

AO 91 (Rev. 11/11) Criminal Complaint

# UNITED STATES DISTRICT COURT

for the

Northern District of Ohio

10 FEB 13 PM 2:11

United States of America

v.

Ben Lupo

Case No.

4:13M 6006

Defendant(s)

## CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of 1/31/2013 in the county of Mahoning in the  
Northern District of Ohio, the defendant(s) violated:

Code Section

Offense Description

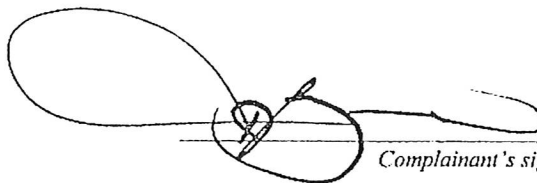
Title 33, U.S.C., Section 1319(c)(2)  
(A) and Title 18 U.S.C., Section 2

Unpermitted discharge into a water of the United States.

This criminal complaint is based on these facts:

See attached Affidavit

☒ Continued on the attached sheet.



Complainant's signature

David J. Barlow, Special Agent, U.S. EPA

Printed name and title

Sworn to before me and signed in my presence.

Date: 02/13/2013



Judge's signature

City and state: Youngstown, Ohio

George J. Limbert, Magistrate Judge

Printed name and title

**AFFIDAVIT**

I, David J. Barlow, being duly sworn, depose and say:

**Affiant**

1. I am a Special Agent with the United States Environmental Protection Agency, Office of Criminal Enforcement, Forensics, and Training, Criminal Investigation Division ("U.S.EPA-CID"). I have been so designated, as a Special Agent, for approximately twenty years. I am presently assigned to the Cleveland, Ohio Resident Office, located in Middleburg Heights, Ohio. U.S.EPA-CID has been granted primary investigative jurisdiction in matters concerning federal environmental criminal violations. My responsibilities as a Special Agent include the investigation of criminal violations of the federal environmental statutes, including violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1251, et seq.
2. As a Special Agent of the U.S. EPA-CID, I am duly authorized by 18 U.S.C. § 3063 to carry firearms, to execute and serve any warrant or other process issued under the authority of the United States, and to make arrests without warrant for any offense committed in my presence or any felony offense for which I have probable cause to believe that the person to be arrested has committed or is committing that felony offense. My immediate responsibilities include violations which occur in the State of Ohio.
3. I was trained in criminal investigations at the Federal Law Enforcement Training Center in Glynco, Georgia. Training in environmental criminal

investigations ensued at the same location. Prior to becoming a Special Agent, I was employed by the United States Environmental Protection Agency ("U.S. EPA"), Environmental Sciences Division, as an Environmental Engineer. As an Environmental Engineer, I conducted compliance inspections, to include those relating to the CWA. As a Special Agent, I have conducted numerous criminal investigations of CWA violations.

4. I make this affidavit from knowledge based on my participation in this investigation, including witness interviews by myself and/or other law enforcement officers, communications with others who have personal knowledge of the events and circumstances described herein, and information gained through my training and experience.

5. The information set forth in this affidavit is for the limited purpose of establishing probable cause. This affidavit, therefore, does not necessarily include all of the information collected during this investigation.

6. I submit this affidavit in support of a criminal complaint charging BEN LUPO with knowingly causing the discharge of a pollutant from a point source into a water of the United States without a permit, specifically BEN LUPO directed the discharge of brine and oil-based drilling mud into a stormwater drain which flowed into an unnamed tributary of the Mahoning River and ultimately into the Mahoning River near Youngstown, Ohio.

### **Summary of the Law**

7. The CWA generally requires all discharges of pollutants from point sources to waters of the United States to be permitted. See 33 U.S.C. § 1311(a). Such permits are issued under the National Pollution Discharge Elimination System (“NPDES”) program. See 33 U.S.C. § 1342. Except in compliance with such a permit, the discharge of any pollutant by any person is unlawful. See 33 U.S.C. § 1311(a).
8. The term “pollutant” is broadly defined under the CWA to include such items as dredged spoil, solid waste, sewage, chemical wastes, and industrial, municipal and agricultural waste discharged into water. See 33 U.S.C. § 1362(6).
9. A “point source” includes any pipe, ditch, channel, tunnel, conduit, well, etc. See 33 U.S.C. § 1362(14).
10. “Waters of the United States” is defined to include intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, and natural ponds the use, degradation, or destruction of which would or could affect interstate or foreign commerce. See 40 C.F.R. § 122.2.
11. The U.S. EPA may delegate to a state the authority to issue CWA permits. See 33 U.S.C. § 1342(b). The federal government retains the right to enforce the provisions of the CWA and such permits. See 33 U.S.C. § 1342(I).

12. Criminal provisions for knowing violations of the NPDES program are found under 33 U.S.C. § 1319(c).

### **Summary of Investigation**

#### **Hardrock Excavating LLC**

13. Bart Ray, of the Ohio Environmental Protection Agency ("Ohio EPA"), advised your Affiant that Hardrock Excavating LLC ("Hardrock"), located at 2761 Salt Springs Road, Youngstown, is a business that provides services to the oil and gas industry in Ohio and Pennsylvania. One aspect of Hardrock's operations includes the storage of brine and oil-based drilling mud at the facility on Salt Springs Road. Brine is water with a high quantity of salt dissolved in it. Oil-based drilling mud is a semi-solid slurry that contains petroleum products. Oil-based drilling mud is used as part of the well drilling process and because of its composition is considered a water pollutant. In total, there are approximately 58 mobile storage tanks located at the facility. Each tank has an approximate capacity of 20,000 gallons.

#### **Tip and Response by the Ohio DNR**

14. Bart Ray, of the Ohio EPA, also advised your Affiant of the following:
- a. The Ohio Department of Natural Resources ("Ohio DNR") received a phone call concerning the Hardrock facility. The caller, who requested to be anonymous, stated that on the night of Thursday,

January 31, 2013, someone would be illegally discharging wastewater from the Hardrock facility.

- b. At approximately 7:30 p.m., shortly after arriving at the Hardrock facility, inspectors from the Ohio DNR found a hose discharging wastewater into a stormwater drain located at the facility. The hose was connected to a storage tank. A sample of the wastewater was obtained from the stormwater drain by the inspector. The sample was black in color. The Ohio EPA was contacted about the discharge in an attempt to prevent further harm to the environment.
- c. Also during the inspection, the Ohio DNR inspectors spoke with a Hardrock employee ("Employee Number 1"). Employee Number 1 was the only Hardrock employee at the facility when the Ohio DNR inspectors arrived at the facility.

Response by Ohio EPA

15. In addition, Bart Ray, of the Ohio EPA, advised your Affiant of the following:

- a. The emergency response branch of the Ohio EPA arrived at the Hardrock facility on the morning of Friday, February 1, 2013. As part of the emergency response, a sample was taken from the storage tank that Employee Number 1 had drained from the night before. At the time of the sampling there were approximately 18 inches of

wastewater remaining in the tank. The wastewater was separated into two phases, the top phase appeared to be very dark and have a oil-like viscosity, much like used motor oil. The other phase, on the bottom, appeared lighter in color and much less viscous than the top layer.

- b. Personnel from the Ohio EPA found that the stormwater drain in question flowed to an unnamed tributary of the Mahoning River. The Mahoning River is within approximately one mile of the Hardrock facility. Personnel from the Ohio EPA also found that the unnamed tributary had puddles of oil throughout its length, all the way from the point where the stormwater drained into the tributary to the Mahoning River. In fact, oil and an oil sheen were visible in the Mahoning River downstream of the confluence of the unnamed tributary and the Mahoning River. A sample of the oily wastewater found in the unnamed tributary was collected.
- c. After discovering the oil in the unnamed tributary and the Mahoning River, the Ohio EPA directed the clean up of the environmental contamination.

Interview of BEN LUPO

16. Bart Ray, of the Ohio EPA, further advised your Affiant of the following:

a. On February 1, 2013, while supervising the cleanup and remediation caused by the discharge of oily wastewater, Kurt Kollar, of the emergency response branch of the Ohio EPA, spoke with BEN LUPO concerning the discharge into the stormwater drain. BEN LUPO stated that he directed a Hardrock employee to discharge the contents of a storage tank into the stormwater drain located at the Hardrock facility. BEN LUPO further stated that this was not the first time he had directed such a discharge. In fact, he stated that he had directed the discharge from a storage tank on a total of six occasions.

b. Later that day, on February 1, 2013, Bart Ray and an inspector from the Ohio DNR interviewed BEN LUPO. BEN LUPO stated that he had directed a Hardrock employee to drain storage tanks located at the Hardrock facility into the nearby stormwater drain. BEN LUPO further stated that he had directed this to happen six times over the last six months. Lastly, BEN LUPO stated that he was responsible and that he "gave the word" for the storage tank to be discharged.

Interview of Hardrock Employee Number 1

17. On February 7, 2013, your Affiant interviewed Employee Number 1. Employee Number 1 stated that he/she discharged wastewater from a storage tank into a stormwater drain at the Hardrock facility on the night of January 31, 2013.



Employee Number 1 further stated that this was not the first time he/she had discharged wastewater from a storage tank into the stormwater drain. Employee Number 1 indicated he/she had discharged wastewater into the stormwater drain on a total of four occasions. Employee Number 1 stated that on the four occasions he/she had been directed by BEN LUPO to discharge the wastewater from the storage tanks into the stormwater drain. BEN LUPO instructed Employee Number 1 to discharge the wastewater only after no one else was present at the facility and after dark.

Interview of Hardrock Employee Number 2

18. On February 12, 2013, your Affiant interviewed another employee of Hardrock ("Employee Number 2"). Employee Number 2 stated that he/she was familiar with the recent discharges from the Hardrock facility. Specifically, Employee Number 2 stated that BEN LUPO, Employee Number 1, and he/she were the only persons at Hardrock that had knowledge of the discharges. While aware of the discharges, Employee Number 2 stated that he/she never directed any of the discharges. Initially Employee Number 2 stated that he/she was aware of a total of four discharges over the last month. However, upon further questioning, Employee Number 2 stated that the discharges began in November 2012 at the direction of BEN LUPO. Employee Number 2 further stated that he/she was aware that Employee Number 1 was directed at least 20 times to discharge wastewater stored at the facility into the stormwater drain. Employee Number 2

was aware of the discharges before they occurred. Lastly, Employee Number 2 stated that BEN LUPO directed him/her, if questioned by the authorities, to state that the discharges were limited to a total of four or six times.

Permit Status and Sample Results

19. Bart Ray, of the Ohio EPA, advised your Affiant of the following:
- a. Neither Hardrock nor BEN LUPO have a permit to discharge any pollutant into the Mahoning River.
  - b. That all the samples collected by the Ohio DNR and the Ohio EPA have been analyzed. These samples were collected from the storage tank that was discharged into the stormwater drain, from the stormwater drain itself, and from the unnamed tributary. The samples indicated the presence of several hazardous pollutants including benzene and toluene. The presence of these pollutants were found in all three samples. In addition to the hazardous pollutants found in the samples, the samples also contained chlorides. The presence of chlorides in the samples is indicative of brine in the sample.

**Affiant's Request for a Criminal Complaint**

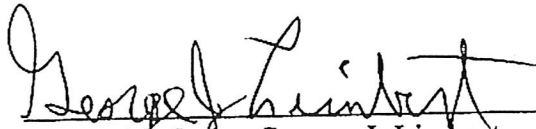
20. Based on the above information, your Affiant respectfully submits that there is probable cause to believe that BEN LUPO has knowingly caused the discharge of a pollutant from a point source into a water of the United States

without a NPDES permit, specifically BEN LUPO directed the discharge of brine and oil-based drilling mud into a stormwater drain which flowed into an unnamed tributary of the Mahoning River and ultimately into the Mahoning River near Youngstown, Ohio, in violation of 33 U.S.C. § 1319(c)(2)(A) and U.S.C. § 2.



Special Agent David J. Barlow  
U.S. Environmental Protection Agency  
Criminal Investigation Division

Sworn and Subscribed to before me and subscribed in my presence this  
13<sup>th</sup> day of February 2013



Honorable Judge George J. Limbert  
United States Magistrate Judge  
Northern District of Ohio