

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF)
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)
 VESTAVIA HILLS BOARD OF EDUCATION) CONSENT ORDER 07-XXX-CMNPS
 LIBERTY PARK MIDDLE SCHOOL)
 VESTAVIA HILLS, T18S, R1W, S8)
 JEFFERSON COUNTY, ALABAMA)
 NPDES ALR167194)

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and the Vestavia Hills Board of Education (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.) and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Operator is a local school board which is constructing the Liberty Park Middle School (hereinafter "Facility") located in T18S, R1W, S8 off Liberty Parkway in the City of Vestavia Hills, Jefferson County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Coal Branch, a water of the State, classified for Fish & Wildlife.

2. The following acronyms are used in this Consent Order and, when used, shall have the meaning of the name or title referenced below.

BMPs	Best Management Practices
CBMPP	Construction Best Management Practices Plan
NOR	Notice of Registration
NPDES	National Pollutant Discharge Elimination System
PE	Professional Engineer licensed to practice in the State of Alabama
QCI	ADEM-recognized Qualified Credentialed Inspector
QCP	ADEM-recognized Qualified Credentialed Professional
SEP	Supplemental Environmental Project

3. The Department is a duly constituted department of the State of Alabama pursuant to §§ 22-22A-1 to 22-22A-16, Ala. Code (2006 Rplc. Vol.).

4. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(1) and 335-6-12-.11(1), the Operator is required to submit to the Department an NOR in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

5. Pursuant to ADEM Admin. Code r. 335-6-12-.05(2), all NPDES construction sites/activities and noncoal mining sites/activities less than five acres in size in Alabama are required to fully implement and regularly maintain effective BMPs to the maximum extent practicable, and in accordance with the Operator's CBMPP that has been prepared by a PE or QCP.

6. On April 5, 2005, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code ch. 335-6-12 for regulated disturbance activities and discharges of treated stormwater from the Facility. The

Department granted registration ALR167194 to the Operator on April 5, 2005. Registration ALR167194 expired on April 4, 2006.

7. During an inspection of the Facility on November 2, 2006, the Department documented that the Operator had not re-registered for and obtained NPDES coverage, although regulated disturbance activities and/or discharges were continuing.

8. During inspections of the Facility on August 29, 2005; November 2, 2006; and January 3, 2007, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in discharges of sediment and other pollutants in stormwater runoff to Coal Branch.

9. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite or in any State water.

10. During the August 29, 2005, inspection by the Department, significant accumulations of sediment resulting from discharges at the Facility were observed offsite.

11. On August 30, 2005, a Warning Letter was sent to the Operator by the Department as a result of the August 29, 2005, inspection. The Warning Letter notified the Operator of deficiencies documented at the Facility and requested the Operator to submit to the Department a copy of the CBMPP for the Facility within seven days of receipt of the Warning Letter. On September 14, 2005, a response from the Operator was received by the Department as well as follow-up responses on October 21, 2005,

and November 2, 2005. However, as of January 12, 2007, the requested CBMPP has not been received by the Department.

12. On November 30, 2006, a Warning Letter was sent to the Operator by the Department as a result of the November 2, 2006, inspection. The Warning Letter notified the Operator of deficiencies documented at the Facility, requested the Operator to re-register for NPDES coverage, and requested the Operator to submit to the Department a copy of the CBMPP for the Facility within seven days of receipt of the Warning Letter.

13. The November 30, 2006, Warning Letter requested the Operator to submit to the Department, within thirty days of receipt of the Warning Letter, certification by a QCP that all deficiencies at the Facility had been corrected. As of January 11, 2007, an NOR requesting re-registration and the requested information had not been submitted to the Department.

14. The Operator consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

15. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

16. The Operator denies the Department's allegations and contends that no discharges are causing any harm to the public health or environment. On April 9, 2007, Qualified Credentialed Professionals (QCP) representing the Operator made an inspection of the Facility, Coal Branch and the land situated between the Facility and Coal Branch for the purpose of determining whether or not sedimentation resulting from discharge at the Facility was observed in Coal Branch. The QCPs that made the inspection were Gallet & Associates, Inc. and Goodwin, Mills and Caywood, Inc. Representatives of the Contractor for the Operator, McCrory Building Company, Inc., were also present. The QCPs found no visible accumulation of sedimentation in Coal Branch or its tributaries within the drainage area of the Facility.

17. The Department disagrees with the Operator's contentions. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100 or exceed \$25,000 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not

exceed \$250,000. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS: The Department contends that the Operator did not ensure that effective BMPs were fully implemented and maintained, resulting in the discharge of pollutants that could otherwise have been prevented and/or minimized. There is no evidence that the noted violations caused irreparable harm to the environment. There is no evidence that the noted violations were a threat to the health or safety of the public.

B. THE STANDARD OF CARE: The Department contends that the Operator failed to keep the Operator's registration coverage current. The Operator did not implement and fully maintain effective BMPs at the Facility. The Operator did not exhibit a standard of care commensurate with applicable regulatory requirements.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department contends that the Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator's failure to comply with applicable regulatory requirements and delayed response to the noted violations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Department contends that tThe Operator took little or no action to minimize or mitigate the effects of the noted violations.

E. HISTORY OF PREVIOUS VIOLATIONS: The Operator does not have a history of previous violations.

F. THE ABILITY TO PAY: The Operator has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

ORDER

Therefore, without admitting that the Operator has violated any statutes or regulations, the Operator, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to the Department and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Operator agree to enter into this Consent Order with the following terms and conditions:

A. The Operator agrees to pay to the Department a civil penalty in the amount of \$20,000 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five

days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The parties agree that the Operator may elect to submit a plan to the Department to implement a SEP. If the Operator elects to implement this SEP, the Operator agrees to submit to the Department for review and acceptance, no later than thirty days after the effective date of this Consent Order, unless extended in writing by the Department, a letter proposing the SEP, as well as an implementation plan and schedule not to exceed 180 days after the effective date of this Consent Order, which must be accepted by the Department to be acceptable as a SEP which offsets the penalty assessed above. This SEP may, at the sole discretion of the Department, offset the penalty at a ratio of one dollar of penalty for every three dollars spent on the SEP. Adequate documentation of all such expenses shall be submitted to the Department for review and concurrence in determining the amount of the penalty offset no later than thirty days after the approved completion date of the SEP or the completion of the SEP, whichever is earlier. Should the Operator not offset the total amount of the penalty, the Operator agrees that the remaining amount of the penalty shall be due and payable within thirty days of the Department's notifying the Operator of the amount of penalty due to be paid. If the SEP is not acceptable to the Department, the total amount of the penalty shall be due within thirty days of the Operator's receipt of the Department's notification that the SEP is not acceptable. Furthermore, in the event the SEP is not fully implemented within the timeframe accepted by the Department the total amount

of the penalty shall be due within thirty days of the Operator's receipt of the Department's notification that the SEP is not acceptable.

C. The Operator agrees 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
PO Box 301463
Montgomery, Alabama 36130-1463

D. The Operator agrees, immediately upon the effective date of this Consent Order and continuing thereafter, to ensure immediate and future compliance with the AWPCA, applicable ADEM regulations, and all NPDES registration limitations, terms, and conditions for all ADEM NPDES regulated sites/facilities disturbed, operated, owned, and/or controlled by the Operator or responsible officials of the Operator, except as may be provided otherwise by an ADEM approved compliance schedule contained in this Consent Order or any other Order executed or issued by the Department.

E. The Operator agrees, immediately upon the effective date of this Consent Order and continuing thereafter, to fully implement and maintain temporary BMPs to prevent/minimize to the maximum extent practicable noncompliant and/or unpermitted discharges of pollutants to waters of the State.

F. The Operator agrees, unless relieved of this requirement in writing by the Department, that:

1. all inspections/evaluations shall be performed by a PE, a QCP, a qualified person under the direct supervision of a PE/QCP, or by a QCI;

2. BMP implementation and maintenance, and other corrective/remediation activities, shall be performed under the direct supervision of, and shall be certified by, a PE/QCP;
3. all applications, plans, and information shall be certified by a PE/QCP;
4. all submittals to the Department shall comply with applicable ADEM regulations and shall be signed by the Operator and certified by a PE/QCP;
and
5. all applications, plans, reports, and other submittals to the Department shall indicate who prepared the submittal, who conducted and/or supervised the inspection/work including his or her PE, QCP, or QCI designation, how the inspection/work was conducted, and the results of the inspection/work.

The Operator agrees, within seven days of the receipt of any written comments from the Department, to modify any application, plan, information, report, or other submittal, or submit additional information/clarification to the Department to address any comments made by the Department in writing.

G. The Operator agrees, within five days after the effective date of this Consent Order, to have a comprehensive inspection performed of the Facility, offsite conveyances, and affected State waters.

H. The Operator agrees, within ten days after the effective date of this Consent Order, to submit to the Department a complete NPDES registration, including the required fee, for the Facility.

I. The Operator agrees, within ten days after the effective date of this Consent Order, to submit to the Department a CBMPP detailing effective BMPs to be implemented to prevent/minimize to the maximum extent practicable sediment and other pollutants in stormwater leaving the Facility, and to ensure full compliance with the requirements of ADEM Admin. Code ch. 335-6-12.

J. The Operator agrees, within ten days after the effective date of this Consent Order, to submit to the Department a detailed report documenting the extent, if any, of offsite sedimentation and other pollutants from the Facility deposited offsite and/or in Coal Branch (a water of the State). The detailed report will include a detailed plan for the remediation and/or removal of any sediment and other pollutants, if any, from the Facility deposited offsite and/or in Coal Branch, if offsite sediment or other pollutants are identified in the report.

K. The Operator agrees, within twenty days after the effective date of this Consent Order, to fully implement and maintain effective BMPs, implement all plans required by this Consent Order, and correct all deficiencies, if any, at the Facility. If offsite sedimentation is noted in the detailed report required in Item J, sediment removal/remediation in a manner acceptable to the Department will be completed in offsite conveyances and affected State waters (Coal Branch).

L. The Operator agrees, within twenty-five days after the effective date of this Consent Order, to submit to the Department a certification that effective BMPs have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin. Code ch. 335-6-12 has been achieved at the Facility,

offsite conveyances, that sediment removal/remediation in a manner acceptable to the Department has been completed in offsite conveyances, and affected State waters, if offsite sedimentation was identified in the detailed report required in Item J.

M. The parties agree 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.

N. The Parties agree 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.

O. The Operator agrees that the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

P. 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 the Circuit Court of Montgomery County. 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 the Operator's 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 have been beyond the reasonable control of the Operator) and which delays or prevents performance 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 working 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 circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but the Department is not obligated to do so.

Q. The Department and the Operator agree 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 may 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.

R. The Department and the Operator agree that 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.

S. The Department and the Operator agree that this Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

T. The Department and the Operator agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed penalty Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

U. The Department and the Operator agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions herein shall remain in full force and effect.

V. The Department and the Operator agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

W. The Department and the Operator agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or

modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

Executed in duplicate with each part being an original.

VESTAVIA HILLS BOARD OF EDUCATION

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

(Signature of Authorized Representative)

Onis "Trey" Glenn, III
Director

(Print Name of Authorized Representative)

Date Signed: _____

Title

Date Signed: _____