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December 22, 2010

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EPA GRC  
Office of Regional Hearing Clerk

Ms. Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region I  
One Congress Street  
Suite 100, Mail Code ORA17-1  
Boston, MA 02109-3912

Re: In the Matter of: Mt. Tom Generating Company, LLC  
Docket No. CWA-01-2010-0059  
NPDES Permit No. MA0005339

Dear Ms. Santiago:

Enclosed please find Mt. Tom Generating Company LLC's Answer and Request for Hearing in response to the Administrative Complaint and Notice of Opportunity for Hearing filed by Kathleen E. Woodward on behalf of EPA Region I.

Please file this Answer and Request for Hearing in your usual manner. Also, you should be aware that the Respondent and EPA staff have negotiated a settlement of this matter, which we expect to file shortly after the holidays. Thank you for your attention to this matter. If you have any questions, please feel free to contact me at the above number or email address.

Sincerely,



Mark R. Sussman

Enclosure

cc: Kathleen E. Woodward, Esq.

Murtha Cullina LLP | Attorneys at Law

BOSTON

HARTFORD

MADISON

NEW HAVEN

STAMFORD

WOBURN

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I



In the Matter of:

Docket No. CWA-01-2010-0059

Mt. Tom Generating Company, LLC  
Route 5, Smith's Ferry  
Holyoke, Massachusetts 01040

Proceeding to Assess a Class II Civil  
Penalty Under Section 309(a) of the  
Clean Water Act, as amended, 33  
U.S.C. § 1319(a)

NPDES Permit No. MA0005339

Respondent.

December 22, 2010

**ANSWER TO ADMINISTRATIVE COMPLAINT AND REQUEST FOR HEARING**

TO: Wanda Santiago  
Regional Hearing Clerk  
Environmental Protection Agency-Region I  
5 Post Office Square, Suite 100  
Mail Code ORA17-1  
Boston, MA 02109-3912

Respondent, Mt. Tom Generating Company LLC ("Mt. Tom") submits the following Answer to Administrative Complaint, Docket No. CWA-01-2010-0059 and requests a hearing on this matter.

**Statutory Authority**

1. Paragraph No. 1 alleges conclusions of law and does not require a response.
2. Paragraph No. 2 alleges conclusions of law and does not require a response.

**Respondent**

3. Mt. Tom admits the allegations within Paragraph No. 3.
4. Paragraph No. 4 alleges conclusions of law and does not require a response.

## Allegations

5. Mt. Tom admits the allegations within Paragraph No. 5.
6. Mt. Tom admits the allegations within Paragraph No. 6.
7. Paragraph No. 7 alleges conclusions of law and does not require a response.
8. Paragraph No. 8 alleges conclusions of law and does not require a response.
9. Mt. Tom admits to the allegations within Paragraph No. 9.
10. Mt. Tom admits the allegations within Paragraph No. 10.
11. Mt. Tom admits the allegations within Paragraph No. 11.
12. Mt. Tom admits the allegations within Paragraph No. 12.
13. Mt. Tom admits the allegations within Paragraph No. 13.
14. Mt. Tom asserts that the NPDES Permit speaks for itself and contains a complete and accurate description of the permit requirements.
15. Mt. Tom admits that stormwater runoff from its construction site discharged to the Connecticut River through Outfall 004 during the months of November 2008, December 2008, April 2009 and May 2009, but denies that such stormwater was subject to the average monthly industrial stormwater limits in its NPDES permit.
16. Mt. Tom admits that stormwater runoff from its construction site discharged to the Connecticut River through Outfall 004 during the months of November 2008, December 2008, April 2009 and May 2009, but denies that such stormwater was subject to the average daily industrial stormwater limits in its NPDES permit.
17. Mt. Tom asserts that the NPDES Permit speaks for itself and contains a complete and accurate description of the permit requirements.
18. Mt. Tom denies the allegations contained within Paragraph 18.

**Count 1: Failure to Comply with the Average Monthly Permit Limitations for TSS (Outfall 004)**

19. Mt. Tom's answers to Paragraphs 1 through 18 are incorporated as if fully set forth herein.

20. Mt. Tom denies the allegations within Paragraph No. 20.

**Count 2: Failure to Comply with the Daily Maximum Permit Limitations for TSS (Outfall 004)**

21. Mt. Tom's answers to Paragraphs 1 through 20 are incorporated as if fully set forth herein.

22. Mt. Tom denies the allegations within Paragraph No. 22.

**Count 3: Failure to Comply with the Average Monthly Permit Limitations for TSS (Outfall 002)**

23. Mt. Tom's answers to Paragraphs 1 through 22 are incorporated as if fully set forth herein.

24. Mt. Tom denies the allegations within Paragraph 24.

**Proposed Assessment of Civil Penalty**

25. Mt. Tom denies that a civil penalty of \$177,500 represents the statutory maximum. The remaining allegations within Paragraph No. 25 constitute conclusions of law and do not require a response.

26. Mt. Tom denies that there were forty (40) days of violation and that a civil penalty of \$177,500 is authorized by statute.

27. Paragraph No. 27 alleges conclusions of law and does not require a response.

28. Mt. Tom denies the allegations within Paragraph No. 28.

**Notice of Opportunity to Request a Hearing**

29. Mt. Tom admits that it has the right to request a hearing pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.14 and hereby requests such a hearing.

30. Mt. Tom has filed its Answer and Request for Hearing with the Regional Hearing Clerk at the address provided in Paragraph 30.

31. Mt. Tom has served Kathleen Woodward at the address provided in Paragraph 31.

32. Mt. Tom requested and was granted an extension of time to January 3, 2011 to respond to the Administrative Complaint and to request a hearing. This Answer and Request for Hearing is being timely filed.

**Continued Compliance Obligation**

33. Paragraph No. 33 alleges conclusions of law and does not require a response.

**Defenses and Opposition to Proposed Civil Penalty**

**First Defense**

U.S. EPA's failure to process Mt. Tom's timely application for renewal of its NPDES permit precluded Mt. Tom from seeking a modification of its permit to address stormwater discharge from construction activities. U.S. EPA failed to process Mt. Tom's application for more than a decade.

**Second Defense**

The discharge limitations adopted for stormwater from industrial activities at the Mt. Tom site using best engineering judgment are not applicable to discharges of stormwater from construction activities. At the time the discharges from DSN-004 occurred, Mt. Tom was constructing a significant new air pollution system designed to remove mercury and acid gases

from operations at Mt. Tom. It is inequitable and unfair to apply effluent limitations for industrial stormwater to stormwater resulting from construction activities.

### **Third Defense**

Mt. Tom took prompt action to minimize discharges of suspended solids from the construction activities at the Mt. Tom site. Mt. Tom implemented all reasonably available best management practices (“BMPs”) to minimize erosion and sedimentation of soils in the construction area. When Mt. Tom realized that the BMPs could not assure compliance with the NPDES permit’s Total Suspended Solids (“TSS”) limit that was established for industrial activities, Mt. Tom plugged the DSN-004 outfall to prevent additional stormwater discharges.

### **Fourth Defense**

In April 2008, a natural algae bloom occurred in the surface impoundment holding wastewater prior to the discharge from outfall DSN-002. The algae bloom unexpectedly caused an increase in TSS during one sampling event. Notwithstanding this higher than normal single sample, other samples taken from DSN-002 demonstrate that the average TSS concentration from DSN-002 was less than the average limitation in Mt. Tom’s Permit.

### **Fifth Defense**

Section 309(g)(3), 33 U.S.C. §1319(g)(3), provides that in determining the amount of any administrative penalty under section 309, EPA:

shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

The nature, circumstances, extent and gravity of the alleged violations do not warrant a penalty. Further, Mt. Tom does not have a history of similar violations, and its actions to address

the alleged violations demonstrate a lack of culpability. Since the alleged violations resulted either from: (1) construction area runoff, which was not intended to be limited by the industrial stormwater provisions of Mt. Tom's NPDES permit; or (2) a natural algae bloom; justice requires that there be no civil penalty for the alleged violations.

**Request for a Hearing**

Mt. Tom hereby requests an administrative hearing on the issues raised by the Civil Administrative Complaint and this Answer.

Mt. Tom respectfully reserves the right to supplement this response and to make objections in addition to the ones noted in this response.

Respectfully Submitted,

Mt. Tom Generating Company LLC

  
Mark R. Sussman  
Sarah P. Kowalczyk  
Murtha Cullina LLP  
CityPlace I - 185 Asylum Street  
Hartford, Connecticut 06103-3469  
Telephone: 860.240.6000  
Facsimile: 860.240.6150  
E-mail: [msussman@murthalaw.com](mailto:msussman@murthalaw.com)

Its Attorneys

Dated: December 22, 2010

In the Matter of: Mt. Tom Generating Company, LLC

Docket No. CWA-01-2010-0059

**CERTIFICATE OF SERVICE**

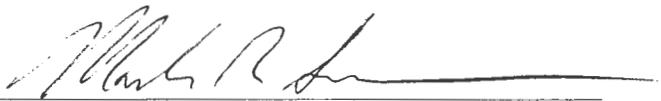
I hereby certify that copies of the foregoing ANSWER TO THE ADMINISTRATIVE COMPLAINT AND REQUEST A HEARING in the matter of Mt. Tom Generating Company, LLC, Docket No. CWA-01-2010-0059, were sent on December 22, 2010, to the following persons in the manner indicated:

Original and one copy by First Class Mail:

Ms. Wanda Santiago  
Regional Hearing Clerk  
U.S. Environmental Protection Agency-Region 1  
5 Post Office Square, Suite 100  
Mail Code ORA17-1  
Boston, MA 02109-3912

Copy by First Class Mail and email:

Kathleen E. Woodward  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency, Region I  
5 Post Office Square, Suite 100  
Mail Code OES4-2  
Boston, MA 02109-3912

  
Mark R. Sussman