

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF	)	
	)	
E CORNELL MALONE CORP.	)	ORDER 21-XXX-CLD
E CORNELL MALONE CORP. PROPERTY	)	
BIRMINGHAM, T17S, R1W, S3	)	
JEFFERSON COUNTY, ALABAMA	)	
FID#63903.1	)	

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and E Cornell Malone Corp (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16, as amended, the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 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, as amended.

STIPULATIONS

1. The Operator is an Alabama corporation that is registered with the Alabama Secretary of State's Office. The Operator is constructing the commercial development, E Cornell Malone Corp Property (hereinafter "Facility") located off Queenstown Road, in Birmingham, Jefferson County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to unnamed tributary of Stinking Creek a water of the State.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16, as amended.

3. Pursuant to Ala. Code § 22-22A-4(n), as amended, the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387, as

amended. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22A-14, as amended.

4. The following references and 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
NOI	Notice of Intent
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
WL	Warning Letter

5. 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.

6. The Department, during inspections of the Facility on May 28, 2020, and August 6, 2020, documented that the Operator had not registered for and obtained NPDES coverage prior to commencing regulated disturbance activities. Therefore, the Operator violated ADEM Admin. Code r. 335-6-12-.11 by operating an NPDES construction site without having submitted a complete and correct NOR to the Department.

7. ADEM Admin. Code r. 335-6-12-.21(1) provides that commencement and/or continuation of NPDES construction activity is prohibited unless effective BMPs are implemented and maintained in accordance with a CBMPP prepared/certified by a QCP as adequate to meet the requirements of ADEM Admin. Code chap. 335-6-12 and applicable requirements of ADEM Administrative Code Division 335-6. The CBMPP and any BMPs shall meet or exceed the technical standards of ADEM Admin. Code chap. 335-6-12, and the Alabama Handbook For Erosion Control, Sediment Control, And Stormwater Management On Construction Sites And Urban Areas published by the Alabama Soil and Water Conservation Committee (hereinafter the "Alabama Handbook").

8. During the inspections of the Facility on May 28, 2020, and August 6, 2020, the Department observed and documented that, the Operator had not properly implemented and maintained effective BMPs although NPDES construction activity had commenced and was continuing, in violation of ADEM Admin. Code r. 335-6-12-.21(1).

9. ADEM Admin. Code r. 335-6-12-.35(10) requires operators to promptly take all reasonable steps to determine the nature and impact of non-complying discharge, and to remove, to the maximum extent practical, pollutants deposited offsite or in any waterbody.

10. During the August 6, 2020, inspection, the Department observed and documented accumulations of sediment resulting from discharges at the Facility offsite in violation of ADEM Admin. Code r. 335-6-12-.21(1).

11. On June 8, 2020, a WL was sent to the Operator by the Department as a result of the May 28, 2020, inspection. The WL notified the Operator of deficiencies documented at the Facility, and required the Operator to submit to the Department a report showing steps that were taken at the Facility to correct the noted violations within ten days of receipt of the WL. The required report has not been received by the Department.

12. On August 21, 2020, a NOV was sent to the Operator by the Department as a result of the August 6, 2020, inspection. The NOV notified the Operator of deficiencies documented at the Facility, and required the Operator to submit to the Department a report prepared by a QCP showing steps that were taken at the Facility to correct the noted violations within ten days of receipt of the NOV. The required report has not been received by the Department.

13. Ala. Code § 22-22-9(e), as amended, requires an operator to respond within the specified time frame to a notice of violation or non-compliance by the Department. The Operator violated Ala. Code § 22-22-9(e), as amended, by failing to respond to the NOV.

14. The Operator neither admits nor denies the Department's allegations. 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. Pursuant to Ala. Code § 22-22A-5(18)(c), as amended, 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. Any civil penalty assessed pursuant to this authority shall not exceed twenty-five thousand dollars (\$25,000.00) for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed two hundred fifty thousand dollars (\$250,000.00). 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:** Considering the general nature of the violations, the magnitude and duration of the violations, their effects, if any on impaired waters, and lack of any available evidence of irreparable harm to the environment or threat to the public, the Department determined the base penalty to be \$22,300.00.

B. **THE STANDARD OF CARE:** In considering this factor, the Department noted the substantial off-site environmental impacts to adjacent property. In consideration of the standard of care by the Operator, the Department enhanced the penalty by \$12,100.00.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Operator has delayed certain costs with implementing and maintaining proper BMPs. In consideration of the economic benefit to the Operator, the Department has enhanced the penalty by an additional \$100.00.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Operator to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is not aware of any pervious violations not addressed above.

F. THE ABILITY TO PAY: The Department is unaware of any evidence regarding the Operator's inability to pay the civil penalty.

G. 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.

H. The civil penalty is summarized in Attachment 1.

#### 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), as amended, as well as the need for timely and effective enforcement.

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 \$20,000.00 in settlement of the violations alleged herein within forty-five (45) days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five (45) 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. 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

C. That the Operator shall take immediate action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Facility and prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State.

D. That the Operator shall, within five (5) days of the date of issuance of this Consent Order, have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. That the Operator shall, within ten (10) days of the date of issuance of this Consent Order, submit to the Department the results of the QCP comprehensive inspection and a plan to return the Facility, offsite conveyances, and affected State waters to compliance with Permit requirements.

F. That, within ten (10) days of the date of issuance of this Consent Order, to submit to the Department a complete NOI. The NOI, including the appropriate permit fees, should be submitted electronically via the e-NOI system for the NPDES Construction General Permit on the ADEM website at <https://app.adem.alabama.gov/eNOI/>.

G. That, within thirty (30) days of the date of issuance of this Consent Order, the Operator shall fully implement effective BMPs, designed by a QCP, that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12, and correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation.

H. That, within seven (7) days of the completion of the activities required in G above, the Operator shall submit to the Department a certification signed by the QCP that effective BMPs that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12 have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin Code chap. 335-6-12, has been achieved at the Facility, offsite conveyances, and affected State waters.

I. 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.

J. 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.

K. That the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

L. 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 (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 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.

M. 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.

N. 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.

O. This Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

P. 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.

Q. 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.

R. That any modifications of this Consent Order must be agreed to in writing and signed by both parties.

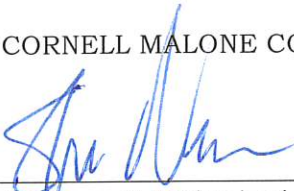
S. That, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local



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.

E CORNELL MALONE CORP.

  
\_\_\_\_\_  
(Signature of Authorized Representative)

SHAWN NEWTON  
(Print Name of Authorized Representative)

GM  
\_\_\_\_\_  
Title

Date Signed: 12/8/20

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

\_\_\_\_\_  
Lance R. LeFleur  
Director

Date Signed: \_\_\_\_\_

## ATTACHMENT 1 - PENALTY SYNOPSIS

E CORNELL MALONE CORP. - E CORNELL MALONE CORP. PROPERTY    Birmingham,  
Jefferson County    FID63903.1

Violation	Number of Violations	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
Operating an NPDES construction site without, or outside of, NPDES coverage.	1	\$5,000	\$3,800	
Effective Best Management Practices (BMPs) not implemented and/or maintained	2	\$6,000	\$4,500	
Discharge/accumulation of sediment offsite	1	\$7,500	\$2,500	
Failure to respond to a Notice of Violation	1	\$3,800	\$1,300	
<b>Totals:</b>	<b>5</b>	<b>\$22,300</b>	<b>\$12,100</b>	
Economic Benefit*:				\$100
Sub-Total:				\$34,500
Mitigating Factors*:				
Ability to Pay*:				
Other Factors*:				
Amount of Initial Penalty:				\$34,500
Total Adjustments:				-\$14,500
<b>Final Penalty:</b>				<b>\$20,000</b>

\*See the Department's "Contentions" portion of the Order for a detailed description of each violation and the penalty factors.