

OHIO E.P.A.

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ENTERED DIRECTOR'S JOURNAL

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the matter of:

Mastodon LLC
2950 East Broad Street
Columbus, Ohio 43209

Director's Final Findings
and Orders

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

PREAMBLE

It is agreed by the parties hereto as follows:

By Donna Lassiter Date: 7-8-11

I. JURISDICTION

These Director's Final Findings and Orders ("Orders") are issued to the Mastodon LLC ("Respondent") pursuant to the authority vested in the Director of the Ohio Environmental Protection Agency ("Ohio EPA") under Ohio Revised Code ("ORC") §§ 6111.03, and 3745.01.

II. PARTIES BOUND

These Orders shall apply to and be binding upon Respondent and its successors in interest liable under Ohio law.

III. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 6111 and the rules promulgated thereunder.

IV. FINDINGS

The Director of Ohio EPA has determined the following findings:

1. Respondent is Mastodon LLC, a domestic liability corporation with a business address of 2950 East Broad Street, Columbus, Ohio 43209. Respondent is engaged in real estate transactions, management and investment.
2. Respondent owns approximately 194.04 acres of property located in Morrow County Ohio mid way between Interstate I-71 and the City of Mount Gilead identified as parcel numbers:
 - a. F15-001-A0-225-03 – 23.766 acres
 - b. F15-001-A0-230-00 – 80.500 acres
 - c. F15-001-A0-231-03 – 85.629 acres
 - d. F15-001-A0-231-04 – 4.145 acres
3. On a portion of these properties, hereinafter referred to as the "Mining Properties", Respondent conducted a peat mining operation, known as Cypress Ridge Peat Mining. The mining operations were in furtherance of a development plan for property which entailed creating a lakefront community with residential properties surrounding three lakes created by the mining operation. Peat mining operations commenced sometime in the year 2001.
4. The mining operations largely occurred within wetlands, as that term is defined by Ohio Administrative Code Rule (OAC) 3745-32-01(O), located on the Mining Properties.
5. Wetlands are "waters of the state" as that term is defined by ORC § 6111.01(H). Further, the United States Army Corps of Engineers ("Corps") determined that the wetlands on the Mining Properties were "navigable waters" as that term is defined by 33 USC § 1362(7).
6. In conducting mining operations within wetlands on the Mining Properties, Respondent caused dredged or fill material to be placed or deposited within the wetlands. Placing fill within navigable waters at this site would require an authorization from the Corps pursuant to 33 USC § 1344(a) and a 401 water quality certification from the State of Ohio pursuant to OAC Rule 3745-32-02(A)(2) and 33 USC §1341(a)(1).
7. Pursuant to ORC § 6111.04(A)(1), no person shall cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state.
8. Pursuant to ORC § 6111.01(D) "other wastes" means garbage, refuse, decayed wood, sawdust, shavings, bark, and other wood debris, lime, sand, ashes, offal, night soil, oil, tar, coal dust, dredged or fill material, or silt, other substances that are not sewage, sludge, sludge materials, or industrial waste, and any other

"pollutants" or "toxic pollutants" as defined in the Federal Water Pollution Control Act that are not sewage, sludge, sludge materials, or industrial waste.

9. Pursuant to ORC § 6111.07(A), no person shall violate or fail to perform any duty imposed by ORC §§ 6111.01 to 6111.08 or violate any order, rule, or term or condition of a permit issued or adopted by the Director of Ohio EPA pursuant to those sections. Each day of violation is a separate offense.
10. Respondent did not possess a permit from the Corps for placing dredge or fill material in the wetlands on the properties as required pursuant to 33 USC § 1344(a) nor a 401 water quality certification from the State of Ohio as required by OAC Rule 3745-32-02(A)(2).
11. Respondent failure to obtain a 401 water quality certification is a violation of OAC Rule 3745-32-02(A) and ORC §§ 6111.04 and 6111.07.
12. Upon learning of the unpermitted filling that was occurring on the Mining Property, the Corps issued a Cease and Desist Order on November 1, 2002.
13. Subsequent to the Cease and Desist Order, Respondent worked with the Corps and Ohio EPA on a Mitigation Plan to replace wetlands impacted by the unpermitted activities on the Mining Properties. In September, 2009, Ohio EPA approved Respondent's Mitigation Plan which is attached hereto as Exhibit 1 and made a part hereof. In summary, the Mitigation Plan includes the following mitigation projects:

Designation	Location	Type of Mitigation	Acreage
Mitigation Areas 1-5	Lake 7.39, Pond 3.61 and Surrounding Wetland Creation Areas	17.72 acres of Forested Wetland Creation/3.61 acres of Scrub/Shrub Wetland Restoration(Pond 3.61)	21.33
Mitigation Area 6	Wetland A	Wetland Enhancement	14.73
Mitigation Area 7	Wetlands D, F and G and Surrounding Areas including Kokosing River	Preservation of Wetlands, Stream and Upland Buffer	2.13 (Wetlands) 20.33 (Upland)
Mitigation Area 8	Off-site category 3 Wetlands (Wetland A, B and C) and Upland Area Surrounding Wetland A, B and C	Preservation of Wetlands and Upland Buffer	7.2 (Wetlands) 22.53 (Whitt Upland and Parker Buffer)

14. Respondent intends to transfer the Mining Properties to Flying Horse Farms, a not for profit corporation which plans to operate an overnight camp for seriously ill children. Camp facilities will include residential cabins for overnight accommodations, a dining and activity center, medical facilities, equestrian facilities, a recreational center, amphitheater, arts and craft center. For purposes of Orders 8 and 9, this property is referred to as "the Camp Property".
15. Compliance with the ORC Chapter 6111 is not contingent upon the availability or receipt of financial assistance.
16. The Director has given consideration to, and based his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with these Orders and to evidence relating to conditions calculated to result from compliance with these Orders, and its relation to the benefits to the people of the State to be derived from such compliance in accomplishing the purposes of ORC Chapter 6111.

V. ORDERS

The Director hereby issues the following Orders:

1. Except in accordance with these Findings and Orders, Respondent, its officers, directors, agents, servants, employees, successors, assigns, and those in active concert or participation with them are permanently enjoined from discharging any pollutant into waters of the state of Ohio, unless such discharge is in compliance with a permits required under ORC Chapter 6111.
2. Respondent shall commence implementation of the Mitigation Plan within six (6) months of the effective date of these Orders and finalize implementation of physical creation, restoration and enhancement activities within eighteen (18) months of the effective date of these Orders.
3. Respondent shall give written notice within thirty (30) days from the commencement of implementation of the Mitigation Plan and written notice within thirty (30) days of completion of the implementation of the Mitigation Plan to Randy Bournique or his successor in accordance with the Paragraph X of these Orders.
4. Wetlands that are being created, restored or enhanced pursuant to these Orders shall achieve the following performance standards:

- a) A Vegetative Index of Biotic Integrity (VIBI) score of 63 or higher (Depression, Eastern Corn Belt Plains) will be obtained in the created mitigation areas by the end of the monitoring period or the applicant can demonstrate that the wetland is on a trajectory of achieve the VIBI score of 63 or higher. The mitigation areas will develop shrub and/or forested communities over time; therefore, the VIBI will be scored using the target vegetation community (VIBI-SH or VIBI-F). Individual metrics will be graphed over time to determine if the mitigation wetland exhibits a positive trajectory toward the establishment of a shrub and/or forested community. Surviving shrubs will be at a density of 250 per acre; and surviving trees will be at a density of 100 per acre.
 - b) The occurrence of invasive wetland species, as identified in Table 1 of the ORAM Version 5.0 Narrative Rating form, shall not be greater than 5% based on areal cover within the created, restored and enhanced wetland mitigation areas at the end of the ten (10)-year monitoring period. Should the extent of the invasive wetland species exceed or trend towards exceeding 5%, a plan for eradication will be developed and implemented upon approval from the Ohio EPA and the Corps.
 - c) Less than 10% of its total mitigation area shall be "unvegetated open water." "Unvegetated open water" is defined as inundated areas where there is no or minimal floating aquatic or submersed or floating non-rooted aquatic bed vegetation (e.g. Utricularia spp., Ceratophyllum spp. excluding species in the Lemnaceae) growing in the area of inundation.
 - d) At least 75% of the wetland mitigation area shall be comprised of native perennial hydrophytes.
 - e) In addition to the current wetland acreage on site, at least 21.33 acres on site will meet the three (3) wetland criteria (rooted hydrophytic vegetation, hydric soils and wetland hydrology) as outlined in the 1987 Corps Wetland Delineation Manual by the end of the ten (10)-year monitoring period.
5. Respondent shall initiate mitigation monitoring immediately following completion of mitigation construction and shall continue through a ten (10)-year monitoring period. Respondent shall submit or do the following:
- a) **Baseline Report:** Baseline monitoring will be conducted within six (6) months of completion of mitigation construction. The baseline monitoring report will be submitted by December 31st of the year that mitigation construction activities are complete (Baseline Year). An as-built map with six (6)-inch contour intervals will be submitted to the

Ohio EPA and the Corps within the baseline monitoring report. The as-built map will be used as the base map for all future submittals including monitoring reports. A map depicting the designated monitoring points, including locations at which photographs are taken, will also be submitted to the Ohio EPA and the Corps within the baseline monitoring report.

- b) **Monitoring Reports:** Reports containing the data listed in the appropriate subsections below shall be submitted to Ohio EPA in years 1, 3, 5, 7 and 10 following completion of mitigation construction. The first report is due to Ohio EPA by December 31st of the first full year following completion of mitigation construction. All subsequent reports shall be submitted by December 31st of monitoring years 3, 5, 7 and 10.

Respondent may include any additional information that it believes relevant for Ohio EPA's consideration.

- c) **Photographs:** A representative observation point shall be selected in each plant community type in mitigation areas 1, 2, 3, 4, 5 and 6. This point will be the one that best represents the characteristics of the entire plant community. The observation points shall be marked on the as-built map submitted with the baseline monitoring report.

Each color photo point shall be photo documented from the same position and angle during July of each monitoring year.

- d) **3rd and 7th Year Site Visit:** Respondent shall arrange a mitigation meeting and mitigation site visit with Ohio EPA and the Corps during the growing season after the third year monitoring report has been submitted and another site visit after the seventh year monitoring report has been submitted.
- e) **Hydrology Monitoring:** Water level data shall be collected at two wetland mitigation areas using automatic recorders. One recorder should be located within the Wetland A enhancement area and the other shall be located within the Lake 7.39 mitigation area. The daily water level data shall be used to develop an annual hydrograph to be submitted in the reports for years 1, 3, 5, 7 and 10.
- f) **Soils Monitoring:** A minimum of one test pit per area shall be collected in each of the wetland creation areas known as Pond 3.61, Lake 7.39 and the Surrounding Wetland Creation areas. Describe the

soil profile and hydric soil indicators. Indicate the soil map unit name (soil series and phase) and the taxonomic subgroup.

- g) **Vegetation Monitoring:** The location and name of each plant community type within the mitigation area and buffer area shall be marked on the as-built map or named on a scaled aerial photograph and submitted with the baseline monitoring report.

A representative observation point shall be selected in each plant community type in Wetland Mitigation Areas 1, 2, 3, 4, 5 and 6. This point shall be the one that best represents the characteristics of the entire plant community. The observation points shall be marked on the as-built map submitted with the baseline monitoring report.

The dominant plant species shall be visually determined in each vegetation layer of each community type, and the scientific names of these species shall be included in the report. Dominant species are those species which have the greatest relative basal area (woody overstory), greatest height (woody overstory), greatest percentage of areal coverage (herbaceous understory), and/or greatest number of stems (woody vines).

- h) **Vegetative Index of Biotic Integrity (VIBI):** In order to evaluate each contiguous wetland area, one VIBI will be conducted in each of the following areas: (i) Lake 7 and the wetland creation areas around it (Mitigation Areas 1-5) and (ii) Wetland A Mitigation Area. The VIBIs for these two areas will be conducted in Monitoring years 3, 7 and 10. In order to accurately assess these two mitigation areas, three (3) fixed plots (20m x 50m) and ten (10) randomly selected plots (10m x 10m) will be established and evaluated. A total of four (4) VIBI scores will be calculated in Monitoring years 3, 7 and 10 within these two mitigation areas. The location of the three (3) fixed plots will be determined after the as-built map is generated to ensure that all vegetation and hydrologic regimes are accounted for. Two of the fixed plots will be located in the Lake 7 and the wetland creation areas around it (Mitigation Areas 1-5). One of the fixed plots will be located in Wetland A Mitigation Area.
- i) **Wetland Delineation:** The Respondent shall conduct a delineation of the mitigation wetlands during the growing season of the third and tenth year after completion of construction of the mitigation wetlands using the Corps' 1987 Wetland Delineation Manual (or successor document).

6. If the mitigation wetlands are not performing as proposed by the end of the tenth year of post-construction monitoring, the monitoring period may be extended or Ohio EPA may require Respondent to revise the Mitigation Plan or seek out new or additional mitigation areas.
7. Within sixty (60) days of the effective date of these Orders, Respondent shall record Environmental Covenants attached hereto as Exhibit 2 with the Morrow County Recorder's Office pursuant to the requirements of ORC §§ 5301.80 to R.C. 5301.92 to protect the wetlands set forth in the approved Mitigation Plan in perpetuity. Respondent shall provide Ohio EPA with recorded copies of the Environmental Covenants within 14 days of recording.
8. Respondent shall pay the amount of \$125,000.00 in settlement of Ohio EPA's claims for civil penalties, which may be assessed pursuant to ORC Chapter 6111. Within thirty (30) days after the effective date of these Orders, payment to Ohio EPA shall be made by an official check made payable to "Treasurer, State of Ohio" for \$25,000.00 of the total amount. The official check shall be submitted to Brenda Case, or her successor, together with a letter identify the Respondent, to:

Office of Fiscal Administration
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216-1049

A photocopy of the check shall be sent to Mark Mann, Ohio EPA, Central Office
at:

Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, Ohio 43216-1049

9. In lieu of paying the remaining \$100,000.00 of the civil penalty, Respondent shall, take the following actions to implement a Supplemental Environmental Project to legally restrict the uses of the non-wetland areas of the Camp property in perpetuity in conformance with the proposed Environmental Covenant attached hereto as Exhibit 3:
 - a. Within 30 days of the effective date of these Orders, Respondent shall deposit \$100,000.00 into an interest bearing escrow account (the "Escrow Account").
 - b. By no later than January 31, 2016, Respondent shall record the Environmental Covenant attached hereto as Exhibit 3 pursuant to the requirements of ORC §§ 5301.80 to 5301.92 with the Morrow County Recorder's Office to legally restrict

future development and use of the non-wetland acreage on the Camp Property. Respondent shall provide Ohio EPA with a recorded copy of the Environmental Covenant within 14 days of recording.

c. Should Respondent fail to record the Environmental Covenant in accordance with the January 31, 2016 deadline required by Order No. 9b, Respondent shall immediately pay to Ohio EPA the \$100,000.00 plus interest accrued in the Escrow Account. Respondent shall make payment by check to "Treasurer, State of Ohio," and submitted to:

Ohio EPA
Office of Fiscal Administration
P.O. Box 1049
Columbus, Ohio 43216-1049

Respondent shall include, with payment, a copy of these Orders and a written explanation of the specific Order provision upon which payment is being made.

VI. TERMINATION

Respondent's obligations under these Orders shall terminate when Respondent certifies in writing and demonstrates to the satisfaction of Ohio EPA that Respondent has performed all obligations under these Orders and the Chief of Ohio EPA's Division of Surface Water acknowledges, in writing, the termination of these Orders. If Ohio EPA does not agree that all obligations have been performed, then Ohio EPA will notify Respondent of the obligations that have not been performed, in which case Respondent shall have an opportunity to address any such deficiencies and seek termination as described above.

The certification shall contain the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate and complete."

This certification shall be submitted by Respondent to Ohio EPA and shall be signed by a responsible official of the Respondent. For purposes of these Orders, a responsible official is defined in OAC Rule 3745-33-03(E)(1) for a corporation, OAC Rule 3745-33-03(E)(2) for a partnership, OAC Rule 3745-33-03(E)(3) for a sole proprietorship, and OAC Rule 3745-33-03(E)(4) for a municipal, state, or other public facility.

VII. OTHER CLAIMS

Nothing in these Orders shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or

corporation, not a party to these Orders, for any liability arising from, or related to activities occurring on or at the site.

VIII. OTHER APPLICABLE LAWS

All actions required to be taken pursuant to these Orders shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. These Orders do not waive or compromise the applicability and enforcement of any other statutes or regulations applicable to Respondent.

IX. MODIFICATIONS

These Orders may be modified by agreement of the parties hereto. Modifications shall be in writing and shall be effective on the date entered in the journal of the Director of Ohio EPA.

X. REPORTING

All documents submitted to Ohio EPA in connection with these Orders shall be sent to the following address, unless Respondent is otherwise notified in writing of a different name or address:

Ohio EPA, Division of Surface Water, 401 Unit
Lazarus Government Center
50 West Town Street
P.O. Box 1049
Columbus, Ohio 43216-1049

All written notices, requests, or verifications to be sent to Respondent pursuant to these Orders shall be sent to and/or delivered to:

Maureen A. Brennan
Baker Hostetler LLP
3200 National City Center
1900 E. 9th Street
Cleveland, Ohio 4414-3485

Sean P. Byrne
Stage Capital, LLC
2950 E. Broad Street
Columbus, Ohio 43209

David A. Belford
2950 E. Broad Street, 2nd Floor
Columbus, Ohio 43209

XI. RESERVATION OF RIGHTS

Ohio EPA and Respondent each reserve all rights, privileges and causes of action, except as specifically waived in § XII of these Orders.

XII. WAIVER

In order to resolve disputed claims, without admission of fact, violation or liability, and in lieu of further enforcement action by Ohio EPA for only the violations specifically cited in these Orders, Respondent consents to the issuance of these Orders and agrees to comply with these Orders. Compliance with these Orders shall be a full accord and satisfaction for Respondent's liability for the violations specifically cited herein.

Respondent hereby waives the right to appeal the issuance, terms and conditions, and service of these Orders, and Respondent hereby waives any and all rights Respondent may have to seek administrative or judicial review of these Orders either in law or equity.

Notwithstanding the preceding, Ohio EPA and Respondent agree that if these Orders are appealed by any other party to the Environmental Review Appeals Commission, or any court, Respondent retains the right to intervene and participate in such appeal. In such an event, Respondent shall continue to comply with these Orders notwithstanding such appeal and intervention unless these Orders are stayed, vacated or modified.

XIII. EFFECTIVE DATE

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

