee.