

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

IN THE MATTER OF: )  
)  
) Docket No. CWA-07-2015-0069  
MID-AMERICA SAND, L.L.C. )  
)  
) Respondent, )  
)  
) FINDINGS OF VIOLATION,  
) ORDER FOR COMPLIANCE  
) ON CONSENT  
Proceedings under Section 309(a)(3) of the )  
Clean Water Act, 33 U.S.C. § 1319(a)(3) )  
\_\_\_\_\_ )

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) is issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(a)(3). The authority to take action under Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), is vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, EPA, Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA, Region 7.

2. Respondent is Mid-America Sand, L.L.C. (hereafter “Respondent”), a corporation and a “person” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(5).

3. EPA, together with Respondents, enter into this Section 309(a)(3) Order for Compliance on Consent in order to carry out the goals of the CWA, 33 U.S.C. § 1251 *et seq.*, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

4. It is the parties’ intent through this agreement to address unauthorized discharges of pollutants by Respondent into the waters of the United States without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301 of the CWA, 33 U.S.C. § 1311. Specifically, Section 301 of the CWA, 33 U.S.C. § 1311, provides that except as in compliance with certain specified provisions of the CWA, the unauthorized discharge of any pollutant into the waters of the United States by any person is unlawful.

5. By entering into this Order, Respondent (1) consents to and agrees not to contest EPA's authority or jurisdiction to issue or enforce this Order, (2) agrees to undertake all actions

required by the terms and conditions of this Order, and (3) consent to be bound by the requirements set forth herein. Respondent also waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Order, including, but not limited to, any right of judicial review of this Order under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

### Statutory and Regulatory Framework

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344.

7. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

8. Section 404 of the CWA, 33 U.S.C. § 1344, specifically requires a person to obtain a permit from the Secretary of the Army acting through the Chief of Engineers, commonly referred to as the United States Army Corps of Engineers (hereinafter “Corps”), for any discharge of “dredged or fill material” into the “navigable waters” of the United States.

9. The Missouri Department of Natural Resources (“MDNR”) is the state agency with the authority to administer the federal NPDES program in Missouri pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the implementing regulations, and a Memorandum of Understanding dated October 30, 1974. EPA maintains concurrent enforcement authority with authorized state programs for violations of the CWA.

10. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters,” in part, as the “waters of the United States,” which are defined at 40 C.F.R. § 232.2 and 33 C.F.R. Part 328, and which include wetlands adjacent to waters of the United States.

11. 40 C.F.R. § 232.2 defines the term “dredged material” to mean material that is excavated or dredged from waters of the United States.

12. 40 C.F.R. § 232.2 defines the term “discharge of dredged material” to mean, with specified exceptions, any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, *inter alia*, the addition of dredged material to a specified discharge site located in waters of the United States; and any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land-clearing, ditching, channelization, or other excavation.

13. 40 C.F.R. § 232.2 defines the term “fill material” to include material placed in waters of the United States where the material has the effect of changing the bottom elevation of any portion of a water of the United States. The definition provides examples including, *inter alia*,

rock, sand, soil, clay, overburden, and materials used to create any structure or infrastructure in the waters of the United States.

14. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes the issuance of an order against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, requiring such person to comply.

#### Factual Background

15. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

16. At all times relevant to this action, Respondent owned, operated, leased and/or otherwise controlled property located in the Sections 1 and 2 of Township 50 North, Range 32 West, Jackson County, Missouri and Sections 29 and 32 of Township 51 North, Range 31 West, Clay County, Missouri (hereinafter the “Site” or “Facility”).

17. On August 22, 2011, MDNR issued a General State Operating Permit, MO-G500174, (“NPDES Permit”) to Respondent. The permit expired May 31, 2015 and has been administratively extended.

18. Respondent’s NPDES Permit authorizes discharges of stormwater, process, and wash water from all outfalls, including an outfall identified by Respondent as “Outfall 001”.

19. In 2010 continuing through the present, Respondent and/or persons acting on its behalf, by the use of earth moving equipment and/or Outfall 001, authorized and/or directed the grading, excavation, placement, and discharge of dredged and/or fill material including, but not limited to, dirt, spoil, rock, and sand, impacting approximately 5.35 acres of wetlands.

20. On November 1, 2012, representatives from the Corps inspected the Site and documented the discharges of dredged and/or fill material described in Paragraph 19.

21. The dredged and/or fill materials discharged by Respondent into wetlands are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

22. The discharge of the dredged and/or fill material into wetlands referenced in Paragraph 19 constitutes the “discharge of a pollutant” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

23. The earth moving equipment and Outfall 001 referenced in Paragraphs 18 and 19 constitute “point source(s)” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

24. The wetlands, referenced in Paragraph 19, are “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), 40 C.F.R. § 232.2, and 33 C.F.R. Part 328.

25. Respondent did not obtain a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, prior to the performance of the work described in Paragraph 19, nor did Respondent perform the work described in Paragraph 19 under any prior permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

#### **A. FINDINGS OF VIOLATION**

26. The facts stated in Paragraphs 15 through 25 above are herein incorporated.

27. Respondent's discharge of pollutants from a point source into waters of the United States occurred without a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344, and, therefore, these discharges violated Section 301 of the CWA, 33 U.S.C. § 1311.

#### **B. ORDER FOR COMPLIANCE ON CONSENT**

Based on the FINDINGS OF FACT and FINDINGS OF VIOLATION set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), EPA hereby ORDERS, and Respondents hereby AGREE to take, the actions described below:

28. Respondent agrees to submit a Work Plan to EPA for review and approval that shall describe Respondent's proposed restoration of the impacted Site described herein. The Work Plan shall be submitted to EPA within 30 days of the effective date of this Order. The work shall be completed within 180 days of the issuance of a construction permit to Mid-America Sand, L.L.C. by Missouri Department of Natural Resources, in accordance with the specifications set forth in the Work Plan.

- a. The Work Plan should include: the projected work and materials necessary to restore and modify the Site by removing berms or other features and perform limited plantings as appropriate.
- b. If EPA approves the Work Plan, it shall be implemented according to the schedule for implementation in the approved work plan.
- c. If EPA does not approve the Work Plan, Respondent shall address the comments and resubmit the work plan for review within thirty (30) days of receipt of EPA's disapproval.
- d. Upon resubmission, EPA, in its sole discretion, may either approve the Work Plan, or if EPA determines that the Work Plan does not adequately address the comments provided by EPA, EPA may modify the work plan and will provide Respondent with a copy of the work plan as modified. Respondent shall implement the modified Work Plan according to the schedule contained therein.

29. Once approved by EPA, the Work Plan identified above shall be incorporated by reference and fully enforceable under the terms of this Order.

30. Within 180 days of the issuance of a construction permit to Mid-America Sand, L.L.C. by Missouri Department of Natural Resources, Respondent shall submit to EPA, with a copy to MDNR, a Final Report describing the procedures implemented by Respondent to eliminate all unpermitted discharges as described in Paragraph 19 above.

- a. The Final Report shall include, at a minimum: the work completed to relocate Outfall #001 and otherwise any dredge and/or fill material from the wetlands described in Paragraph 19.
- b. The Final Report shall also include photographic evidence, copies of relevant documents, and a signed statement indicating that the work is complete, including any work completed as part of the Work Plan described above.

31. EPA will review the Final Report and approve it or provide Respondent written comments. If requested by Respondent, EPA will provide Respondent an opportunity to discuss the written comments. Respondent shall resubmit the Final Report in a form that responds to EPA's comments within fifteen (15) days after receipt of EPA's written comments.

32. The submission of documents by Respondent, as identified above, shall include the following written statement, followed by signature of a duly authorized representative of Respondent:

*I certify under penalty of law that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

33. All documents to be submitted to EPA under this Order shall be submitted by mail to:

Delia Garcia, or designee  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219.

#### General Provisions

34. Respondent's failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that Respondent has violated the Act and failed to comply with the terms of the Order.

35. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibilities to obtain any required local, state, and/or federal permits.

36. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the CWA, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. EPA reserves the right to enforce the terms of this Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

37. Respondent neither admits nor denies the factual allegations set forth in this Order.

#### Access and Requests for Information

38. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect property owned or operated by Respondent and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

#### Severability

39. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

#### Parties Bound

40. This Order shall apply to and be binding upon the Respondent, its agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

#### Effective Date

41. The terms of this Order shall be effective and enforceable on the filing date pursuant to 40 C.F.R. § 22.31(b). All time periods herein shall be calculated therefrom unless otherwise provided in this Order.

#### Termination

42. This Order shall remain in effect until either EPA approval of the Final Report as set forth in Paragraph 31 above and/or a written notice of termination is issued by an authorized representative of EPA.

#### Signatories

43. The undersigned for each party has the authority to bind each respective Party to the

terms and conditions of this Order. The Order may be signed in part and counterpart by each Party.

**For the Complainant, United States Environmental Protection Agency, Region 7:**

  
KAREN A. FLOURNOY  
Director  
Water, Wetlands and Pesticides Division

8-11-15  
DATE

  
MELISSA BAGLEY  
Assistant Regional Counsel  
Office of Regional Counsel

8/11/15  
DATE

**For Respondent:**



\_\_\_\_\_  
TIM VANCE  
MEMBER  
MID-AMERICA SAND, L.L.C.

*8-4-15*

\_\_\_\_\_  
DATE

*Tim Vance, Member*  
\_\_\_\_\_  
NAME AND TITLE

**CERTIFICATE OF SERVICE**

I certify that on the date noted below I mailed the foregoing Findings of Violation and Order for Compliance by certified mail, return receipt requested, to:

MID-AMERICA SAND, L.L.C.

Mr. Tim Vance, Registered Agent  
5201 Brighton  
Kansas City, MO 64130

and

Mr. Rick Houston, General Manager  
14800 N. 210 Highway  
Independence, MO 64058.

Date

August 11, 2015

Anna M. Rose