

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

DSL D HOMES (GULF COAST) LLC  
HIGHLAND PARK AT THE HIGHLANDS  
SPANISH FORT, T4S, R2E, S2,  
BALDWIN COUNTY, ALABAMA  
NPDES REGISTRATION NO. ALR10AAE6

CONSENT ORDER 20-XXX-CLD

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM") and DSL D Homes (Gulf Coast), LLC (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 a Louisiana foreign limited liability company, doing business in Alabama, constructing homes in the residential subdivision, Highland Park in the Highlands (hereinafter "Facility") located in T4S, R2E, S2, south of Jimmy Falkner Drive, near Spanish Fort, Baldwin County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to an unnamed tributary to Hunawell 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 the 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 AWPCA, Ala. Code §§ 22-22-1 through 22-22-14, 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
NOI	Notice of Intent
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
UT	Unnamed Tributary

5. Pursuant to ADEM Admin. Code rs. 335-6-12-.05(1) and 335-6-12-.11(1), the Operator is required to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

6. On March 18, 2016, the Operator submitted to the Department an NOI requesting NPDES coverage under NPDES General Permit ALR10000 (hereinafter "Permit") for regulated disturbance activities and discharges of treated stormwater from the Facility. The Department granted registration ALR10AAE6 to the Operator on May 10, 2016.

7. Pursuant to Part III. A. of the Permit, the Permittee shall design, install, and maintain effective erosion control and sediment controls, appropriate for site conditions. Sediment control measures, erosion control measures, and other site management practices must be properly selected based on site-specific conditions, must meet or exceed the technical standards outlined in 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") and the site-specific CBMPP prepared in accordance with Part III. E.

8. Pursuant to Part III. E. of the Permit, construction activity may not commence until a CBMPP has been prepared in a format acceptable to the Department and certified by a QCP as adequate to meet the requirements of this Permit. The Permittee shall properly implement and regularly maintain the controls, practices, devices, and measures specified in the CBMPP.

9. The Department inspected the Facility on March 6, 2018, and observed and documented that, although NPDES construction activity had commenced and was continuing, the Operator had not properly implemented and maintained effective BMPs in violation of Parts III. A. and E. of the Permit.

10. Pursuant of Part III. I. of the Permit, the permittee shall promptly take all reasonable steps to remove, to the maximum extent practical, pollutants deposited offsite or in any waterbody or stormwater conveyance structure.

11. During the inspection of the Facility on March 6, 2018, accumulations of sediment resulting from discharges at the Facility were observed and documented by the Department offsite, in violation of Part III. I. of the Permit.

12. Pursuant to Part I. C. 9. of the Permit, the Permittee is not authorized to discharge stormwater where the turbidity of such discharge will cause or contribute a substantial visible contrast with the natural appearance of the receiving water.

13. During the March 6, 2018, inspection, the Department observed and documented that the Operator had caused a substantial visible contrast in the natural appearance of the receiving water, in violation of Parts I. C. 9. of the Permit.

14. On March 14, 2018, a NOV was sent to the Operator by the Department as a result of the March 6, 2018, inspection. The NOV notified the Operator of deficiencies documented at the Facility, and required the Operator to submit to the Department, within ten (10) days of receipt of the NOV, a report prepared by a QCP showing steps that were taken at the Facility to correct the noted violations within ten (10) days of receipt of the NOV. The Department received the required report on April 3, 2018; however, to date, the site has not been certified by the QCP to be in compliance with the Permit.

15. The Department inspected the Facility on August 26, 2019, and observed and documented that, although NPDES construction activity had commenced and was continuing, the Operator had not properly implemented and maintained effective BMPs in violation of Parts III. A. and E. of the Permit.

16. During the inspection of the Facility on August 26, 2019, accumulations of sediment resulting from discharges at the Facility were observed and documented by the Department offsite, in violation of Part III. I. of the Permit.

17. During the August 26, 2019, inspection, the Department observed and documented that the Operator had caused a substantial visible contrast in the natural appearance of the receiving water, in violation of Parts I. C. 9. of the Permit.

18. On September 25, 2019, a NOV was sent to the Operator by the Department as a result of the August 26, 2019, inspection. The NOV notified the Operator of deficiencies documented at the Facility, and required the Operator to submit to the Department, within ten (10) days of receipt of the NOV, a report prepared by a QCP showing steps that were taken at the Facility to correct the noted violations within ten (10) days of receipt of the NOV. The Department has not received the required report at the writing of this Order.

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

#### CONTENTIONS

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 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 exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an Order issued by the Department shall not exceed \$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:** The Department considered the general nature of each violation, the magnitude and duration of each non-compliant discharge, their

effects, if any, on impaired waters, and any available evidence of irreparable harm to the environment or threat to the public. The Department determined the base penalty to be \$13,000.

B. THE STANDARD OF CARE: In consideration of this factor, the Department noted the standard of care taken by the Operator was not commensurate with the applicable regulatory requirements and increased the penalty by an additional \$6,500.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Operator avoided certain costs associated with proper implementation and maintenance of BMPs. Based on the Department's estimates of these delayed costs and the timeframe of non-compliance, the Department determined that the Operator did derive an economic benefit from these violations and increased the penalty by an additional \$2,700.

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 unaware of any historical violations previous to those addressed herein.

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

G. The Civil Penalty is summarized in the penalty synopsis.

H. 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.

#### OPERATOR CONTENTIONS

A. The Operator asserts that it did not develop the Highland Park at the Highlands subdivision, and did not build the drainage system and the detention basins. The drainage system and basins are not under the Operator's operational control. Sediment from erosion associated with the basin near lot 65 has impacted the wetlands behind lots 57 to 65 in the past (2015 to present).

B. Other builders have worked in Highland Park at the Highlands including Smart Living LLC, under permit ALR10BA61. Smart Living LLC had a Warning letter in March 2017 that mentioned sediment offsite and sediment accumulation in the basin.

C. The Operator contends that it did not gain any economic benefit from the noncompliance, as they have spent in excess of \$65,000 on sediment and erosion controls since 2018, and continue to spend money on repairs and maintenance every month during home construction on the site.

D. The Operator strives to use a standard of care that prevents sediment impacts to the wetlands and works to improve the standard of care by training employees in BMP installation and maintenance.

E. The Operator asserts that it undertook an extensive sediment remediation in the wetlands behind lots 57 to 65 in 2018 to resolve the NOV of March 14, 2018. The amount of sediment impact previously removed by the Operator in 2018, from the wetlands was certified to be in excess of 2,300 cubic yards. However, the amount of sediment loss previously from the Operator's facility home building land disturbance in 2018 was less than 300 cubic yards. Previous removal of the sediment satisfied ADEM requirements. The remediation area for the removal of the sediments was previously observed and verified on August 24, 2018, during an ADEM inspection. The previous removal of the additional sediment by the Operator provided water quality benefits to the overall watershed downstream of the facility. The Operator contends that the turbidity recorded by ADEM during the inspection on August 26, 2018, was due to sediment in the detention basin, ongoing erosion of the basin, and outfall that is not under its control.

F. The Operator asserts that sediment remediation is currently underway, in 2019, behind lot 57 and 58 to remove the accumulated sediment from the wetlands. Due to the dynamic nature of the intermittent stream in the wetlands, the sediment from previous impacts from sources other than the Operator's construction continues to flow down into the wetlands behind lots 57 and 58. The Operator acknowledges that sediment from lot 58 has impacted the

wetlands in 2018 and 2019, but much of the sediment in the remediation area is from previous sediment impacts from areas not under its control.

#### 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 (hereinafter collectively "Parties") agree to enter into this Consent Order with the following terms and conditions:

A. That the Operator shall pay to the Department a civil penalty in the amount of \$11,000 in settlement of the violations alleged herein within forty-five (45) days from the issuance of this Consent Order. Failure to pay the civil penalty within forty-five (45) days from the date of issuance of this Consent Order 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, within five (5) days of the date of issuance of this Consent Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. That, within ten (10) days of the date of issuance of this Consent Order, the Operator shall submit to the Department a detailed plan, prepared/certified by a QCP, for the removal and/or remediation of sediment and other pollutants deposited offsite and/or in State waters.

F. 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 NPDES General Permit ALR100000, and correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation.

G. That within seven (7) days of the completion of the activities required in paragraph F. 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 NPDES Permit ALR100000 have been implemented, all deficiencies have been corrected, and full compliance with the requirements of NPDES Permit ALR100000, has been achieved at the Facility, offsite conveyances, and affected State waters.

H. 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.

I. 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.

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

K. That, for purposes of this Consent Order only, the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. 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.

L. 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.

M. 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 the same.

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

O. 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.

P. 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.

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

R. 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.

DSL D HOMES (GULF COAST) LLC

D. Pierce  
(Signature of Authorized Representative)

DANNY PIERCE  
(Print Name of Authorized Representative)

MANAGER  
Title

Date Signed: 1/2/2020



ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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

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

### ATTACHMENT 1 - PENALTY SYNOPSIS

DSLH Homes (Gulf Coast) LLC – Highland Park at the Highlands Spanish Fort, Baldwin  
County NPDES ALR10AAE6

Violation	Number of Violations	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
Effective Best Management Practices (BMPs) not implemented and/or maintained	1	\$3,000	\$1,500	\$0
Discharge/accumulation of sediment offsite	1	\$5,000	\$2,500	\$0
Water Quality Standard violation	1	\$5,000	\$2,500	\$0
<b>Totals:</b>	<b>3</b>	<b>\$13,000</b>	<b>\$6,500</b>	<b>\$0</b>

Economic Benefit*:	\$2,700
Sub-Total:	\$22,200
Mitigating Factors*:	\$0
Ability to Pay*:	\$0
Other Factors*:	\$11,200
Amount of Initial Penalty:	\$22,200
Total Adjustments:	\$11,200
<b>Final Penalty:</b>	<b>\$11,000</b>

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