

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF)
)
)

BENNIE FULLER DBA)

FULLER SAND & GRAVEL COMPANY) CONSENT ORDER NO. 04 -077-CMNPS

WHATLEY PIT)

WHATLEY, CLARKE COUNTY, ALABAMA)

EXPIRED NPDES # AL0070521)

T8N, R4E, S21)
_____)

FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, Code of Alabama (1975), §§ 22-22A-1 through 22-22A-16, as amended, and the Alabama Water Pollution Control Act (AWPCA), Code of Alabama (1975), §§ 22-22-1 through 22-22-14, as amended, the ADEM Administrative Code of Regulations (ADEM Admin. Code R.) promulgated pursuant thereto, and the National Pollutant Discharge Elimination System (NPDES) administered by the Alabama Department of Environmental Management ("the Department" or "ADEM") and approved by the Administrator of the U.S. Environmental Protection Agency (EPA) pursuant to the Federal Water Pollution Control Act (FWPCA) §402, 33 U.S.C. § 1342, as amended, and without the adjudication of any issues of fact or law and upon the consent of the parties concerned hereto, the Department makes the following FINDINGS:

1. Bennie Fuller dba Fuller Sand & Gravel Company (hereinafter "Operator"), operates a sand and gravel facility, Whatley Pit (AL0070521), located at T8N, R4E, S21 in Whatley, Clarke County, Alabama.

2. The Department is a duly constituted department of the State of Alabama pursuant to Code of Alabama (1975), § 22-22A-1 through 22-22A-16, as amended.

3. Pursuant to Code of Alabama (1975), § 22-22A-4(n), as amended, the Department is the State agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the FWPCA. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA.

4. On August 1, 1997, the Operator was issued NPDES permit coverage AL0070521 by the Department for discharges of treated effluent from the Whatley Pit in Clarke County, Alabama, to an unnamed tributary to Basset Creek, a water of the State, classified as suitable for Fish and Wildlife, and to groundwater which is unclassified. The NPDES permit expired on July 31, 2002.

5. Among the terms, limitations and conditions of the expired permit is a duty to reapply for reissuance of the permit at least 180 days prior to its expiration and a duty to comply with ADEM rules and regulations. ADEM Admin. Code R. 335-6-6-.08,(k),(8) requires submission of a complete and correct application at least 180 days prior to the expiration date of the permit.

6. Department records indicate the Operator failed to respond to a Warning – Need to Reapply Letter dated March 20, 2003, a Notice of Violation – Need to Reapply

Letter dated December 9, 2002, and a Notice of Violation – Need to Reapply Letter dated April 2, 2003.

7. Pursuant to Code of Alabama 1975, §§22-22-1 through 22-22-14, as amended, and ADEM Admin. Code R. 335-6-6-.03, no person shall discharge or continue to discharge pollutants into waters of the State without first having obtained valid NPDES permit coverage.

8. On February 12, 2003, Department personnel conducted an inspection of the Whatley Pit, which documented that the facility was operating without valid NPDES permit coverage, and that required pollution control structures and management practices had not been implemented and/or maintained resulting in ongoing, uncontrolled, and unpermitted discharges of pollutants to the waters of the State.

9. On March 16, 2004, an application requesting reissuance of NPDES permit coverage was submitted by the Operator.

10. The Operator neither agrees nor disagrees with the FINDINGS presented in this Consent Order, but in an effort to cooperate with the Department and to comply with the provisions of the AWPCA, the Operator has consented to the terms of this Consent Order.

11. The Department has agreed to the terms of this Consent Order in order to resolve the violations cited in this Consent Order, and the Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

ORDER

Based on the foregoing FINDINGS and pursuant to Code of Alabama (1975), §§ 22-22A-5(10), 22-22A-5(12), 22-22A-5(18), and 22-22-9(i), as amended, and with the consent of the Operator, it is hereby ORDERED:

A. That, not later than forty-five (45) days after the effective date of this Consent Order, the Operator shall pay to the Department a civil penalty in the amount of Five-Thousand Dollars (\$5,000) for the violations cited herein. In determining the penalty amount set forth herein, the Department considered the statutorily prescribed factors set forth at Code of Alabama (1975), § 22-22A-5(18)(c), as amended.

B. That all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. That the Operator shall, immediately upon the effective date of this Consent Order and continuing thereafter, ensure immediate and future compliance with the AWPCA, applicable ADEM regulations, and all NPDES permit limitations, terms, and conditions for all sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator, except as may be provided otherwise by an ADEM approved compliance schedule contained in this Consent Order.

D. That, not later than seven (7) days from the effective date of this Consent Order, the Operator shall have performed and submitted the results to the Department

of a comprehensive evaluation of the facility, prepared by a Professional Engineer (hereinafter "PE") registered in Alabama. The purpose of this evaluation is to determine the facility's compliance status with ADEM NPDES rules.

E. That, not later than ten (10) days after the effective date of this Consent Order, the Operator shall submit to the Department a plan, including a compliance schedule, to accomplish corrective actions and/or improvements identified by the comprehensive evaluation of the facility. The plan must meet applicable requirements of the Department's NPDES rules. Within seven (7) days of receipt of any comments from the Department, the Operator shall modify the plan to address any comments made by the Department in writing.

F. That, not later than twenty-five (25) days after the effective date of this Consent Order the Operator shall implement corrective actions and/or improvements identified by the comprehensive evaluation of the facility, that do not require reissuance and modification of the expired permit to implement to ensure compliance with ADEM NPDES rules and the expired permit.

G. That not later than thirty (30) days after the effective date of this Consent Order the Operator shall submit certification by a PE that all deficiencies identified by the comprehensive evaluation that do not require reissuance and modification of the expired permit have been corrected, and full compliance with the requirements of the ADEM NPDES rules has been achieved.

H. If modification to the application and PAP plan submitted on March 16, 2004 is necessary to detail corrective actions to ensure compliance with ADEM requirements,

the Operator shall submit additional information and or clarification to update the application for reissuance of expired permit AL0070521 no later than thirty (30) days after the effective date of the consent order. The Operator shall correct any deficiencies in the application within seven (7) days of being notified by the Department.

I. That, not later than forty-five (45) days after the effective date of this Consent Order, the Operator shall have performed by a PE comprehensive evaluations of all other permitted and unpermitted sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator and submit the results to the Department to determine the compliance status of each facility with ADEM NPDES rules.

J. That, not later than fifty (50) days after the effective date of this Consent Order, the Operator shall submit to the Department plan(s), including a compliance schedule(s), that meet applicable requirements of the Department's NPDES rules, signed by the Operator and certified by a PE, to accomplish corrective actions and/or improvements identified by the comprehensive evaluations of all other permitted and unpermitted sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator. Within seven (7) days of receipt of any comments from the Department, the Operator shall modify the plans to address any comments made by the Department in writing.

K. That, not later than fifty-five (55) days after the effective date of this Consent Order, the Operator shall implement corrective actions and/or improvements

identified by the comprehensive evaluations of all other permitted and unpermitted sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator, that do not require major modifications of the existing permit(s) or issuance of permit coverage to ensure compliance with ADEM NPDES rules.

L. That not later than sixty (60) days after the effective date of this Consent Order the Operator shall submit certification by a PE that all deficiencies identified by the comprehensive evaluations of all other permitted and unpermitted sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator have been corrected, and full compliance with the requirements of ADEM NPDES rules and permits have been achieved, except for any corrective actions that must be authorized by issuance of permit coverage or a major modification to an existing NPDES permit.

M. If modifications to permits or issuance of permit coverage are determined to be necessary to implement corrective actions at the other permitted and unpermitted sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible corporate officials of the Operator to ensure compliance with the NPDES rules, the Operator shall submit complete and correct applications for issuance of permit coverage or major modification of existing NPDES permits, including the appropriate fee, no later than sixty-five (65) days after the effective date of the consent order. The Operator shall correct any deficiencies in the application(s) within seven (7) days of being notified by the Department.

N. That this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

O. That, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

P. That the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

Q. That, for purposes of this Consent Order only, the Operator agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in a court of competent jurisdiction, including, but not limited to, Montgomery County Circuit Court. The Operator also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Operator shall be limited to the defenses of *Force Majeure*, compliance with this Agreement, and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to be beyond the reasonable control of the Operator) and which delays or prevents performances by a date required by the

Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten (10) days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the Department may extend the time as justified by the specific circumstances.

R. That the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility which would constitute possible violations not addressed in this Consent Order, then such future violations shall be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Operator shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if future Orders, litigation or other enforcement action address new matters not raised in this Consent Order.

S. That, by agreement of the parties, this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall

not be appealable, and the Operator does hereby waive any hearing on the terms and conditions of same.

Executed in duplicate with each part being an original.

BENNIE FULLER DBA
FULLER SAND & GRAVEL COMPANY

Bennie Fuller
(Signature)

President
Title

Date Signed: 5-11-04

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

James W. Warr
James W. Warr
Director

Date Signed: 7 July 2004