

**Executive Summary – Enforcement Matter – Case No. 44094
New Birmingham Resources, LLC
RN106065964
Docket No. 2012-0948-MLM-E**

Order Type:

1660 Agreed Order

Findings Order Justification:

N/A

Media:

MLM – WQ, WR

Small Business:

No

Location(s) Where Violation(s) Occurred:

NBR Sand, 905 Interstate Highway 20 West, Tyler, Smith County

Type of Operation:

Sand mining operation

Other Significant Matters:

Additional Pending Enforcement Actions: No

Past-Due Penalties: No

Other: N/A

Interested Third-Parties: None

Texas Register Publication Date: October 5, 2012

Comments Received: No

Penalty Information

Total Penalty Assessed: \$34,124

Amount Deferred for Expedited Settlement: \$6,824

Amount Deferred for Financial Inability to Pay: \$0

Total Paid to General Revenue: \$13,650

Total Due to General Revenue: \$0

Payment Plan: N/A

SEP Conditional Offset: \$13,650

Name of SEP: The Conservation Fund - Bunn's Lake Habitat Acquisition & Preservation Project

Compliance History Classifications:

Person/CN - Average

Site/RN - Average

Major Source: No

Statutory Limit Adjustment: N/A

Applicable Penalty Policy: September 2011

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New Birmingham Resources, LLC
RN106065964
Docket No. 2012-0948-MLM-E

Investigation Information

Complaint Date(s): N/A

Complaint Information: N/A

Date(s) of Investigation: November 17, 2011

Date(s) of NOE(s): March 30, 2012

Violation Information

1. Failed to prevent the unauthorized discharge of process water into or adjacent to water in the state. Specifically, the process water used to wash and sort the sand grains, is channelled through a series of straw and rock filters, then discharged into Brewer Lake. Samples of the discharge collected during the investigation indicated elevated levels of total suspended solids (2,110 milligrams per liter) [TEX. WATER CODE § 26.121(a)(1)].
2. Failed to obtain authorization prior to impounding, diverting, or using state water. Specifically, Respondent was diverting state water from at least one on-channel water source for process use without authorization [30 TEX. ADMIN. CODE § 297.11 and TEX. WATER CODE § 11.121].

Corrective Actions/Technical Requirements

Corrective Action(s) Completed:

N/A

Technical Requirements:

1. The Order will require Respondent to implement and complete a Supplemental Environmental Project (“SEP”). (See SEP Attachment A)
2. The Order will also require Respondent to:
 - a. Within 30 days, submit a technically complete application for a water rights permit;
 - b. Within 45 days, submit written certification of compliance with Ordering Provision a.;
 - c. Respond completely and adequately, as determined by the TCEQ, to all requests for information concerning the permit application within 30 days after the date of such requests or by any other deadline specified in writing;
 - d. Within 180 days, cease the unauthorized discharge of process water into or adjacent to water in the state;
 - e. Within 195 days, submit written certification of compliance with Ordering Provision d.; and

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f. Within 330 days, submit written certification to demonstrate that a water rights permit has been obtained for the diversion, storing, impounding, taking, and/or use of state water or that such activities have ceased until authorization is obtained.

Litigation Information

Date Petition(s) Filed: N/A
Date Answer(s) Filed: N/A
SOAH Referral Date: N/A
Hearing Date(s): N/A
Settlement Date: N/A

Contact Information

TCEQ Attorney: N/A
TCEQ Enforcement Coordinator: Lanae Foard, Enforcement Division, Enforcement Team 1, MC 169, (512) 239-2554; Debra Barber, Enforcement Division, MC 219, (512) 239-0412
TCEQ SEP Coordinator: Stuart Beckley, SEP Coordinator, Enforcement Division, MC 219, (512) 239-3565
Respondent: Robert Kunzi, President and COO, New Birmingham Resources, LLC, P.O. Box 665, Rusk, Texas 75785
Respondent's Attorney: N/A

Attachment A
Docket Number: 2012-0948-MLM-E

SUPPLEMENTAL ENVIRONMENTAL PROJECT

Table 1: Case Information

Respondent:	New Birmingham Resources, LLC
Penalty Amount:	Thirty-Four Thousand One Hundred Twenty-Four Dollars (\$34,124)
SEP Offset Amount:	Thirteen Thousand Six Hundred Fifty Dollars (\$13,650)
Type of SEP:	Contribution to a Pre-approved Third-Party Recipient
Third-Party Recipient:	The Conservation Fund
Project Name:	<i>Bunn's Lake Habitat Acquisition & Preservation Project</i>
Location of SEP:	Orange County

The Texas Commission on Environmental Quality (“TCEQ”) agrees to offset the administrative penalty amount assessed in this Agreed Order for Respondent to contribute to a Supplemental Environmental Project (“SEP”). The SEP Offset Amount is set forth above and such offset is conditioned upon completion of the project in accordance with the terms of this Attachment A.

1. Project Description

A. Project

Respondent shall contribute the SEP Offset Amount to the Third-Party Recipient named above. The contribution will be to The Conservation Fund for the Bunn's Lake Habitat Acquisition & Preservation Project. The contribution will be used in accordance with the SEP between the Third-Party Recipient and the TCEQ (the “Project”). Specifically, the SEP Offset Amount will be used to acquire in fee and transfer by donation 552 acres of forested wetlands known as Bunn's Lake to the National Park Service's Big Thicket National Preserve, to be permanently protected for water quality and wildlife habitat.

Bunn's Lake is located northeast of the City of Beaumont in Orange County, Texas, east of the Neches River and north of the current boundary of Big Thicket National Preserve. This preserve comprises one of the southernmost large expanses of forested wetlands on the Upper Coast, and is the first sizeable forest that migrating birds see as they finish their migration journey across the Gulf of Mexico in the spring. Coastal bottomland floodplain forests are not only important for many high priority breeding birds such as Wood Duck, Mallard, Hooded Merganser, Swallow-tailed Kite, Red-headed Woodpecker, Prothonotary Warbler and Bald Eagle, but are absolute necessities for landbirds during migration.

All dollars contributed will be used solely for the direct cost of the Project and no portion will be spent on administrative costs. The SEP will be performed in accordance with all federal, state, and local environmental laws and regulations.

Respondent's signature affixed to this Agreed Order certifies that it has no prior commitment to make this contribution and that it is being contributed solely in an effort to settle this enforcement action.

B. Environmental Benefit

Acquiring and permanently protecting the Bunn's Lake tract will prevent pollution, reduce the amount of pollutants reaching the environment, and enhance the quality of the environment. These slow-moving backwater bayous contain a structural diversity and high biomass of standing vegetation, and surface litter material that provides refuge and a food source for many animals. This community provides habitat for wintering, migration and breeding birds including waterfowl, wading birds, and shorebirds. Permanently protecting this land will improve water quality, prevent fragmentation, and protect this large expanse of open space, wildlife habitat, and forestland for local communities and tourists alike.

C. Minimum Expenditure

Respondent shall contribute at least the SEP Offset Amount to the Third-Party Recipient and comply with all other provisions of this SEP.

2. Performance Schedule

Within 30 days after the effective date of this Agreed Order, Respondent shall contribute the SEP Offset Amount to the Third-Party Recipient. Respondent shall make the check payable to **The Conservation Fund SEP** and shall mail the contribution with a copy of the Agreed Order to:

The Conservation Fund
Attention: Julie Shackelford, Texas Program Director
P.O. Box 4608 SFA Station
Nacogdoches, Texas 75962-4608

3. Records and Reporting

Concurrent with the payment of the SEP Offset Amount, Respondent shall provide the Enforcement Division SEP Coordinator with a copy of the check and transmittal letter indicating full payment of the SEP Offset Amount due to the Third-Party Recipient. Respondent shall mail a copy of the check and transmittal letter to:

New Birmingham Resources, LLC
Agreed Order - Attachment A

Texas Commission on Environmental Quality
Enforcement Division
Attention: SEP Coordinator, MC 219
P.O. Box 13087
Austin, Texas 78711-3087

4. Failure to Fully Perform

If Respondent does not perform its obligations under this SEP agreement in any way, including full expenditure of the SEP Offset Amount and submittal of the required reporting described in Sections 2 and 3 above, the Executive Director (“ED”) may require immediate payment of all or part of the SEP Offset Amount.

In the event the ED determines that Respondent failed to complete the project, Respondent shall remit payment for all or a portion of the SEP Offset Amount, as determined by the ED, and shall include on the check the docket number of this Agreed Order and note that it is for reimbursement of a SEP. Respondent shall make the check payable to “Texas Commission on Environmental Quality” and shall mail it to:

Texas Commission on Environmental Quality
Litigation Division
Attention: SEP Coordinator, MC 175
P.O. Box 13087
Austin, Texas 78711-3087

5. Publicity

Any public statements concerning this SEP made by or on behalf of Respondent, must include a clear statement that the Project was performed as part of the settlement of an enforcement action brought by the TCEQ. Such statements include advertising, public relations, and press releases.

6. Clean Texas Program

Respondent shall not include this SEP in any application made to TCEQ under the “Clean Texas” (or any successor) program(s). Similarly, Respondent may not seek recognition for this contribution in any other state or federal regulatory program.

7. Other SEPs by TCEQ or Other Agencies

The SEP Offset Amount identified in this Agreed Order has not been, and shall not be, included as a SEP for Respondent under any other Agreed Order negotiated with the TCEQ or any other agency of the state or federal government.



Penalty Calculation Worksheet (PCW)

Policy Revision 3 (September 2011)

PCW Revision August 3, 2011

TCEQ

DATES	Assigned	3-Apr-2012	Screening	16-Apr-2012	EPA Due	
	PCW	19-Jul-2012				

RESPONDENT/FACILITY INFORMATION	
Respondent	New Birmingham Resources, LLC
Reg. Ent. Ref. No.	RN106065964
Facility/Site Region	5-Tyler
Major/Minor Source	Minor

CASE INFORMATION		No. of Violations	1
Enf./Case ID No.	44094	Order Type	1660
Docket No.	2012-0948-MLM-E	Government/Non-Profit	No
Media Program(s)	Water Rights	Enf. Coordinator	Lanae Foard
Multi-Media		EC's Team	Enforcement Team 1
Admin. Penalty \$ Limit Minimum	\$0	Maximum	\$5,000

Penalty Calculation Section

TOTAL BASE PENALTY (Sum of violation base penalties) **Subtotal 1** **\$1,250**

ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

Compliance History **5.0%** Enhancement **Subtotals 2, 3, & 7** **\$62**

Notes: Enhancement for one NOV with same/similar violations.

Culpability **No** **0.0%** Enhancement **Subtotal 4** **\$0**

Notes: The Respondent does not meet the culpability criteria.

Good Faith Effort to Comply Total Adjustments **Subtotal 5** **\$0**

Economic Benefit **0.0%** Enhancement* **Subtotal 6** **\$0**

Total EB Amounts: \$30
Approx. Cost of Compliance: \$350
*Capped at the Total EB \$ Amount

SUM OF SUBTOTALS 1-7 **Final Subtotal** **\$1,312**

OTHER FACTORS AS JUSTICE MAY REQUIRE **285.8%** **Adjustment** **\$3,750**

Reduces or enhances the Final Subtotal by the indicated percentage.

Notes: A 300% enhancement was added because the diversion occurred during severe drought conditions (average U.S. Drought Monitor Level D2).

Final Penalty Amount **\$5,062**

STATUTORY LIMIT ADJUSTMENT **Final Assessed Penalty** **\$5,062**

DEFERRAL **20.0%** Reduction **Adjustment** **-\$1,012**

Reduces the Final Assessed Penalty by the indicted percentage. (Enter number only; e.g. 20 for 20% reduction.)

Notes: Deferral offered for expedited settlement.

PAYABLE PENALTY **\$4,050**

Screening Date 16-Apr-2012

Docket No. 2012-0948-MLM-E

PCW

Respondent New Birmingham Resources, LLC

Policy Revision 3 (September 2011)

Case ID No. 44094

PCW Revision August 3, 2011

Reg. Ent. Reference No. RN106065964

Media [Statute] Water Rights

Enf. Coordinator Lanae Foard

Compliance History Worksheet

>> **Compliance History Site Enhancement (Subtotal 2)**

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written notices of violation ("NOVs") with same or similar violations as those in the current enforcement action (<i>number of NOVs meeting criteria</i>)	1	5%
	Other written NOVs	0	0%
Orders	Any agreed final enforcement orders containing a denial of liability (<i>number of orders meeting criteria</i>)	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government (<i>number of judgements or consent decrees meeting criteria</i>)	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government (<i>number of counts</i>)	0	0%
Emissions	Chronic excessive emissions events (<i>number of events</i>)	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (<i>number of audits for which notices were submitted</i>)	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (<i>number of audits for which violations were disclosed</i>)	0	0%
<i>Please Enter Yes or No</i>			
Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 5%

>> **Repeat Violator (Subtotal 3)**

No

Adjustment Percentage (Subtotal 3) 0%

>> **Compliance History Person Classification (Subtotal 7)**

Average Performer

Adjustment Percentage (Subtotal 7) 0%

>> **Compliance History Summary**

Compliance History Notes

Enhancement for one NOV with same/similar violations.

Total Compliance History Adjustment Percentage (Subtotals 2, 3, & 7) 5%

>> **Final Compliance History Adjustment**

Final Adjustment Percentage *capped at 100% 5%

Screening Date 16-Apr-2012

Docket No. 2012-0948-MLM-E

PCW

Respondent New Birmingham Resources, LLC

Policy Revision 3 (September 2011)

Case ID No. 44094

PCW Revision August 3, 2011

Reg. Ent. Reference No. RN106065964

Media [Statute] Water Rights

Enf. Coordinator Lanae Foard

Violation Number 1

Rule Cite(s) 30 Tex. Admin. Code § 297.11 and Tex. Water Code § 11.121

Violation Description Failed to obtain authorization prior to impounding, diverting, or using state water, as documented during an investigation conducted on November 17, 2011. Specifically, the Respondent was diverting state water from at least one on-channel water source for process use without authorization.

Base Penalty \$5,000

>> Environmental, Property and Human Health Matrix

Release	Harm			Percent
	Major	Moderate	Minor	
Actual				0.0%
Potential				

>> Programmatic Matrix

Falsification	Harm			Percent
	Major	Moderate	Minor	
	x			5.0%

Matrix Notes: 100% of the rule requirement was not met.

Adjustment \$4,750

\$250

Violation Events

Number of Violation Events 5 Number of violation days 151

mark only one with an x	daily	
	weekly	
	monthly	x
	quarterly	
	semiannual	
	annual	
	single event	

Violation Base Penalty \$1,250

Five monthly events are recommended from the investigation date (November 17, 2011) to the screening date (April 16, 2012).

Good Faith Efforts to Comply

0.0% Reduction

\$0

	Before NOV	NOV to EDRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	x	(mark with x)

Notes: The Respondent does not meet the good faith criteria for this violation.

Violation Subtotal \$1,250

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$30

Violation Final Penalty Total \$5,062

This violation Final Assessed Penalty (adjusted for limits) \$5,062

Economic Benefit Worksheet

Respondent New Birmingham Resources, LLC
Case ID No. 44094
Req. Ent. Reference No. RN106065964
Media Water Rights
Violation No. 1

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
No commas or \$							

Delayed Costs

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Equipment				0.00	\$0	\$0	\$0
Buildings				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0
Engineering/construction				0.00	\$0	\$0	\$0
Land				0.00	\$0	n/a	\$0
Record Keeping System				0.00	\$0	n/a	\$0
Training/Sampling				0.00	\$0	n/a	\$0
Remediation/Disposal				0.00	\$0	n/a	\$0
Permit Costs	\$350	17-Nov-2011	13-Aug-2013	1.74	\$30	n/a	\$30
Other (as needed)				0.00	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to prepare an application for a permit to appropriate state water, including filing and recording fees. Date required is the investigation date. Final date is the expected date of compliance.

Avoided Costs

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Disposal				0.00	\$0	\$0	\$0
Personnel				0.00	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.00	\$0	\$0	\$0
Supplies/equipment				0.00	\$0	\$0	\$0
Financial Assurance [2]				0.00	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance

\$350

TOTAL

\$30



Penalty Calculation Worksheet (PCW)

Policy Revision 3 (September 2011)

PCW Revision August 3, 2011

TCEQ

DATES	Assigned	3-Apr-2012	Screening	16-Apr-2012	EPA Due	
	PCW	19-Jul-2012				

RESPONDENT/FACILITY INFORMATION

Respondent	New Birmingham Resources, LLC		
Reg. Ent. Ref. No.	RN106065964		
Facility/Site Region	5-Tyler	Major/Minor Source	Minor

CASE INFORMATION

Enf./Case ID No.	44094	No. of Violations	1
Docket No.	2012-0948-MLM-E	Order Type	1660
Media Program(s)	Water Quality	Government/Non-Profit	No
Multi-Media		Enf. Coordinator	Lanae Foard
		EC's Team	Enforcement Team 1
Admin. Penalty \$ Limit Minimum	\$0	Maximum	\$25,000

Penalty Calculation Section

TOTAL BASE PENALTY (Sum of violation base penalties) **Subtotal 1**

ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

Compliance History Enhancement **Subtotals 2, 3, & 7**

Notes

Culpability Enhancement **Subtotal 4**

Notes

Good Faith Effort to Comply Total Adjustments **Subtotal 5**

Economic Benefit Enhancement* **Subtotal 6**

Total EB Amounts *Capped at the Total EB \$ Amount
 Approx. Cost of Compliance

SUM OF SUBTOTALS 1-7 **Final Subtotal**

OTHER FACTORS AS JUSTICE MAY REQUIRE **Adjustment**

Reduces or enhances the Final Subtotal by the indicated percentage.

Notes

Final Penalty Amount

STATUTORY LIMIT ADJUSTMENT **Final Assessed Penalty**

DEFERRAL Reduction **Adjustment**

Reduces the Final Assessed Penalty by the indicated percentage. (Enter number only; e.g. 20 for 20% reduction.)

Notes

PAYABLE PENALTY

Screening Date 16-Apr-2012

Docket No. 2012-0948-MLM-E

PCW

Respondent New Birmingham Resources, LLC

Policy Revision 3 (September 2011)

Case ID No. 44094

PCW Revision August 3, 2011

Reg. Ent. Reference No. RN106065964

Media [Statute] Water Quality

Enf. Coordinator Lanae Foard

Compliance History Worksheet

>> Compliance History Site Enhancement (Subtotal 2)

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written notices of violation ("NOVs") with same or similar violations as those in the current enforcement action (<i>number of NOVs meeting criteria</i>)	1	5%
	Other written NOVs	0	0%
Orders	Any agreed final enforcement orders containing a denial of liability (<i>number of orders meeting criteria</i>)	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government (<i>number of judgements or consent decrees meeting criteria</i>)	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government (<i>number of counts</i>)	0	0%
Emissions	Chronic excessive emissions events (<i>number of events</i>)	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (<i>number of audits for which notices were submitted</i>)	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (<i>number of audits for which violations were disclosed</i>)	0	0%

Please Enter Yes or No

Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 5%

>> Repeat Violator (Subtotal 3)

No

Adjustment Percentage (Subtotal 3) 0%

>> Compliance History Person Classification (Subtotal 7)

Average Performer

Adjustment Percentage (Subtotal 7) 0%

>> Compliance History Summary

Compliance History Notes

Enhancement for one NOV with same/similar violations.

Total Compliance History Adjustment Percentage (Subtotals 2, 3, & 7) 5%

>> Final Compliance History Adjustment

Final Adjustment Percentage *capped at 100% 5%

Screening Date 16-Apr-2012

Docket No. 2012-0948-MLM-E

PCW

Respondent New Birmingham Resources, LLC

Policy Revision 3 (September 2011)

Case ID No. 44094

PCW Revision August 3, 2011

Reg. Ent. Reference No. RN106065964

Media [Statute] Water Quality

Enf. Coordinator Lanae Foard

Violation Number 1

Rule Cite(s) Tex. Water Code § 26.121(a)(1)

Violation Description Failed to prevent the unauthorized discharge of process water into or adjacent to water in the state, as documented during an investigation conducted on November 17, 2011. Specifically, the process water used to wash and sort the sand grains, is channelled through a series of straw and rock filters, then discharged into Brewer Lake. Samples of the discharge collected during the investigation indicated elevated levels of total suspended solids (2,110 milligrams per liter).

Base Penalty \$25,000

>> Environmental, Property and Human Health Matrix

Table with columns: Release (Actual, Potential), Harm (Major, Moderate, Minor), and Percent (15.0%). Includes 'OR' label.

>> Programmatic Matrix

Table with columns: Falsification, Major, Moderate, Minor, and Percent (0.0%).

Matrix Notes Human health or the environment has been exposed to significant amounts of pollutants which do not exceed levels that are protective of human health or environmental receptors.

Adjustment \$21,250

\$3,750

Violation Events

Number of Violation Events 5 Number of violation days 151

Table for event frequency: daily, weekly, monthly (marked with x), quarterly, semiannual, annual, single event.

Violation Base Penalty \$18,750

Five monthly events are recommended from the investigation date (November 17, 2011) to the screening date (April 16, 2012).

Good Faith Efforts to Comply

0.0% Reduction \$0

Table for Good Faith Efforts: Extraordinary, Ordinary, N/A (marked with x).

Notes The Respondent does not meet the good faith criteria for this violation.

Violation Subtotal \$18,750

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$37,877

Violation Final Penalty Total \$29,063

This violation Final Assessed Penalty (adjusted for limits) \$29,063

Economic Benefit Worksheet

Respondent New Birmingham Resources, LLC
Case ID No. 44094
Reg. Ent. Reference No. RN106065964
Media Water Quality
Violation No. 1

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
No commas or \$							

Delayed Costs

Equipment				0.00	\$0	\$0	\$0
Buildings				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0
Engineering/construction	\$500,000	17-Nov-2011	16-Dec-2012	1.08	\$1,804	\$36,073	\$37,877
Land				0.00	\$0	n/a	\$0
Record Keeping System				0.00	\$0	n/a	\$0
Training/Sampling				0.00	\$0	n/a	\$0
Remediation/Disposal				0.00	\$0	n/a	\$0
Permit Costs				0.00	\$0	n/a	\$0
Other (as needed)				0.00	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to install a closed-loop fresh water tank system to store process water. Date required is the investigation date. Final date is the expected date of compliance.

Avoided Costs

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Disposal				0.00	\$0	\$0	\$0
Personnel				0.00	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.00	\$0	\$0	\$0
Supplies/equipment				0.00	\$0	\$0	\$0
Financial Assurance [2]				0.00	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance

\$500,000

TOTAL

\$37,877

Compliance History Report

Customer/Respondent/Owner-Operator: CN603316761 New Birmingham Resources, LLC Classification: AVERAGE Rating: 3.00
Regulated Entity: RN106065964 NBR SAND Classification: AVERAGE Site Rating: 3.00
ID Number(s): INDUSTRIAL AND HAZARDOUS WASTE ID NUMBER TYL5
NONPERMITTED
STORMWATER PERMIT TXR05AF58
PETROLEUM STORAGE TANK REGISTRATION 84600
REGISTRATION
Location: 905 INTERSTATE 20 W, TYLER, TX, 75706
TCEQ Region: REGION 05 - TYLER
Date Compliance History Prepared: April 20, 2012
Agency Decision Requiring Compliance History: Enforcement
Compliance Period: April 20, 2007 to April 20, 2012
TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History
Name: Lanae Foard Phone: (512) 239-2554

Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? NO
2. Has there been a (known) change in ownership/operator of the site during the compliance period? NO
3. If YES, who is the current owner/operator? N/A
4. If YES, who was/were the prior owner(s)/operator(s)? N/A
5. If YES, when did the change(s) in owner or operator occur? N/A
6. Rating Date: 9/1/2011 Repeat Violator: NO

Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgments, and consent decrees of the State of Texas and the federal government.
N/A
- B. Any criminal convictions of the state of Texas and the federal government.
N/A
- C. Chronic excessive emissions events.
N/A
- D. The approval dates of investigations. (CCEDS Inv. Track. No.)

1 03/28/2012(982168)
- E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

Date: 02/11/2011 (895286)
Self Report? NO Classification: Moderate
Citation: 30 TAC Chapter 335, SubChapter A 335.4
TWC Chapter 26 26.121
Description: Failure to prevent the unauthorized discharge of diesel fuel to the ground in the vicinity of the facility aboveground storage tank (AST) where vehicles are refueled.
- F. Environmental audits.
N/A
- G. Type of environmental management systems (EMSs).
N/A

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**IN THE MATTER OF AN
ENFORCEMENT ACTION
CONCERNING
NEW BIRMINGHAM
RESOURCES, LLC
RN106065964**

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§
§
§
§

**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**AGREED ORDER
DOCKET NO. 2012-0948-MLM-E**

I. JURISDICTION AND STIPULATIONS

On _____, the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") considered this agreement of the parties, resolving an enforcement action regarding New Birmingham Resources, LLC ("Respondent") under the authority of TEX. WATER CODE chs. 7, 11, and 26. The Executive Director of the TCEQ, through the Enforcement Division, and the Respondent together stipulate that:

1. The Respondent owns and operates a sand mining operation located at 905 Interstate Highway 20 West in Tyler, Smith County, Texas (the "Facility").
2. The Respondent has caused, suffered, allowed or permitted the discharge of any waste or the performance of any activity in violation of TEX. WATER CODE ch. 26 or any rule, permit, or order of the Commission. The Respondent's Facility adjoins, is contiguous with or surrounds state water as defined in TEX. WATER CODE § 11.021 and 30 TEX. ADMIN. CODE § 297.1(50).
3. The Executive Director and the Respondent agree that the Commission has jurisdiction to enter this Agreed Order, and that the Respondent is subject to the Commission's jurisdiction.
4. The Respondent received notice of the violations alleged in Section II ("Allegations") on or about April 4, 2012.
5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by the Respondent of any violation alleged in Section II ("Allegations"), nor of any statute or rule.

6. An administrative penalty in the amount of Thirty-Four Thousand One Hundred Twenty-Four Dollars (\$34,124) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). The Respondent has paid Thirteen Thousand Six Hundred Fifty Dollars (\$13,650) of the administrative penalty and Six Thousand Eight Hundred Twenty-Four Dollars (\$6,824) is deferred contingent upon the Respondent's timely and satisfactory compliance with all the terms of this Agreed Order. The deferred amount will be waived upon full compliance with the terms of this Agreed Order. If the Respondent fails to timely and satisfactorily comply with all requirements of this Agreed Order, the Executive Director may require the Respondent to pay all or part of the deferred penalty. Thirteen Thousand Six Hundred Fifty Dollars (\$13,650) shall be conditionally offset by the Respondent's completion of a Supplemental Environmental Project ("SEP").
7. Any notice and procedures, which might otherwise be authorized or required in this action, are waived in the interest of a more timely resolution of the matter.
8. The Executive Director and the Respondent agree on a settlement of the matters alleged in this enforcement action, subject to final approval in accordance with 30 TEX. ADMIN. CODE § 70.10(a).
9. The Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas ("OAG") for further enforcement proceedings if the Executive Director determines that the Respondent has not complied with one or more of the terms or conditions in this Agreed Order.
10. This Agreed Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Agreed Order, whichever is later.
11. The provisions of this Agreed Order are deemed severable and, if a court of competent jurisdiction or other appropriate authority deems any provision of this Agreed Order unenforceable, the remaining provisions shall be valid and enforceable.

II. ALLEGATIONS

As owner and operator of the Facility, the Respondent is alleged to have:

1. Failed to prevent the unauthorized discharge of process water into or adjacent to water in the state, in violation of TEX. WATER CODE § 26.121(a)(1), as documented during an investigation conducted on November 17, 2011. Specifically, the process water used to wash and sort the sand grains, is channelled through a series of straw and rock filters, then discharged into Brewer Lake. Samples of the discharge collected during the investigation indicated elevated levels of total suspended solids (2,110 milligrams per liter).
2. Failed to obtain authorization prior to impounding, diverting, or using state water, in violation of 30 TEX. ADMIN. CODE § 297.11 and TEX. WATER CODE § 11.121, as documented during an investigation conducted on November 17, 2011. Specifically, the Respondent was diverting state water from at least one on-channel water source for process use without authorization.

III. DENIALS

The Respondent generally denies each allegation in Section II ("Allegations").

IV. ORDERING PROVISIONS

1. It is, therefore, ordered by the TCEQ that the Respondent pay an administrative penalty as set forth in Section I, Paragraph 6 above. The payment of this administrative penalty and the Respondent's compliance with all the terms and conditions set forth in this Agreed Order resolve only the allegations in Section II. The Commission shall not be constrained in any manner from requiring corrective action or penalties for violations which are not raised here. Administrative penalty payments shall be made payable to "TCEQ" and shall be sent with the notation "Re: New Birmingham Resources, LLC, Docket No. 2012-0948-MLM-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. The Respondent shall implement and complete a SEP in accordance with TEX. WATER CODE § 7.067. As set forth in Section I, Paragraph 6 above, Thirteen Thousand Six Hundred Fifty Dollars (\$13,650) of the assessed administrative penalty shall be offset with the condition that the Respondent implement the SEP defined in Attachment A, incorporated herein by reference. The Respondent's obligation to pay the conditionally offset portion of the administrative penalty assessed shall be discharged upon final completion of all provisions of the SEP agreement.
3. It is further ordered that the Respondent shall undertake the following technical requirements:
 - a. Within 30 days after the effective date of this Agreed Order, submit a technically complete application for a water rights permit to:

Water Rights Permitting
Water Supply Division, MC 160
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

- b. Within 45 days after the effective date of this Agreed Order, submit written certification of compliance with Ordering Provision No. 3.a, in accordance with Ordering Provision No. 3.g below;

- c. Respond completely and adequately, as determined by the TCEQ, to all requests for information concerning the permit application within 30 days after the date of such requests or by any other deadline specified in writing;
- d. Within 180 days after the effective date of this Agreed Order, cease the unauthorized discharge of process water into or adjacent to water in the state;
- e. Within 195 days after the effective date of this Agreed Order, submit written certification of compliance with Ordering Provision No. 3.d, in accordance with Ordering Provision No. 3.g below;
- f. Within 330 days after the effective date of this Agreed Order, submit written certification to demonstrate that a water rights permit has been obtained for the diversion, storing, impounding, taking, and/or use of state water or that such activities have ceased until authorization is obtained, in accordance with Ordering Provision No. 3.g below; and
- g. The certifications required by Ordering Provision Nos. 3.b, 3.e, and 3.f shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, 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 fines and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Water Section, Manager
Tyler Regional Office
Texas Commission on Environmental Quality
2916 Teague Drive
Tyler, Texas 75701-3734

4. The provisions of this Agreed Order shall apply to and be binding upon the Respondent. The Respondent is ordered to give notice of the Agreed Order to personnel who maintain day-to-day control over the Facility operations referenced in this Agreed Order.
5. If the Respondent fails to comply with any of the Ordering Provisions in this Agreed Order within the prescribed schedules, and that failure is caused solely by an act of God, war, strike, riot, or other catastrophe, the Respondent's failure to comply is not a violation of this Agreed Order. The Respondent shall have the burden of establishing to the Executive Director's satisfaction that such an event has occurred. The Respondent shall notify the Executive Director within seven days after the Respondent becomes aware of a delaying event and shall take all reasonable measures to mitigate and minimize any delay.
6. The Executive Director may grant an extension of any deadline in this Agreed Order or in any plan, report, or other document submitted pursuant to this Agreed Order, upon a written and substantiated showing of good cause. All requests for extensions by the Respondent shall be made in writing to the Executive Director. Extensions are not effective until the Respondent receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.
7. This Agreed Order, issued by the Commission, shall not be admissible against the Respondent in a civil proceeding, unless the proceeding is brought by the OAG to: (1) enforce the terms of this Agreed Order; or (2) pursue violations of a statute within the Commission's jurisdiction, or of a rule adopted or an order or permit issued by the Commission under such a statute.
8. This Agreed Order may be executed in separate and multiple counterparts, which together shall constitute a single instrument. Any page of this Agreed Order may be copied, scanned, digitized, converted to electronic portable document format ("pdf"), or otherwise reproduced and may be transmitted by digital or electronic transmission, including but not limited to facsimile transmission and electronic mail. Any signature affixed to this Agreed Order shall constitute an original signature for all purposes and may be used, filed, substituted, or issued for any purpose for which an original signature could be used. The term "signature" shall include manual signatures and true and accurate reproductions of manual signatures created, executed, endorsed, adopted, or authorized by the person or persons to whom the signatures are attributable. Signatures may be copied or reproduced digitally, electronically, by photocopying, engraving, imprinting, lithographing, electronic mail, facsimile transmission, stamping, or any other means or process which the Executive Director deems acceptable. In this paragraph exclusively, the terms "electronic transmission", "owner", "person", "writing", and "written" shall have the meanings assigned to them under TEX. BUS. ORG. CODE § 1.002.
9. Under 30 TEX. ADMIN. CODE § 70.10(b), the effective date is the date of hand-delivery of the Order to the Respondent, or three days after the date on which the Commission mails notice of the Order to the Respondent, whichever is earlier.

SIGNATURE PAGE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

For the Commission

Ben J. J. [Signature]
For the Executive Director

11/16/12
Date

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity indicated below my signature, and I do agree to the terms and conditions specified therein. I further acknowledge that the TCEQ, in accepting payment for the penalty amount, is materially relying on such representation.

I also understand that failure to comply with the Ordering Provisions, if any, in this order and/or failure to timely pay the penalty amount, may result in:

- A negative impact on compliance history;
- Greater scrutiny of any permit applications submitted;
- Referral of this case to the Attorney General's Office for contempt, injunctive relief, additional penalties, and/or attorney fees, or to a collection agency;
- Increased penalties in any future enforcement actions;
- Automatic referral to the Attorney General's Office of any future enforcement actions; and
- TCEQ seeking other relief as authorized by law.

In addition, any falsification of any compliance documents may result in criminal prosecution.

Robert Kunzi
Signature

8/13/2012
Date

Robert Kunzi
Name (Printed or typed)
Authorized Representative of
New Birmingham Resources, LLC

President & COO
Title

Instructions: Send the original, signed Agreed Order with penalty payment to the Financial Administration Division, Revenues Section at the address in Section IV, Paragraph 1 of this Agreed Order.

Attachment A
Docket Number: 2012-0948-MLM-E

SUPPLEMENTAL ENVIRONMENTAL PROJECT

Table 1 Case Information

Respondent:	New Birmingham Resources, LLC
Penalty Amount:	Thirty-Four Thousand One Hundred Twenty-Four Dollars (\$34,124)
SEP Offset Amount:	Thirteen Thousand Six Hundred Fifty Dollars (\$13,650)
Type of SEP:	Contribution to a Pre-approved Third-Party Recipient
Third-Party Recipient:	The Conservation Fund
Project Name:	<i>Bunn's Lake Habitat Acquisition & Preservation Project</i>
Location of SEP:	Orange County

The Texas Commission on Environmental Quality (“TCEQ”) agrees to offset the administrative penalty amount assessed in this Agreed Order for Respondent to contribute to a Supplemental Environmental Project (“SEP”). The SEP Offset Amount is set forth above and such offset is conditioned upon completion of the project in accordance with the terms of this Attachment A.

1. Project Description

A. Project

Respondent shall contribute the SEP Offset Amount to the Third-Party Recipient named above. The contribution will be to The Conservation Fund for the Bunn's Lake Habitat Acquisition & Preservation Project. The contribution will be used in accordance with the SEP between the Third-Party Recipient and the TCEQ (the “Project”). Specifically, the SEP Offset Amount will be used to acquire in fee and transfer by donation 552 acres of forested wetlands known as Bunn's Lake to the National Park Service's Big Thicket National Preserve, to be permanently protected for water quality and wildlife habitat.

Bunn's Lake is located northeast of the City of Beaumont in Orange County, Texas, east of the Neches River and north of the current boundary of Big Thicket National Preserve. This preserve comprises one of the southernmost large expanses of forested wetlands on the Upper Coast, and is the first sizeable forest that migrating birds see as they finish their migration journey across the Gulf of Mexico in the spring. Coastal bottomland floodplain forests are not only important for many high priority breeding birds such as Wood Duck, Mallard, Hooded Merganser, Swallow-tailed Kite, Red-headed Woodpecker, Prothonotary Warbler and Bald Eagle, but are absolute necessities for landbirds during migration.

All dollars contributed will be used solely for the direct cost of the Project and no portion will be spent on administrative costs. The SEP will be performed in accordance with all federal, state, and local environmental laws and regulations.

Respondent's signature affixed to this Agreed Order certifies that it has no prior commitment to make this contribution and that it is being contributed solely in an effort to settle this enforcement action.

B. Environmental Benefit

Acquiring and permanently protecting the Bunn's Lake tract will prevent pollution, reduce the amount of pollutants reaching the environment, and enhance the quality of the environment. These slow-moving backwater bayous contain a structural diversity and high biomass of standing vegetation, and surface litter material that provides refuge and a food source for many animals. This community provides habitat for wintering, migration and breeding birds including waterfowl, wading birds, and shorebirds. Permanently protecting this land will improve water quality, prevent fragmentation, and protect this large expanse of open space, wildlife habitat, and forestland for local communities and tourists alike.

C. Minimum Expenditure

Respondent shall contribute at least the SEP Offset Amount to the Third-Party Recipient and comply with all other provisions of this SEP.

2. Performance Schedule

Within 30 days after the effective date of this Agreed Order, Respondent shall contribute the SEP Offset Amount to the Third-Party Recipient. Respondent shall make the check payable to **The Conservation Fund SEP** and shall mail the contribution with a copy of the Agreed Order to:

The Conservation Fund
Attention: Julie Shackelford, Texas Program Director
P.O. Box 4608 SFA Station
Nacogdoches, Texas 75962-4608

3. Records and Reporting

Concurrent with the payment of the SEP Offset Amount, Respondent shall provide the Enforcement Division SEP Coordinator with a copy of the check and transmittal letter indicating full payment of the SEP Offset Amount due to the Third-Party Recipient. Respondent shall mail a copy of the check and transmittal letter to:

New Birmingham Resources, LLC
Agreed Order - Attachment A

Texas Commission on Environmental Quality
Enforcement Division
Attention: SEP Coordinator, MC 219
P.O. Box 13087
Austin, Texas 78711-3087

4. Failure to Fully Perform

If Respondent does not perform its obligations under this SEP agreement in any way, including full expenditure of the SEP Offset Amount and submittal of the required reporting described in Sections 2 and 3 above, the Executive Director (“ED”) may require immediate payment of all or part of the SEP Offset Amount.

In the event the ED determines that Respondent failed to complete the project, Respondent shall remit payment for all or a portion of the SEP Offset Amount, as determined by the ED, and shall include on the check the docket number of this Agreed Order and note that it is for reimbursement of a SEP. Respondent shall make the check payable to “Texas Commission on Environmental Quality” and shall mail it to:

Texas Commission on Environmental Quality
Litigation Division
Attention: SEP Coordinator, MC 175
P.O. Box 13087
Austin, Texas 78711-3087

5. Publicity

Any public statements concerning this SEP made by or on behalf of Respondent, must include a clear statement that the Project was performed as part of the settlement of an enforcement action brought by the TCEQ. Such statements include advertising, public relations, and press releases.

6. Clean Texas Program

Respondent shall not include this SEP in any application made to TCEQ under the “Clean Texas” (or any successor) program(s). Similarly, Respondent may not seek recognition for this contribution in any other state or federal regulatory program.

7. Other SEPs by TCEQ or Other Agencies

The SEP Offset Amount identified in this Agreed Order has not been, and shall not be, included as a SEP for Respondent under any other Agreed Order negotiated with the TCEQ or any other agency of the state or federal government.