

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:)	
)	
City of Vestavia Hills)	
Municipal Separate Storm Sewer System (MS4))	
NPDES Permit No. ALS000017)	Consent Order No. 20-XXX-CWP
Vestavia Hills, Jefferson County, Alabama)	
)	
)	

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (“the Department”) and the City of Vestavia Hills, Alabama (“the Permittee”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17, as amended, the Alabama Water Pollution Control Act (“AWPCA”), Ala. Code §§ 22-22-1 to 22-22-14 (as amended), and the ADEM Administrative Code of Regulations (“ADEM Admin. Code”) promulgated pursuant thereto.

STIPULATIONS

1. The Permittee operates a municipal separate storm sewer system (“MS4”) located in Vestavia Hills, Jefferson County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to the AWPCA.
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 1388. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA.
4. On June 7, 2017, the Department issued the National Pollutant Discharge Elimination System (“NPDES”) Permit Number ALS000017 (“the Permit”) to the Permittee, which authorizes storm water discharges from the MS4 to waters of the State. The NPDES permit was effective July 1, 2017 and expires June 30, 2022.

5. Part II.A. of the Permit requires the development, revision, implementation, maintenance and enforcement of a Storm Water Management Program (“SWMP”) to control the quality of storm water discharged from the Permittee’s MS4. The requirements of the SWMP shall be met by the development and implementation of a storm water management program plan (“SWMPP”) which addresses the best management practices (“BMPs”), control techniques and systems, design and engineering methods, public participation and education, monitoring and other appropriate provisions designed to reduce the discharge of pollutants from the MS4. The activities and associated schedules outlined by the SWMPP or updates to the SWMPP are conditions of the Permit.

6. Part II.B.4. of the Permit requires the development, revision, implementation and enforcement of an ongoing program to control storm water runoff discharged to the Permittee’s MS4 from qualifying construction sites.

7. On November 7, 2019, the Department conducted an audit on the Permittee’s SWMP which included reviewing the SWMPP and the program for qualifying construction sites.

8. On November 12, 2019, the Department followed-up the audit with a request for additional documentation and a list of clarifying questions. The Permittee responded to the request for additional information on November 22, 2019.

9. On December 3, 2019, the Department issued the Permittee a Notice of Violation (“NOV”) for violation of the Permit. The Permittee responded to the NOV on January 17, 2020.

10. On January 31, 2020, the Permittee submitted the 2018-2019 Annual Report to the Department as required by the Permit. The Annual Report is a narrative report with general discussion of program elements, explanation of activities not fully implemented or completed, and result of activities completed. The 2018-2019 Annual Report covers the period of October 1, 2018 to September 30, 2019.

DEPARTMENT’S CONTENTIONS

11. Regarding Qualifying Construction Sites, the Permittee’s SWMPP that was in effect at the time of the audit stated that “Monthly inspections are required due to the Cahaba River’s impaired status resulting in Vestavia Hills’ sites being categorized as ‘Priority Construction

Sites.’ ” The SWMPP is required by the Permit to be developed and implemented to reduce the discharge of pollutants to the MS4 and are conditions of the Permit.

12. Based on information provided during the audit, review of the additional information submitted on November 22, 2019 and the Permittee’s response to the NOV submitted on January 17, 2020, the Department determined that the Permittee violated the SWMPP and Part II.B.4.6. of the Permit by failing to inspect priority construction sites at a minimum of monthly to verify use and proper maintenance of BMPs.

13. The Permittee’s 2018-2019 Annual Report states in Section 3.4.2, Activities Complete or In Progress, that for “Activity 6: Inspect sites in accordance with the frequency specified in the Permit” that “This activity was complete”. However, the Department determined that the Permittee failed to inspect priority construction sites on a monthly basis which is the frequency specified in the permit. The Permittee also failed to provide an explanation as to the reasons the program activity of inspecting construction sites in accordance with the Permit had not been completed or implemented. Thus, the Permittee violated Part IV.4.c.2 of the Permit by not providing an explanation of program activities that had not been completed or implemented in the 2018-2019 Annual Report. The Permittee failed to submit an accurate 2018-2019 Annual Report to the Department.

14. Pursuant to ADEM Admin. Code r. 335-6-6-.12(a)(1), a Permittee must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the AWPCA and the FWPCA and is grounds for enforcement action, for permit termination, revocation, and re-issuance, suspension, modification; or denial of a permit renewal application.

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 alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

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 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 that 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 AND BASE PENALTY: Based on the information available to the Department, violations of the Permit, ADEM Admin. Code div. 335-6 and the AWPCA were noted. The Department considered the general nature of each violation, the violations' effects, if any, on the receiving waters, and any available evidence of irreparable harm to the environment or threat to the public.

B. THE STANDARD OF CARE: By committing the violations alleged herein, the Permittee did not exhibit a standard of care commensurate with the applicable program requirements. In consideration of the standard of care manifested by the Permittee, the Department has enhanced the penalty.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department is not aware of any evidence indicating that the Permittee received any significant economic benefit from these violations.

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

E. HISTORY OF PREVIOUS VIOLATIONS: The Department is not aware of violations not otherwise addressed herein.

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

G. The civil penalty is summarized in Attachment 1.

H. The Department neither admits nor denies the Permittee's contentions, which are set forth below. 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 desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

PERMITTEE'S CONTENTIONS

17. The Permittee admits to its partial lack of timely inspection of certain construction sites permitted for land disturbance within the City of Vestavia Hills during the initial stages of implementing its inspection program (2018-2019) to fully meet "monthly" requirements as specified in our new individual MS4 permit. However, it asserts that the cause of this deficiency was related to failed inspection software for a small number of such construction sites. The Permittee further contends that each of the sites subject to the untimely inspections had approved BMP plans reviewed by the City and third party QCI/QCP inspections were performed in a timely manner. Upon determination of the software failure, the City immediately remedied the deficiency and has maintained a timely inspection history since that time. The City contends that there is no objective determination that its failure to inspect resulted in environmental harm. Furthermore, its standard of care was appropriate given its immediately implemented resolution of its software issue prior to commencement of the audit activity.

18. The Permittee admits to an error in submission of its 2018-2019 Annual Report, but denies substantive harm given the fact that the error was a result of an unintentional failure to edit standard language produced through partnership with the Storm Water Management Authority (SWMA) of Jefferson County.

19. The Permittee denies that it failed to provide an explanation as to the inspection deficiency as its correspondence following the initial receipt of the notice of violation produced a detailed explanation of the software deficiency.

20. The Permittee contends that it provided multiple efforts to mitigate and minimize alleged and potential environmental damage through execution of limitation of use covenants and easements dedicating multiple parcels of real estate for environmental stewardship purposes. It participated in multiple stream restoration projects and provided uncompensated leadership to multiple environmental regulation efforts.

21. As to the remaining contentions, the Permittee neither admits nor denies the Department's contentions.

22. The Permittee consents to abide by the terms of this Consent Order.

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 penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, as well as the need for timely and effective enforcement, and the Department believes that the penalty assessed below and the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Permittee (hereinafter collectively "Parties") agree to enter into this CONSENT ORDER with the following terms and conditions:

- A. Within **forty-five days** of the effective date of this Order, the Permittee agrees to pay the Department a civil penalty in the amount of \$8,000.00. Failure to pay the civil penalty within forty-five days of the effective date of this Order may result in the Department's filing a civil action in the Circuit Court of Montgomery to recover the civil penalty.
- B. That the Permittee shall meet the requirements of the Permit and SWMPP regarding qualifying construction sites not later than 90 days after the effective date of this Consent Order.

C. All penalties due pursuant to this 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. 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.

E. 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.

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

G. 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 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 shall be accompanied by the reasons (including documentation) for each extension and the proposed extension time. The Permittee shall submit this information so that it is received by 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 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.

H. 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 MS4 which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in other orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate. The Permittee shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if such future orders, litigation, or other enforcement action addresses new matters not raised in this Consent Order.

I. 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.

J. This Consent Order shall not affect the Permittee's obligation to comply with all applicable Federal, State, local laws, regulations, and permit conditions.

K. Final approval and entry into this Consent Order are subject to the requirements that the Department provide notice of proposed orders to the public, and that the public have at least thirty days within which to comment on the proposed Consent Order.

L. 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.

M. Any modification of this Consent Order shall be agreed to in writing and signed by both Parties.

N. 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 obligation to comply in the future with any permit.

Executed in duplicate, with each part being an original.

CITY OF VESTAVIA HILLS, ALABAMA

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

EXECUTED AND ISSUED:

By: Ashley C. Curry

By: _____

Its: MAYOR

Its: _____

Date: 6/23/20

Date: _____

By: Jeffrey D. Durr

Its: City Manager

Date: 6/25/2020

Attachment 1

**City of Vestavia Hills--Phase I MS4
Vestavia Hills, Alabama, Jefferson County
NPDES No. ALS000017**

Violation*	Number of Violations*	(A)	(B)	(C)
		Seriousness of Violation*	Standard of Care*	History of Previous Violations*
Failure to Implement BMPs outlined in SWMPP/Permit	1	\$ 5,000.00	\$ 5,000.00	\$ -
Failure to Submit accurate 2018-2019 Annual Report	1	\$ 500.00	\$ 500.00	\$ -

Additional Adjustments due to negotiations, receipt of additional information, or public comment	
Mitigating Factors (-)	
Economic Benefit (+)	
Ability to Pay (-)	
Other Factors (+/-)	-\$3,000.00
Total Adjustments (+/-)	-\$3,000.00

\$5,500.00	\$5,500.00	\$0.00
Total (A)	Total (B)	Total (C)
Base Penalty Total [Total (A) + Total (B) + Total (C)]		\$11,000.00
Mitigating Factors (-)		
Economic Benefit (+)		
Ability to Pay (-)		
Other Factors (+/-)		
INITIAL PENALTY		\$11,000.00
Total Adjustments (+/-)		-\$3,000.00
FINAL PENALTY		\$8,000.00

Footnotes

*See the "Findings" portion of the Order for a detailed description of each violation and the penalty factors