

ADEM



ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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ONIS "TREY" GLENN, III, P.E.

DIRECTOR

BOB RILEY

GOVERNOR

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

May 2, 2006

JOHN S WAITES
PRESIDENT
WAITES CONCRETE COMPANY INC
210 17TH STREET
TALLADEGA AL 35106

Dear Mr. Waites:

Re: Waites Concrete Company Inc.
210 17th Street- Talladega, AL
Consent Order 06-056-CWP

Please find enclosed ADEM Consent Order No. 06-056-CWP which requires Waites Concrete Company Inc. to take certain actions in regard to alleged violations of the Alabama Water Pollution Control Act. This Order has been issued with the consent of Waites Concrete Company Inc. and the Department. Please note that the assessed civil penalty is due within 45 days.

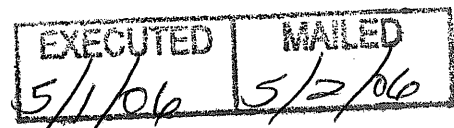
If you have any questions, please do not hesitate to contact me at (334) 271-7823.

Sincerely,

James E. McIndoe
Chief
Water Division

Enclosure

Cc: Glenda Dean, ADEM - Water Division
Arthur Collins, US EPA Region IV
ADEM - Public Affairs Office
Freida K Thomas, ADEM - Office of the Director



ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

)	
IN THE MATTER OF)	
)	
WAITES CONCRETE COMPANY INC)	CONSENT ORDER NO. 06-056-CWP
210 17 TH STREET)	
TALLADEGA, ALABAMA)	
GENERAL NPDES ALG11-0184)	
)	

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Waites Concrete Company, Inc. (hereinafter the "Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Code of Alabama, 1975, §§ 22-22A-1 through 22-22A-16, as amended, the Alabama Water Pollution Control Act, Code of Alabama, 1975, §§ 22-22-1 through 22-22-14, as amended, and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Permittee is an Alabama business operating a batch concrete manufacturing facility, located on 210 17th Street in Talladega, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to §§ 22-22A-1 through 22-22A-16, Code of Alabama, 1975, as amended.
3. Pursuant to § 22-22A-4(n), Code of Alabama, 1975, the Department is the state water pollution control agency for the purposes of the Federal Clean Water Act, 33 U.S.C. §§ 251 through 1387. In addition, the Department is authorized to administer and enforce the

provisions of the Alabama Water Pollution Control Act, §§ 22-22-1 through 22-22-14, Code of Alabama, 1975, as amended.

4. On August 20, 2002, the Department issued the Permittee General National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number ALG11-0184 (hereinafter the "Permit"). General NPDES Permit ALG11-0184 was effective September 1, 2002. The Permit established limitations for pH and Total Suspended Solids (hereinafter "TSS") on the discharge of process wastewater and wastewater from vehicle and equipment washing from such point sources, designated herein as outfall DSN001-1 and DSN009-1 respectively, into an unnamed tributary to Isabell Branch. The Permit requires that the Permittee monitor its discharges and submit Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. The Permittee has two onsite holding ponds which contain the aforementioned wastewater. The DMRs document that a discharge has not occurred from the holding ponds.

5. During the night of December 5th 2005, heavy rainfall led to the discharge of wastewater from holding ponds located at the Permittee's property in Talladega, Alabama. The wastewater containing cementitious material spilled into the unnamed tributary to Isabell Branch that runs adjacent to the Permittee's property. The purpose of the ponds was to collect the runoff from the batch plant and the washwater that contains the cement fines. The ponds are essentially open pits constructed using earthen berms around three sides of the perimeter and large concrete blocks as divider dikes. At the time of the release, the earthen berms had eroded at three locations, forming a single channel to the unnamed tributary to Isabell Branch, a tributary to Town Creek.

6. On the afternoon of December 6th, 2005, the Talladega Emergency Management Association informed the Department's Birmingham Field Office of a fish kill in Town Creek, located in the city of Talladega, Alabama. Subsequently, an investigation was conducted by personnel from the Department's Birmingham Field Office and the Department of Conservation and Natural Resources (hereinafter "DCNR")-Wildlife and Freshwater Fisheries Division. As a

result of the investigation, it was determined that the fish kill occurred during the late night hours of December 5th, 2005 and lasted until the early morning hours of December 6th, 2005. The total number of fish killed is estimated by DCNR-Wildlife and Freshwater Fisheries Division to be 4,820 with a total weight of 79.3 pounds. In addition, observed during the investigation was a concrete cascade from the Permittee's property into the unnamed tributary to Isabell Branch (approximately an 8 ft. steep drop). The water depth of the unnamed tributary appeared shallow in places with pools and small runs. Grey residue was noted on the banks of the stream, and the water was cloudy-grey. Also, at the time of the investigation, pH readings were taken by the Department's Birmingham Field Office personnel. The pH readings were taken upstream in the unnamed tributary at the locations noted below. The pH readings are as follows:

TIME	TEMP	pH	LOCATION
1615	10.5°C	8.75s.u.	at South Street bridge crossing creek
1620	10.5°C	8.75s.u.	Approx 50 ft above South Street bridge
1622	10.5°C	8.75s.u.	Approx 75 ft above South Street bridge
1637	10.7°C	8.75s.u.	Behind sheriff's office at pipeline crossing
1705	9.4°C	12.76s.u.	Approx 100 ft below point source
1710	7.2°C	12.88s.u.	Milky puddle directly below point source
1712	9.8°C	9.76s.u.	Eddying pool slightly above point source
1715	9.8°C	9.12s.u.	Furthest upstream of point source

7. On December 7, 2005, the Department's Birmingham Field Office personnel conducted a follow-up visit to the Permittee's property. No discharge was noted at the time of this visit. Sand and soil had been placed in the breached area of the holding pond. This temporary measure had stopped the release; however, the Department informed the Permittee that the temporary retaining structure did not appear adequate to withstand a heavy rainfall. In-

stream samples were collected both upstream and downstream of the point source in the unnamed tributary for Total Dissolved Solids (hereinafter "TDS"), TSS, chlorides, oil and grease, pH, and ortho-phosphates.

8. Code of Alabama, 1975, §22-22-9(i)(3) provides that "[e]very person, prior to discharging any new or increased pollution into any waters of this state, shall apply to the [Department] in writing for a permit and must obtain such permit before discharging such pollution." The Permittee has neither applied for nor obtained a permit authorizing the discharge referenced in paragraph 7 above.

9. ADEM Admin.Code R. 335-6-10-.09(1)2. provides that "industrial wastes or other wastes shall not cause the pH to deviate more than one unit from the normal or natural pH, nor be less than 6.0, nor greater than 8.5." The pH reading taken above the point source on December 7, 2005, was 8.27 s.u., and the pH reading taken **below the point source was 9.24 s.u.**

10. On December 19, 2005, the Department conducted a Compliance Evaluation Inspection at the Permittee's facility. No discharge was observed at the time of this inspection. Also, the temporary berm that was constructed of sand and soil, (as noted in paragraph 7 above) had been replaced by an improved temporary structure. Along the main containment berm of this structure, riprap was placed approximately three feet high. Also, filter fabric was installed over the riprap and covered with surge stone. However, earthen berms were still being utilized to prevent wastewater in the holding ponds from discharging into the creek.

11. During the December 19th inspection, it was noted the Permittee violated Part IV A.4.b. and Part IV A. 4.c. of the Permit by failing to maintain a proper Best Management Practices (hereinafter "BMP") Inspection Log at the facility and by failing to provide and document BMP training for facility personnel required to implement the BMP Plan, respectively.

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

13. 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

Pursuant to Code of Alabama, (1975), § 22-22A-5(18)c., in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, 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 violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. In arriving at this civil penalty, the Department has considered the following:

A. *SERIOUSNESS OF THE VIOLATION*: A fish kill occurred in Town Creek as a result of the release of wastewater from the Permittee's holding ponds. The total number of fish killed is estimated to be 4,820 with a total weight of 79.3 pounds.

B. *THE STANDARD OF CARE*: The Permittee failed to implement adequate secondary containment measures to prevent an unpermitted discharge of cementitious material to state waters. The Permittee also failed to maintain adequate BMP measures.

C. *ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED*: The Department has been unable to ascertain if there has been a significant economic benefit.

D. *EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT*: In response to the release, the Permittee made temporary repairs

to correct the breach in the berm of the holding ponds. Also, the Permittee has retained a licensed Professional Engineer to assist in the development of a new containment system.

E. *HISTORY OF PREVIOUS VIOLATIONS*: On August 1, 2002, the Permittee was issued a Notice of Violation (hereinafter "NOV"). The NOV cited the Permittee for failing to properly implement a BMP Plan, by failing to maintain a BMP inspection log and by failing to provide and document BMP training. Also, the NOV documented a breach in the berm of the Permittee's holding ponds. However, at the time of that inspection, there did not appear to be a discharge from the ponds but there was visible concrete observed in the unnamed tributary to Isabell Branch.

F. *THE ABILITY TO PAY*: The Permittee 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 it 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, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Code of Alabama, (1975), §§ 22-22A-5(18)c., 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 Permittee agree to enter into this Consent Order with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of Nine Thousand dollars (\$9,000.00) in settlement of the violations alleged herein within 45 days from the effective date of this Consent Order. Failure to pay the civil penalty within 45 days

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

B. The Permittee agrees to comply with all terms, conditions and limitations of the Permit, including the discharge limitations and BMP requirements, until either the expiration of that Permit or the expiration of Waites Concrete Company, Inc.'s coverage by that Permit, whichever comes first.

C. The Permittee agrees, within 30 days from the effective date of this Consent Order, to submit for the Department's review and comment a report, prepared by a professional engineer licensed in the State of Alabama, addressing the steps that have been taken and/or being taken to correct these violations. Also, the report should include a time schedule for completing the projects to ensure compliance with state and federal regulations. Implementation of the corrective action identified by the Engineering Report shall be completed within 180 days from the effective date of this Consent Order.

D. The Permittee agrees that for every day after the effective date of this Consent Order in which an action required by this Consent Order is not fully implemented as required by the terms of this Consent Order, the Permittee shall pay to the Department a stipulated penalty of \$100.00 per day for the first thirty (30) days. Thereafter, the penalty shall increase to \$200.00 per day for the 31st through the 60th day inclusive, \$300.00 per day for the 61st through the 90th day inclusive in which violations occur. Payment of any stipulated penalty due under this Consent Order shall be due not later than 45 days after the due date of the action and every 45 days thereafter, if necessary. Notification to the Permittee by the Department of the assessment of any stipulated penalty is not required, and the stipulated penalty is due and payable to the Department within 45 days after the due date of the action and each 45 days thereafter, if necessary, regardless of whether demand for the stipulated penalty has been received by the Permittee.

E. The Permittee agrees to comply with the discharge limitations and monitoring requirements of the applicable permit immediately upon the effective permit coverage and will

maintain compliance each and every day thereafter. Beginning on the effective date of the permit and continuing 180 days, the Permittee will pay to the Department stipulated penalties in the amount of Two Hundred Dollars (\$200.00) for each and every violation of any daily maximum or minimum limitation of the Permit. If, after 180 days from the effective date of the permit, the Permittee continues to violate the permit, the Department reserves the right to proceed unilaterally to address those violations through subsequent orders, litigation and/or suspension or revocation of the Permit. All penalties owed to the Department under this condition shall be submitted with the DMR upon which the violation is reported.

F. The Permittee 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, AL 36130-1463

All such checks shall reference the Permittee's name, address, and the docket number of this Consent Order and shall be accompanied by a letter describing the dates and values of the violations for which the stipulated penalties are paid.

G. 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.

H. 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.

I. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

J. For purposes of this Consent Order only, the Permittee 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 Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee 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 Permittee, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) 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 10 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 Permittee, 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 it is not obligated to do so.

K. The Department and the Permittee 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 Permittee 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.

L. The Department and the Permittee 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 Permittee does hereby waive any hearing on the terms and conditions of same.

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

N. The Department and the Permittee agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty (30) days within which to comment on the Consent Order.

O. The Department and the Permittee 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 hereof shall remain in full force and effect.

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

Q. The Department and the Permittee 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 Permittee of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original

WAITES CONCRETE COMPANY, INC.

By:

John S. Waites
President

DATE:

03/04/06

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Onis "Trey" Glenn, III

Onis "Trey" Glenn, III, P.E., Director
Alabama Department of
Environmental Management
Post Office Box 301463
Montgomery, Alabama 36130-1463
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DATE:

5/1/06