COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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L. Preston Bryant, Jr
Secretary of Natural Resources

David K. Paylor
Director

Francis L. Daniel
Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION – ORDER BY CONSENT
ISSUED TO
SANDY BOTTOM MATERIALS, INC.
FOR
BYRUM SAND PIT
VPDES Registration No. VAG840194

SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §§ 62.1-44.15(8a) and (8d), between the State Water Control Board and Sandy Bottom Materials, Inc., regarding the Byrum Sand Pit, for the purpose of resolving certain violations of environmental law and/or regulations.

SECTION B: Definitions:

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code §10.1-1183.

3. "Director" means the Director of the Department of Environmental Quality.

4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

5. "DMME" means the Virginia Department of Mines, Minerals and Energy.

6. "Facility" means the Byrum Sand Pit, an open-pit sand, clay and silt mine located at 1136 Audubon Road in Suffolk, Virginia.

7. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10

8. "Fill material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.

9. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

10. "Other wastes" means substances except industrial wastes and sewage which may cause pollution in any state waters. Va. Code § 62.1-44.3.

11. "Overburden" means soil taken from the surface of a mine to be later used for mine reclamation.

12. "Owner" or "operator" means the owner or operator of any facility or activity subject to regulation under the VPDES program.

13. "Person" means one or more individuals, a corporation, a partnership, an association, a governmental body, a municipal corporation, or any other legal entity. Va. Code § 62.1-44.3.

14. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.

15. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution" for the terms and purposes of this chapter. Va. Code § 62.1-44.3.

16. "Sandy Bottom Materials" means Sandy Bottom Materials, Inc., certified to do business in Virginia, its affiliates, partners, subsidiaries and parents.

17. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.

18. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3; 9 VAC 25-210-10.

19. "Surface water" means all state waters that are not ground waters as defined in § 62.1-255 of the Code of Virginia.

20. "SWP3" means a storm water pollution prevention plan.

21. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

22. "USACE" means the United States Army Corps of Engineers.

23. "VAC" means Virginia Administrative Code.

24. VPDES" means Virginia Pollutant Discharge Elimination System.

25. "VPDES Permit" means VPDES General Permit No. VAG84 for Nonmetallic Mineral Mining, which was effective July 1, 2004, and expires June 30, 2009, and which will be reissued effective July 1, 2009, and expire June 30, 2014.

26. "VPDES Regulation" means 9 VAC 25-190-10 *et seq.*- the VPDES General Permit for Nonmetallic Mineral Mining.

27. "VWP permit" means an individual or general permit issued by the Board under § 62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

28. "VWPP Regulation" means 9 VAC 25-210-10 *et seq.* - the Virginia Water Pollution Prevention (VWPP) Permit Regulation.

29. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Va. Code § 62.1-44.3; 9 VAC 25-210-10.

SECTION C: Finding of Facts and Conclusions of Law

1. Sandy Bottom Materials, a "person" under Va. Code § 62.1-44.3, operated the Facility, an open-pit sand, clay and silt mine in Suffolk, Virginia. The Facility is subject to the VPDES Permit through Registration No. 840194, which was effective August 17, 2007. The Facility operates pursuant to DMME Permit No. 90481AA, ("DMME Permit") which was issued on January 1, 2007, and City of Suffolk Conditional Use Permit Ordinance No. 06-0-016.

2. The Facility, and a large pile of soil to the east of the Facility, which is composed of overburden from Sandy Bottom Materials' mining operations, are situated on land owned

by a third party and was operated pursuant to a Preliminary Borrow Pit Agreement ("Agreement") between Sandy Bottom Materials and the former land owner [Mr. Bobby James Byrum, Sr. ("Mr. Byrum")] now deceased. On May 25, 2008, Mr. Byrum's estate and Chuckatuck Eight, LLC, initiated legal action in the Circuit Court of the City of Suffolk ("Court") to, among other things, terminate the Agreement. On January 28, 2009, the Court issued a Stipulated Order that denies Sandy Bottom Materials access to the Facility except for limited purposes, including mine reclamation and complying with any other requirement of a State agency.

3. Chuckatuck Creek is located in the James River Basin and is listed in DEQ's 305(b) report as impaired for freshwater benthic bioassessment. The source of the impairment is unknown. Chuckatuck Creek and its tributaries are considered State waters pursuant to 9 VAC 25-210-10 of the VWPP Regulation and § 62.1-44.3 of the Code of Virginia. Likewise, the wetlands adjacent to Chuckatuck Creek and its tributaries are considered State waters.

4. The VPDES Permit authorizes Sandy Bottom Materials to discharge process wastewater and commingled storm water associated with industrial activity from its one permitted outfall within discharge limits established in the VPDES Permit for pH and total suspended solids, to monitor the discharges for flow and for the presence of total petroleum hydrocarbons, and to report the results thereof to DEQ every three months.

5. Part II.D. of the VPDES Permit requires Sandy Bottom Materials to develop and implement a SWP3, which may incorporate by reference other plans or documents required by its DMME Permit. Sandy Bottom Materials is permitted by DMME to mine sand and topsoil; its storm water management practices are contained in the Operational Plan it submitted as part of its permit application to DMME. Sandy Bottom Materials submitted the DMME Operational Plan to DEQ with its VPDES Permit Registration Statement in lieu of a stand-alone SWP3, which DEQ accepted. That document is referred to herein as a "SWP3."

6. Part II.F.1 of the VPDES Permit requires that the SWP3 and associated records such as inspection and training reports, be retained on-site at the Facility and be signed, dated and certified.

7. Part II.H of the VPDES Permit details the required contents of the SWP3. Specifically, Part II.H.2.a.(1) requires a Facility site map; Part II.H.3.d requires a schedule for inspecting best management practices ("BMPs"); Part II.H.3.e requires a schedule for training facility employees on the components and goals of the SWP3; and Part II.H.4 requires that a comprehensive site compliance evaluation ("CSCE") be conducted at least annually.

8. On August 12, 2008, a DMME inspector reported to DEQ enforcement staff the possible discharges of uncontrolled sediment to State waters from two locations on or near the Facility: (1) from the Facility itself into an unnamed tributary to Chuckatuck Creek on the northern boundary of the Facility ("northern tributary") and (2) from the large stockpile of soil to the east of the Facility into another unnamed tributary to Chuckatuck Creek ("eastern tributary").

9. DEQ staff accompanied the DMME inspector and representatives of the City of Suffolk and the USACE on site inspections on August 14, 2008, and August 21, 2008. During the DEQ Facility inspection on August 14, 2008 DEQ staff documented VPDES Permit compliance deficiencies including the following:

   a. The SWP3 and associated records, such as training and inspection records, were not maintained at the Facility as required by Part II.F.1 of the VPDES Permit.

   b. The SWP3 subsequently produced was not signed, dated and certified as required by Part II.F.1 of the VPDES Permit.

   c. The SWP3 did not contain a facility site map, a schedule for evaluating compliance with storm water BMPs, a schedule for training Facility employees on the components and goals of the SWP3, or a requirement to conduct a CSCE as required, respectively, by Part II.H.2.a.(1), Part II.H.3.d, Part II.H.3.e and Part II.H.4 of the VPDES Permit.

10. Sandy Bottom Materials violated VPDES Permit conditions Part II.F.1, Part II.H.2.a.(1), Part II.H.3.d, Part II.H.3.e and Part II.H.4 as noted in paragraph C.9 of this Order.

11. Part II.D of the VPDES Permit and Part 8 of the SWP3 require Sandy Bottom Materials to manage storm water runoff from the Facility in such a manner as to prevent storm water from discharging to State waters, except through the permitted outfall. Part III.F of the VPDES Permit prohibits the discharge into State waters of wastes, or any noxious or deleterious substances, except in compliance with the VPDES Permit. In addition, Part III.G of the VPDES Permit requires Sandy Bottom Materials to notify DEQ immediately upon discovery of an unpermitted discharge.

12. Va. Code § 62.1-44.5 states that "Except in compliance with a certificate issued by the Board, it is unlawful for any person to: 1. [d]ischarge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."

13. Va. Code § 62.1-44.15(5a) states that a VPDES permit and a VWP permit are "certificates" under the statute.

14. The VPDES Regulation at 9 VAC 25-190-50 prohibits storm-water related discharges to State waters except in compliance with the VPDES Permit.

15. Va. Code § 62.1-44.14 states that the Board may delegate its authority to issue certificates to the Director. The Board delegated this authority to the Director in 1976.

16. The Department has issued no permits or certificates to Sandy Bottom Materials for operations at the Facility or for the soil pile to the east of the Facility, other than VPDES General Permit No. VAG84 through Registration No. VAG840194.

17. During the Facility inspections on August 14, 2008, and August 21, 2008, DEQ staff observed that uncontrolled sediment had discharged (1) from the Facility to the northern tributary to Chuckatuck Creek and the adjacent wetlands; and (2) from the large stockpile of soil to the east of the Facility into the eastern tributary to Chuckatuck Creek and the adjacent wetlands. Neither discharge is listed in the VPDES Permit as a permitted outfall. Sandy Bottom Materials had not reported these two apparent unpermitted

discharges to DEQ. It was estimated that a total of 1,180 linear feet of tributary (1,100 linear feet of the eastern tributary and 80 feet of the northern tributary) and 0.92 acre of wetland (0.72 acre adjacent to the eastern tributary and 0.2 acre adjacent to the northern tributary) had been impacted.

18. On August 30, 2007, USACE had confirmed the presence of wetlands adjacent to the eastern tributary to Chuckatuck Creek.

19. Soil is considered a pollutant pursuant 9 VAC 25-210-10 of the VWPP Regulation because it may cause or contribute to pollution of State waters.

20. Sandy Bottom Materials had not obtained a VWP permit authorizing the discharge of fill material into the northern tributary, the eastern tributary, or the wetlands adjacent to those two tributaries to Chuckatuck Creek.

21. The discharge of fill material resulted in the pollution of a wetland in violation of Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50 of the VWPP Regulation.

22. Sandy Bottom Materials has violated the VPDES Permit, the VPDES Regulation, the VWPP Regulation and the Va. Code as described in Sections C.11 and C.17 of this Order by discharging fill material into the northern tributary to Chuckatuck Creek, the eastern tributary to Chuckatuck Creek, and wetlands adjacent to both tributaries while concurrently failing to comply with the conditions of the VPDES Permit.

23. DEQ issued Notice of Violation ("NOV") No. W2008-T-0003 to Sandy Bottom Materials on September 9, 2008, for the violations of the VPDES Permit and issued NOV No. 2008-09-T-002 on September 19, 2008, for the unauthorized fill activities.

24. DEQ compliance and enforcement staff met with representatives of Sandy Bottom Materials on October 1, 2008, who presented a draft SWP3 and facility site map to address violations listed in C.9 of this Order and stated that additional erosion and sediment ("E&S") controls (berms, silt fencing, regrading, seeding and matting) had been installed in the northwest corner of the facility and between the soil stockpile and the eastern tributary and that relocation of the soil stockpile was ongoing. Sandy Bottom Materials memorialized the representations made at the October 1, 2008, meeting in a letter dated October 7, 2008. A site inspection by DEQ compliance and enforcement staff on December 23, 2008, confirmed the installation of the additional E&S controls and the ongoing relocation of the soil stockpile.

25. In view of the Stipulated Order referenced in paragraph C.2 of this Order, and pursuant to its authority under the DMME Permit, DMME issued Sandy Bottom Materials a Notice of Noncompliance on February 25, 2009 ("DMME Notice"). The DMME Notice, among other things, required Sandy Bottom Materials to submit to DMME an approvable mine reclamation plan ("reclamation plan") that includes removal of the remainder of the soil stockpile to the east of the Facility, the re-grading and vegetation of the underlying soil, and the establishment of permanent E&S controls to protect the eastern tributary from future impacts from sediment runoff. Sandy Bottom Materials submitted its revised draft reclamation plan to DMME on May 12, 2009; it was approved by DMME on June 5, 2009. The soil stockpile had been completely removed by July 17, 2009.

SECTION D: Agreement and Order

Accordingly the State Water Control Board by virtue of the authority granted it by Va. Code §§ 62.1-44.15(8a) and (8d), orders Sandy Bottom Materials, and Sandy Bottom Materials, in settlement of the violations cited in this Order, voluntarily agrees to:

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of $25,480 in accordance with the following schedule:

   a. Within 30 days of the effective date of this Order, payment in the amount of $3,480.00;

   b. Following the initial payment of $3,480.00 as described in the above subparagraph D.2.a, payment in the amount of $2,000.00 per month for eleven months payable by the first day of each month beginning January 1, 2010, and continuing until November 1, 2010;

   c. If the Department fails to receive a payment pursuant to the schedule, described in the above subparagraphs D.2.a and D.2.b, the payment shall be deemed late. If any payment is late, the Department reserves the right to demand in writing full payment of the balance owed by Sandy Bottom Materials, under this Order. Sandy Bottom Materials shall pay such balance within 15 days of receipt of a demand letter from the Department. Any allowance by the Department of a late payment by Sandy Bottom Materials shall not serve as a waiver of the Department's reserved right to accelerate payment of the balance.

Payments shall be made by check, certified check, money order, or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Sandy Bottom Materials shall include its Federal Employer Identification Number (54-1915529) with each civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend the Order with the consent of Sandy Bottom Materials, for good cause shown by Sandy Bottom Materials, or on its own motion after notice and opportunity to be heard.

2. This Order only addresses and resolves those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2)

seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.

3. For purposes of this Order and subsequent actions with respect to this Order, Sandy Bottom Materials admits the jurisdictional allegations, but neither admits nor denies the factual findings, and conclusions of law contained herein.

4. Sandy Bottom Materials consents to venue in the Circuit Court of the City of Suffolk for any civil action taken to enforce the terms of this Order.

5. Sandy Bottom Materials declares it has received fair and due process under the Administrative Process Act, Va. Code §§ 2.2 - 4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by Sandy Bottom Materials to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. Sandy Bottom Materials shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other act of God, war, strike, or such other occurrence. Sandy Bottom Materials shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Sandy Bottom Materials shall notify the DEQ Regional Director when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;

   b. the projected duration of any such delay or noncompliance;

   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

   Failure to so notify the Regional Director within 24 hours of learning of any condition above, which Sandy Bottom Materials intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and Sandy Bottom Materials. Nevertheless, Sandy Bottom Materials agrees to be bound by any compliance date, which precedes the effective date of this Order.

11. This Order shall continue in effect until:

    a. Sandy Bottom Materials petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

    b. the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Sandy Bottom Materials.

    Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Sandy Bottom Materials from its obligation to comply with any statute, regulation, Permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules, or specifications attached hereto or submitted by Sandy Bottom Materials and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of Sandy Bottom Materials certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Sandy Bottom Materials to this document. Any documents to be submitted pursuant to this Order shall be submitted by a responsible official of Sandy Bottom Materials.

14. By its signature below, Sandy Bottom Materials voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2009.

_____
Francis L. Daniel, Regional Director
Department of Environmental Quality

Sandy Bottom Materials, Inc., voluntarily agrees to the issuance of this Order.

Date: 8/24/09 By: [signature], President
(Person) (Title)
Sandy Bottom Materials, Inc.

Commonwealth of Virginia
City/County of Suffolk

The foregoing document was signed and acknowledged before me this 24th day of August, 2009, by Jennifer L Trump, who is President of Sandy Bottom Materials, Inc., on behalf of the Corporation.

[signature]
Notary Public

7171642
Registration No.

My commission expires: 8/31/2012.

Notary seal: AMANDA A. WILBURN NOTARY PUBLIC #7171642 COMMISSION EXPIRES AUGUST 31, 2012 COMMONWEALTH OF VIRGINIA

APPENDIX A

Sandy Bottom Materials shall:

1. By January 1, 2010, submit to DEQ Tidewater Regional Office an approvable Corrective Action Plan ("Plan") and Schedule. At a minimum, the Plan must address in detail how the following items will be accomplished, with the goal of achieving no-net-loss of existing wetland acreage and no-net-loss of functions in all surface waters: (1) construction and maintenance of a permanent, stable, vegetated berm between the former site of the soil pile to the east of the Facility and the eastern tributary to Chuckatuck Creek; (2) re-grading to its original, natural contours and re-vegetation of the former site of the soil pile; (3) maintenance of the erosion and sediment controls that were installed to protect the northern tributary to Chuckatuck Creek as noted in subsection C.24 of this Order; (4) preliminary inspection by DEQ; (5) response to any notice of deficiency arising from that preliminary DEQ inspection within 30 days of receipt of such notice; and (6) final inspection and approval by DEQ. All actions under the approved Plan and Schedule shall be completed by April 1, 2010.

2. Mail all submittals and reports required by this Appendix A to:

   Mr. Francis L. Daniel, Regional Director
   DEQ, Tidewater Regional Office
   5636 Southern Boulevard
   Virginia Beach, VA 23462