



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

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DOVER, DELAWARE 19901

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**NOTICE OF ADMINISTRATIVE PENALTY
ASSESSMENT AND ORDER**

Pursuant to 7 Del. C. § 6005

Order No. 2011-W-0011

***PERSONALLY SERVED BY
AN ENVIRONMENTAL PROTECTION
OFFICER***

Issued To:

Ms. Suzanne Powell
YMG Corporation
PMB 108, 4590 Highway One
Rehoboth Beach, DE 19971

Dear Ms. Powell:

This is to notify the YMG Corporation (Respondent) that the Secretary of the Department of Natural Resources and Environmental Control (Department) has found that Respondent is violating 7 Del. Admin. C. §§7103 et seq., *The State of Delaware, Department of Natural Resources and Environmental Control's Guidance and Regulations Governing the Land Treatment of Wastes* (Regulations), State of Delaware Permit WPCC 3009C/86, State of Delaware Permit LTS 5019-86-06, and State of Delaware Permit LTS 5019-09R. Accordingly, the Department is issuing this Notice of Administrative Penalty Assessment and Order (Notice).

BACKGROUND

The State of Delaware Permit WPCC 3009C/86 was issued to the Respondent on March 2, 2001, and authorized the discharge of effluent from the Respondent's Plantations Wastewater Treatment Plant in Rehoboth Beach, Delaware. This facility is designed to treat domestic wastewater from The Plantations development and spray irrigate the treated effluent on the following parcel(s): spray fields located on the west side of County Road 275 between County Roads 277 and 283, Sussex County, Delaware.

Delaware's Good Nature depends on you!

As a condition of Permit WPCC 3009C/86, the Respondent is required to monitor its monitoring wells on a quarterly scheduled basis by collecting samples from these wells and analyzing those samples for a number of pollutant parameters as specified in Permit WPCC 3009C/86. Data generated as a result of the sampling and analysis is summarized in a quarterly Ground Water Discharge Monitoring Report and submitted to the Department on a quarterly basis as required in Permit WPCC 3009C/86. During calendar year 2004 and through September 2010, the Respondent has submitted these reports to the Department.

Documented letters from the Respondent identified the fact that the Respondent has been aware of an elevated nitrate problem in Monitoring Well #4. Sampling parameters for nitrate as nitrogen have exceeded the Environmental Protection Agency's (EPA) Primary Drinking Water Standards over the past few years. For example, a facsimile transmitted from Mr. Brian C. Carbaugh, P.E. (Carbaugh) of WWES Associates, dated September 16, 2004, to the Respondent's Mr. Frank J. Murphy, III (Murphy), notified the Respondent of the excessive level of nitrate concentrations in Monitoring Well #4. (Note: The Ground Water Discharges Section [GWDS] obtained a copy of this facsimile as an attachment to a report dated February 25, 2008, submitted to the Department by Duffield Associates on behalf of the Respondent.) In the facsimile, Carbaugh advised Murphy that "the groundwater nitrate concentrations have regularly been high in Monitoring Well #4..." and further that "...this might mean that there was some leakage from Pond 1 into the groundwater, since Pond 1 was not lined with a synthetic liner when Ponds 2&3 were." Carbaugh additionally noted that he had been tracking this issue "for some time." The Respondent failed to provide noncompliance notification of the violation as required by Part II.A.3 of Permit WPCC 3009C/86.

On March 2, 2006, the Department's Ground Water Protection Branch (GWPB) performed a hydrogeological review of the Respondent's wastewater treatment facility. The hydrogeological report iterated concerns over elevated nitrate concentrations in Monitoring Well Numbers 4, 5, and 6 (concentrations of up to 50.4 mg/L). This report further stated that an evaluation of the aerated lagoon for leakage was warranted; and if this evaluation concluded that the aerated lagoon was, in fact, leaking, Respondent must prepare plans and specifications for lining the aerated lagoon and submit these documents to the Department for review and approval. (Note: Records on file with the GWDS indicated that polishing/storage lagoons 1 and 2 had leaked in the past and geosynthetic liners were subsequently installed.)

Before commencing administrative enforcement action, the GWDS attempted to obtain Respondent's voluntary compliance in accordance with 7 Del. C. § 6019. To that end, on March 14, 2006, the GWDS forwarded the March 2, 2006, hydrogeological report to the Respondent for review and subsequent discussion. Also, on March 27, 2006, the GWDS forwarded an electronic courtesy copy of a draft permit to Respondent that included a schedule of compliance to address the elevated nitrates in Monitoring Well #4.

On June 27, 2006, the GWDS received a letter from Carbaugh on behalf of the Respondent requesting a meeting to discuss the permit conditions addressing the elevated nitrate levels in Monitoring Well # 4. In subsequent discussions and e-mail transmissions, Carbaugh expressed marked disapproval of the need for a timeline in the permit. As a result, the GWDS eliminated the timeline on a good faith promise that the Respondent would complete the work plan in an expeditious manner. On August 14, 2006, the GWDS issued Permit LTS 5019-86-06 to the Respondent containing a schedule of compliance to investigate the elevated nitrate concentrations in Monitoring Well # 4.

On August 15, 2006, the GWDS sent an electronic transmission to Carbaugh requesting an opportunity to further discuss the schedule of compliance. This transmission expressed the GWDS belief that the compliance item to investigate the elevated nitrate concentration in Monitoring Well # 4 should remain in the permit. This issue had been discussed with the Respondent by the GWDS during a telephone conference on March 15, 2006. It was further explained during this session that monitoring parameter excesses typically are addressed by enforcement actions or a Secretary's Order. However, since the Respondent's permit was due for renewal, the GWDS concluded that the best way to address the issue of elevated nitrate concentrations was through a permitted schedule of compliance that would require an investigation of this matter. However, as of August 15, 2006, the Respondent had not begun or committed to an investigation.

On February 25, 2008, Duffield Associates submitted a report titled *Initial Investigation of High Nutrient Concentrations* to the GWDS on behalf of the Respondent. Subsequently, the GWDS received an electronic transmission from Carbaugh on behalf of the Respondent requesting the Department's approval to proceed with the "recommendations" contained in this report. The GWDS responded to this request by letter dated March 19, 2008, stating that the GWDS disapproved of the "recommendations" and alternatively recommended two different options that were acceptable to the GWDS. On May 1, 2008, Carbaugh replied by electronic transmission indicating continued disagreement regarding the GWDS proposed alternatives as viable paths forward. Since there emerged drastically differing professional and technical opinions between the Respondent's professional consultants and the Department's technical staff concerning a workable method of investigation/remediation, on May 28, 2008, the GWDS sent the Respondent a *Manager's Warning*, requiring the Respondent to submit a hydrogeological work plan to the GWDS consistent with the GWDS March 19, 2008, letter.

On June 30, 2008, Carbaugh submitted an *Outline and Schedule for Implementation* to the GWDS on behalf of the Respondent. In general, this outline proposed to line the aerated lagoon in an effort to remediate the elevated nitrate concentrations in Monitoring Well # 4. Additionally, this outline provided a specific timeline to complete repairs of approximately one hundred twenty (120) days from permit issuance. The GWDS accepted this proposal on July 9,

2008, as an effort toward voluntary compliance pursuant to 7 Del. C. § 6019. Further enforcement action was stayed at this time.

On February 20, 2009, Carbaugh, on behalf of the Respondent, submitted to the Department a design drawing for modifications to Lagoon 1. The GWDS issued Permit LTS 5019-09R to the Respondent on April 6, 2009, authorizing the Respondent to repair Lagoon 1 (aerated lagoon) by installing a synthetic liner in accordance with the approved *Outline and Schedule for Implementation*. The permit expired by its own terms on April 5, 2010. As of August 1, 2010, the Respondent neither initiated the installation of a synthetic liner in Lagoon 1 nor applied for a renewal of the above repair permit.

The Respondent constantly failed to meet deadlines for submittals as well as repairs. The Respondent also failed to comply with corrective action. The GWDS attempted, without success, to gain Respondent's voluntary compliance in accordance with 7 Del. C. §6019 since March, 2006. Therefore, on August 3, 2010, the Department issued **Notice of Violation W-10-GWD-03 (NOV)** to the Respondent.

The NOV specifically cited the Respondent for the following violations:

1) Elevated Nitrates in Monitoring Wells 4, 5 & 6

Respondent is in violation of 7 Del. Admin. C. §7103-80.3.1 of the Regulations and *Permit LTS 5019-86-06 Part I.F* because Respondent's spray irrigation system operation was in violation of applicable Federal and State Drinking Water Standards on an average annual basis. Monitoring well data submitted by the Respondent to the Department indicate nitrate concentrations in the ground water at Monitoring Wells # 4, 5 & 6 exceed the Primary Drinking Water Standard of 10 mg/L on an average annual basis.

2) Failure to Notify – Permit Noncompliance

Respondent is in violation of *Permit WPCC 3009C/86 Part II.A.3* because Respondent failed to provide proper notification of permit noncompliance to the Department after receiving the notice dated September 16, 2004 from Carbaugh concerning the elevated nitrate concentrations in Monitoring Well # 4.

3) Failure to Complete Necessary Repairs Pursuant to State of Delaware Permit LTS 5019-09R

Permit LTS 5019-09R was issued on April 6, 2009 by the GWDS authorizing the Respondent to repair Lagoon 1 (Aerated Lagoon) by installing a synthetic liner in accordance with their previously submitted *Outline and Schedule for Implementation*. This Permit expired by its own terms on April 5, 2010. The

Respondent has neither initiated the installation of the synthetic liner in Lagoon 1 nor applied for a renewal of the repair permit.

The August 3, 2010, NOV additionally directed the Respondent to complete the following **Required Actions**:

- 1) **By September 1, 2010**, submit a written report to the GWDS summarizing the methods and results of a detailed inspection of the aerated lagoon and its appurtenances. This report must specify which of the following two action options the Respondent will pursue: Option 1—Line the aerated lagoon or Option 2—Conduct a more in-depth hydrogeologic investigation of the aerated lagoon. Each of these options delineated its own set of specific requirements that were to be in-place **no later than September 15, 2010**.
- 2) Within thirty (30) days of the date of this NOV, submit and implement a remediation plan to reduce nitrate concentrations in the groundwater below and adjacent to the spray field. The remediation plan must include a revised, monthly effluent application nitrogen balance.
- 3) Respondent must continue conducting monthly groundwater sampling of Monitoring Well #4 (located immediately southwest of the aerated lagoon). This monthly sampling must include total nitrogen, nitrate as nitrogen, and all field parameters as outlined in Permit LTS 5019-86-06; quarterly samplings must include all field and laboratory parameters as outlined in Permit LTS 5019-86-06. Respondent must continue said monthly groundwater sampling until Respondent receives written approval from the GWDS to cease this activity.
- 4) Within thirty (30) days of the date of this NOV, Respondent must label all Monitoring Wells with a DNREC ID tag as well as the local ID.

In a letter dated September 1, 2010, the Respondent submitted a report that purported to address all of the August 3, 2010, NOV required actions. However, many of the action items were in a preparatory stage of which additional information/data would be furnished when available in the future. While Respondent subsequently provided periodic “updates” in activity status, these actions were not in accord with the NOV and still remain incomplete. Of particular note, the Respondent indicated in the September 1, 2010, report that it had selected Option 1—installation of a synthetic line in the aerated lagoon—as its remediation course of action. That option required the Respondent to submit an application to renew repair Permit LTS 5019-09R to the Department **no later than September 15, 2010**.

On October 5, 2010, the GWDS issued a **Non-Compliance Notification** to the Respondent, listing all of the outstanding items required by the August 3, 2010 NOV that the

Respondent failed to submit to the GWDS. This notification further advised the Respondent that further enforcement actions pursuant to 7 Del. C. § 6005 would ensue.

FINDINGS OF FACT

Permit WPCC 3009C/86 was issued to Respondent effective March 2, 2001, for a term of five (5) years, expiring on March 1, 2006.

Permit WPCC 3009C/86 Part I.A.2 states: "Operation of the spray irrigation system shall not cause the quality of the State's groundwater resources to be in violation of applicable Federal or State Drinking Water Standards on an average annual basis."

Permit WPCC 3009C/86 Part II.A.3(a) states: "If, for any reason, the permittee does not comply with or will be unable to comply with any effluent limitations or other conditions specified in this permit, the permittee shall provide the Department with the following information, in writing, within five (5) days of becoming aware of any actual or potential noncompliance: 1. A description of, and cause of, noncompliance with any such limitation or condition; and 2. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and the steps being taken to reduce, eliminate and/or prevent recurrence of the noncomplying condition; and 3. Steps taken or planned to reduce or eliminate recurrence of the noncompliance."

Respondent became aware of the existence of a noncompliance condition *via* September 16, 2004 facsimile from Carbaugh to Murphy.

On March 2, 2006, the GWPB performed a hydrogeological review of the Respondent's wastewater treatment facility and issued a report revealing elevated nitrate level concentrations in Monitoring Wells #4, 5 & 6.

On March 14, 2006, the GWDS forwarded a copy of this report to the Respondent.

The GWDS has attempted to gain Respondent's voluntary compliance pursuant to 7 Del. C. § 6019 from March 2006 to August 2010.

Permit LTS 5019-86-06 was issued to the Respondent on August 14, 2006, for a term of five (5) years, expiring on August 13, 2011.

Permit LTS 5019-86-06 Part I.F. states: "Operation of the spray irrigation system shall not cause the quality of Delaware's ground water resources to be in violation of Federal or State Drinking Water Standards on an average annual basis."

Permit LTS 5019-86-06 Part I.H.1 states, in relevant part: "The permittee shall submit information for proper operation of the spray irrigation system in accordance with the following schedule: Investigate the elevated nitrate concentrations in Monitoring Well # 4...submit to the

GWDS a detailed work plan...addressing the concerns in the March 2, 2006 Hydrogeological Review/Report...obtain approval of this work plan from the GWDS...submit to the GWDS a report of findings from the investigation of the cause of the elevated nitrate levels...and the integrity evaluation of the aerated lagoon and Monitoring Well #4...obtain approval from the GWDS prior to initiation of the proposed course of action and.. that the completion of the course of resolution is satisfactory....”

Permit LTS 5019-86-06 Part I.H.2 states: “The permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance by a specified date. In the event of noncompliance, the notice shall include the cause of noncompliance, any remedial action taken, and the probability of meeting the next scheduled requirement.”

Permit LTS 5019-86-06 Part II.A.3 states, in relevant part: “If, for any reason, the permittee does not comply with, or will be unable to comply with, any effluent limitations or other conditions specified in this permit, the permittee shall provide the Department with the following information, in writing, within five (5) days of becoming aware of any actual or potential noncompliance: a. A description and cause of the noncompliance with any limitation or condition; b. The period of noncompliance including the exact date and times; or, if not yet corrected, the anticipated time the noncompliance is expected to continue; and c. The steps being taken or planned to reduce, eliminate and/or prevent recurrence of the noncompliant condition.”

From August, 2006 through March, 2009, the GWDS and the Respondent engaged in protracted discussions concerning the merits/viability of permit conditions of Permit LTS 5019-86-06.

Permit LTS 5019-09R was issued to the Respondent on April 6, 2009, for a term of one (1) year authorizing the Respondent to install a liner in the aerated lagoon.

Permit LTS 5019-09R Part III.A.4 states, in relevant part: “If, for any reason, the permittee does not comply with, or will be able to comply with, any limitations or other conditions specified in this permit, the permittee shall provide the GWDS with the following information, in writing, within five (5) days of becoming aware of any actual or potential non-compliance : a. A description and cause of the non-compliance with any limitation or condition; b. The period of non-compliance including exact dates and times; or, if not yet corrected, the anticipated time the non-compliance is expected to continue and the steps being taken to reduce, eliminate and/or prevent recurrence of the non-compliant condition; and c. Steps taken or planned to reduce or eliminate recurrence of the non-compliance.”

The Respondent allowed the repair permit to expire by its own terms on April 5, 2010, without either initiating or completing any repair work on the aerated lagoon.

On August 3, 2010, the GWDS issued **Notice of Violation (NOV) W-10-GWD-03** to Respondent, delineating the violations and directing Respondent to complete specific Required Actions.

On October 5, 2010, the GWDS issued a **Non-Compliance Notification** to Respondent, enumerating the outstanding NOV action items still unsatisfied and additionally, advising Respondent that further actions pursuant to *7 Del .C. §6005* would ensue.

REGULATORY AND PERMIT VIOLATIONS

7 Del. Admin. C. §7103-80.3.1 states, in relevant part: “These regulations require the operation of systems that will function to their performance criteria without causing the State’s ground water resources to violate State or Federal Drinking Water Standards on an average annual basis.”

Permit WPCC 3009C/86 Part I.A.2 states: “Operation of the spray irrigation system shall not cause the quality of the State’s groundwater resources to be in violation of applicable Federal or State Drinking Water Standards on an average annual basis.”

Permit WPCC 3009C/86 Part II.A.3(a) states: “If, for any reason, the permittee does not comply with or will be unable to comply with any effluent limitations or other conditions specified in this permit, the permittee shall provide the Department with the following information, in writing, within five (5) days of becoming aware of any actual or potential noncompliance: 1. A description of, and cause of, noncompliance with any such limitation or condition; and 2. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and the steps being taken to reduce, eliminate and/or prevent recurrence of the noncomplying condition; and 3. Steps taken or planned to reduce or eliminate recurrence of the noncompliance.”

Permit LTS 5019-86-06 Part I.F states: “Operation of the spray irrigation system shall not cause the quality of Delaware’s ground water resources to be in violation of Federal or State Drinking Water Standards on an average annual basis.”

Permit LTS 5019-86-06 Part I.H.1 states, in relevant part: “The permittee shall submit information for proper operation of the spray irrigation system in accordance with the following schedule: Investigate the elevated nitrate concentrations in Monitoring Well #4...submit to the GWDS a detailed work plan ...addressing the concerns in the March 2, 2006 Hydrogeological Review/Report...obtain approval of this work plan from the GWDS...submit to the GWDS a report of findings from the investigation of the cause of the elevated nitrate levels...and the integrity evaluation of the aerated lagoon and Monitoring Well #4...obtain approval from the GWDS prior to initiation of the proposed course of action and.. that the completion of the course of resolution is satisfactory....”

Permit LTS 5019-86-06 Part I.H.2 states: “The permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance by a specified date. In the event of noncompliance, the notice

shall include the cause of noncompliance, any remedial action taken, and the probability of meeting the next scheduled requirement.”

Permit LTS 5019-86-06 Part II.A.3 states, in relevant part: “If, for any reason, the permittee does not comply with, or will be unable to comply with, any effluent limitations or other conditions specified in this permit, the permittee shall provide the Department with the following information, in writing, within five (5) days of becoming aware of any actual or potential noncompliance: a. A description and cause of the noncompliance with any limitation or condition; b. The period of noncompliance including the exact date and times; or, if not yet corrected, the anticipated time the noncompliance is expected to continue; and c. The steps being taken or planned to reduce, eliminate and/or prevent recurrence of the noncompliant condition.”

Permit LTS 5019-09R Part III.A.4 states, in relevant part: “If, for any reason, the permittee does not comply with, or will be able to comply with, any limitations or other conditions specified in this permit, the permittee shall provide the GWDS with the following information, in writing, within five (5) days of becoming aware of any actual or potential non-compliance : a. A description and cause of the non-compliance with any limitation or condition; b. The period of non-compliance including exact dates and times; or, if not yet corrected, the anticipated time the non-compliance is expected to continue and the steps being taken to reduce, eliminate and/or prevent recurrence of the non-compliant condition; and c. Steps taken or planned to reduce or eliminate recurrence of the non-compliance.”

CONCLUSIONS

The Department has determined that the Respondent is violating *7 Del. Admin. C. § 7103-80.3.1* of the Regulations, State of Delaware Permit WPCC 3009C/86, State of Delaware Permit LTS 5019-86-06, and State of Delaware Permit LTS 5019-09R.

ASSESSMENT OF PENALTY

Pursuant to the provisions of *7 Del. C. §6005(b)(3)*, this is written notice to the Respondent that on the basis of its findings, the Department is assessing the Respondent an administrative penalty of ***Two Hundred Three Thousand Three Hundred Twenty Dollars*** (\$203,320) for the violations identified in this Penalty Assessment and Order.

In addition to the penalty assessment, the Respondent is hereby assessed estimated costs in the amount of ***Thirty Thousand Four Hundred Ninety Eight Dollars*** (\$30,498) pursuant to *7 Del. C. §6005(c)*.

The Respondent shall remit two checks payable to the State of Delaware in the amounts of \$203,320 and \$30,498 within thirty (30) days of receipt of this notice to Kevin Maloney, Deputy Attorney General, Department of Justice, 102 West Water Street, Dover, Delaware, 19901.

PUBLIC HEARING

This Notice of Administrative Penalty Assessment and Order shall become effective and final unless the Department receives from the Respondent, no later than thirty (30) days from the receipt of this Notice, a written request for a public hearing on these matters as provided in 7 Del. C. §6005(b)(3). In the event Respondent requests a hearing, the Department reserves the right to withdraw this Assessment and Order and take any additional enforcement action it deems appropriate, including, but not limited to, the imposition of civil penalties and recovery of the Department's costs pursuant to 7 Del. C. §6005. The Department does not otherwise intend to convene a public hearing on these matters but reserves the right to do so at its discretion.

PRE-PAYMENT

In the alternative, the Respondent may prepay the penalty to the Department within thirty (30) days and sign the attached waiver and return it to the Department. By doing so, the Respondent waives the right to a hearing and the opportunity to appeal or contest this Assessment and Order.

Date: 31 July 2004



Collin P. O'Mara, Secretary

CPO:KPM:LG.rh/jff/52-5.doc

cc: Kevin Maloney, Deputy Attorney General
Laura Gerard, Deputy Attorney General
Kathy Bunting-Howarth, Director, DNREC Division of Water
Dave Schepens, Program Manager, GWDS, DNREC Div. of Water
Roy W. Heineman, Paralegal, DNREC Division of Water
Jennifer M. Bothell, Enforcement Coordinator

WAIVER OF STATUTORY RIGHT TO A HEARING

The **YMG Corporation** hereby waives its right to a hearing and its opportunity to appeal or contest this Assessment and Order and agrees to the following:

1. The **YMG Corporation** will pay the administrative penalty in the amount of **\$203,320** by sending a check payable to the "State of Delaware" within 30 days of receipt of this Assessment and Order. The check shall be directed to Kevin Maloney, Deputy Attorney General, Department of Justice, 102 West Water Street, Dover, Delaware, 19901; and
2. The **YMG Corporation** will reimburse the Department in the amount of **\$30,498**, which represents the Department's estimated costs. The reimbursement shall be paid within thirty (30) days of receipt of this Assessment and Order. The check shall be made payable to the "State of Delaware" and shall be directed to Kevin Maloney, Deputy Attorney General, Department of Justice, 102 West Water Street, Dover, Delaware, 19901; and
3. The **YMG Corporation** further agrees to abide by all of the terms and conditions of this Assessment and Order.

YMG CORPORATION

Date: _____

By: _____
(Signature)

Title: _____

Name: _____
(Print)