

ONIS "TREY" GLENN, III
DIRECTOR



BOB RILEY
GOVERNOR

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February 20, 2008

CERTIFIED MAIL
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ALABAMA DEPARTMENT OF TRANSPORTATION
ATTN D W VAUGHN
1409 COLISEUM BLVD
MONTGOMERY AL 36130

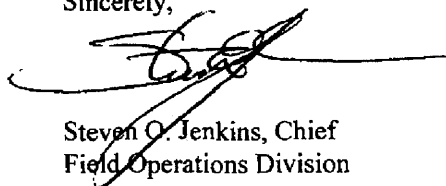
RE: CONSENT ORDER 08-095-CMNPS
NHF - 0042 (501) Highway 98 Project
Mobile County (097)
NPDES ALR169758

Dear Mr. Vaughn:

Please find enclosed the above-referenced Consent Order which requires certain actions to be taken regarding alleged violations of applicable environmental laws and regulations. This Consent Order has been issued with the consent of the Operator and the Department.

Should you have any questions concerning this matter, please contact **Tim Connoles, Facility Unit**, by email at **TNC@adem.state.al.us** or by phone at **(251) 432-6533**.

Sincerely,

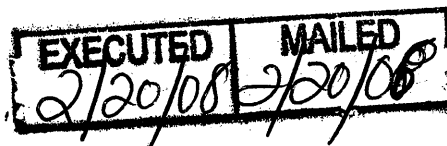


Steven O. Jenkins, Chief
Field Operations Division

SOJ/tnc File:ECO/321

c: Water Management Division, EPA Region IV
Office of Public Affairs, ADEM

Enclosure: Signed Original Consent Order



Birmingham Branch
110 Vulcan Road
Birmingham, AL 35209-4702
(205) 942-6168
(205) 941-1603 (Fax)

Decatur Branch
2715 Sandlin Road, S.W.
Decatur, AL 35603-1333
(256) 353-1713
(256) 340-9359 (Fax)

Mobile Branch
2204 Perimeter Road
Mobile, AL 36615-1131
(251) 450-3400
(251) 479-2593 (Fax)

Mobile - Coastal
4171 Commanders Drive
Mobile, AL 36615-1421
(251) 432-6533
(251) 432-6598 (Fax)

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

ALABAMA DEPARTMENT OF TRANSPORTATION

NHF-0042(501)/HWY 98 PROJECT

MOFFET, WILMER, SEMMES

MOBILE COUNTY, ALABAMA

NPDES ALR169758

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) CONSENT ORDER 08-095-CMNPS
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PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and the Alabama Department of Transportation (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 an Alabama State governmental agency which is constructing the NHF-0042(501)/HWY 98 PROJECT (hereinafter "Facility") located near Wilmer and Semmes in Mobile County, Alabama.

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
NTUs	Nephelometric Turbidity Units
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
SEP	Supplemental Environmental Project
UT	Unnamed Tributary
CWA	Clean Water Act

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 a 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 QCP.

6. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(3) and 335-6-12-.28, the Operator is required to ensure that comprehensive inspections of the Facility, offsite areas and stormwater conveyances, and associated receiving waters are conducted according to a prescribed schedule, after significant precipitation, and as often as needed by a QCP to ensure that effective BMPs have been properly designed,

implemented, and maintained. Each day there is activity at the Facility, the Operator or other qualified person is required to observe that portion of the Facility where construction disturbance has occurred and report any apparent BMP deficiencies to the Operator or QCP.

7. On March 6, 2006, the Operator submitted to the Department a 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 ALR169758 to the Operator on March 6, 2006.

8. On February 27, 2007, the Operator submitted to the Department a NOR requesting re-registration of NPDES coverage ALR169758. The Department granted re-registration of ALR169758 to the Operator on February 27, 2007. Registration ALR169758 is scheduled to expire on March 5, 2008.

9. The Department has inspected the Facility at various times since work began on the project. Prior to September 20, 2007, no significant violations were noted by ADEM personnel.

10. During inspections of the Facility on September 20, 2007, September 22, 2007, October 18, 2007, and November 15, 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 the Escatawpa River, Scarbo Creek, an unnamed tributary to Scarbo Creek, Long Branch, and an unnamed tributary to Long Branch, an unnamed tributary to Collins Creek.

11. During an inspection of the Facility on October 31, 2007, the Department documented that the Operator was operating heavy equipment in an UT of Scarbo Creek resulting in discharges of sediment and other pollutants.

12. Pursuant to ADEM Admin. Code rs. 335-6-12-.26(5) and 335-6-10-.09, it is the Operator's responsibility to be continually aware of and to effectively evaluate instream water quality, including necessary turbidity monitoring. Discharges from the Facility shall not cause turbidity downstream of the Facility to exceed upstream turbidity by 50 NTUs, nor shall discharges from the Facility cause substantial visible contrast in instream turbidity.

13. Analyses of water samples collected by the Department on September 22, 2007, from Scarbo Creek indicated a 367 NTU increase below Discharge Points 5 through 18, from an UT to Scarbo Creek indicated a 399 NTU increase below Discharge Points 14 through 17, from an UT to Collins Creek indicated a 144 NTU increase below Discharge Point 31, and from an UT to Collins Creek indicated a 73 NTU increase below Discharge Points 32 and 33. In addition, stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity downstream of the Facility.

14. Analyses of water samples collected by the Department on October 18, 2007, from Scarbo Creek indicated a 220 NTU increase below Discharge Points 5 through 18, from an UT to Scarbo Creek indicated a 126 NTU increase below Discharge Points 14 through 18, from an UT to Collins Creek indicated a 680 NTU increase below Discharge Point 31, from an UT to Collins Creek indicated a 846 NTU increase below Discharge Points 32 and 33, and Collins Creek indicating a 326 NTU increase below

Discharge Point 33 and the mouth of Collins Creek at Big Creek Lake. In addition, stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity in Big Creek at its junction with Collins Creek and in Big Creek Lake at its junction with Long Branch, downstream from the Facility.

15. Analyses of water samples collected by the Department on October 31, 2007, from the UT of Scarbo Creek indicated a 798 NTU increase below Discharge Point 14.

16. Pursuant to ADEM Admin. Code r. 335-6-12-.15(4), the Operator is required to maintain and submit to the Department upon request certain data, records, reports, and other information for the Facility. Pursuant to ADEM Admin. Code r. 335-6-12-.26(4), the Operator is required to record and maintain detailed records of precipitation that has occurred at the Facility.

17. 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.

18. During the September 20, 2007, September 22, 2007, October 18, 2007, and November 15, 2007, inspections by the Department, accumulations of sediment resulting from discharges at the Facility were observed offsite and in the Escatawpa River, Scarbo Creek, an unnamed tributary to Scarbo Creek, Long Branch, an unnamed tributary to Long Branch, and an unnamed tributary to Collins Creek.

19. On October 3, 2007, a NOV was sent to the Operator by the Department as a result of the September 20, 2007 and September 22, 2007 inspections. The NOV notified the Operator of deficiencies documented at the Facility, and requested the Operator to submit to the Department a copy of the CBMPP within seven days of receipt of the NOV.

20. The October 3, 2007, NOV also requested the Operator to submit to the Department certification by a QCP that all deficiencies at the Facility had been corrected within fifteen days of receipt of the NOV. On October 15, 2007, the Operator submitted to the Department a Professional Engineering Report identifying deficiencies at the site.

21. The Operator denies all allegations and stipulations contained in this Order. The Operator voluntarily consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein in settlement hereof and in compromise of disputed claims under the AWPCA and the CWA.

22. 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

23. 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 sediment was allowed to be discharged from the Facility by the Operator. 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. While the noted violations caused harm, the noted violations did not appear to cause 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 did not fully implement and maintain effective BMPs at the Facility until notified by the Department. The Department also contends that the Operator did not exhibit a standard of care commensurate with applicable regulatory requirements until notified by the Department. The Operator contends that construction began on the project on

September 11, 2006. The Operator further contends that since the initiation of work, weekly inspections have been conducted on the project by ALDOT and contractor personnel and that before September 20, 2007, no significant violations were noted during these inspections.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator's noncompliance with applicable regulatory requirements.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Operator took action to minimize or mitigate to the extent practicable the effects of the noted violations upon the environment after notification from the Department.

E. HISTORY OF PREVIOUS VIOLATIONS: The Operator has a history of previous violations, but does not have a recent history of significant violations. Over the past four years, the Operator has undertaken considerable efforts State-wide to enhance its compliance.

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 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 (hereinafter "Parties") 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 \$75,000 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 Operator agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by interdepartmental transfer of funds.

C. 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.

D. 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.

E. The Operator agrees, immediately upon the effective date of the Consent Order and continuing thereafter, to begin to implement policies to acquire sufficient right of way for all projects bid after the effective date of this Consent Order to provide necessary treatment and storage of sediment consistent with the *Alabama Handbook for Erosion and Sediment Control*.

F. Relative to ALDOT Project NHF-0042(501), US 98, Mobile County, the Operator agrees, unless relieved of this requirement in writing by the Department, that:

1. A QCP will perform inspections/evaluations weekly and after qualifying rainfall events;
2. BMP implementation and maintenance, and other corrective/remediation activities, shall be performed under the direct supervision of a QCP and shall be certified by a QCP;
3. all applications, plans, and information shall be certified by a QCP;

4. all submittals to the Department shall comply with applicable ADEM regulations and shall be signed by the Operator and certified by a 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 QCP designation, how the inspection/work was conducted, and the results of the inspection/work.

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 CBMPP detailing effective BMPs, including a detailed implementation schedule, 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. The CBMPP described shall be implemented in accordance with the schedule accepted by the Department. 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. The seven day time frame may be extended by the Department following receipt of a written request and justification therefore.

I The Operator agrees, within twenty days after the effective date of this Consent Order, to submit to the Department a detailed plan for the remediation and/or removal of any sediment and other pollutants from the Facility deposited offsite and in State waters. As noted below in item J, the Department acknowledges that in some cases, the Operator may be relieved of this responsibility where, after making all reasonable efforts to gain access to the property, access was denied, proof of denial is submitted to and accepted by the Department. The Operator agrees, within seven days of the receipt of any written comments from the Department, to modify any plan, information, report, or other submittal, or submit additional information/clarification to the Department to address any comments made by the Department in writing.

J. The Operator agrees, within twenty days after acceptance by ADEM of items H and I above, to fully implement and maintain effective BMPs, implement all plans required by this Consent Order, and correct all deficiencies at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department. Should the Operator be unable to obtain the approval of the property owner in a timely fashion, thereby delaying compliance with this deadline, ADEM may relieve the Operator of some, or all of, the requirements of these paragraphs, upon demonstration by the Operator that it took all reasonable means to obtain said approval. Removal of sediment from Big Creek Lake will be conducted separately upon full completion/stabilization of the current project and after all in-stream BMPs have been removed and the area is stabilized. This portion of the

Consent Order in no way relieves the Operator of the requirement to conduct removal activities.

K. The Operator agrees, within twenty-five days after the effective date of this Consent Order, unless extended in writing by the Department following a written request and detailed justification therefore, 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, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

L. The Operator agrees to develop an interagency agreement (IA) acceptable to the Department that will be used as a tool to enhance the current environmental management system to require 3rd party QCP inspections of various ALDOT construction projects. The draft of the IA will be submitted for review to the Department within 7 days of the effective date of the order and the Operator will respond to any comments from the Department within seven days of receipt.

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 Parties 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 Parties 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 Parties 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 Parties 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. The Department agrees this Consent Order shall not issue after the receipt of comment advocating a change in the terms of the following Order without the expressed consent of the Operator and that prior to initiating any subsequent enforcement the Department will extend to the Operator an invitation for an informal conference with the Department.

U. The Parties 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 Parties agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

W. The Parties 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.

ALABAMA DEPARTMENT OF
TRANSPORTATION


(Signature of Authorized Representative)

D. W. Vaughn

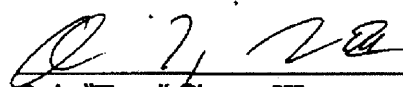
(Print Name of Authorized Representative)

Chief Engineer/Deputy Director

Title

Date Signed: December 14, 2007

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT


Onis "Trey" Glenn, III
Director

Date Signed: 2/20/08