

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

WAITES CONSTRUCTION  
TURNER 280 BORROW PIT  
HARPERSVILLE, SHELBY COUNTY, ALABAMA

EXPIRED NPDES PERMIT NO. ALG890550

Consent Order No. ??-XXX-CWP

**PREAMBLE**

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management ("the Department") and Waites Construction ("the Operator") 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 Operator is an Alabama corporation engaged in a surface mining operation less than five acres in size referred to as the Turner 280 Borrow Pit ("Facility") located on the northwest corner of AL 76 and US Highway 280 in Harpersville, Shelby County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to Lay Lake, a water of the State.

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. The following references and acronyms are used in this 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
eNOI	Electronic Notice of Intent
NOI	Notice of Intent
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
WL	Warning Letter

#### **DEPARTMENT'S CONTENTIONS**

5. Pursuant to Ala. Code § 22-22-9(i)(3), "[e]very person, prior to discharging any new or increased pollution into any waters of this state, shall apply [for a permit] and must obtain such permit before discharging such pollution."

6. On July 5, 2017, the Department issued NPDES permit coverage for the Facility under NPDES General Permit ALG890550 ("the General Permit"). This coverage expired on January 31, 2018.

7. On September 18, 2018, the Department issued a WL to the Operator due to failure to submit a NOI. The WL required the Operator to submit to the Department, within fifteen days of receipt of the WL, a complete and correct Small Mining General NPDES Permit (ALG890000) Notice of Intent (NOI) requesting permit coverage. The Operator received the WL on September 21, 2018.

8. On May 16, 2019, the Department issued a NOV to the Operator due to failure to submit a NOI. The NOV required the Operator to submit to the Department, within fifteen days of receipt of the NOV, a complete and correct Small Mining General NPDES Permit (ALG890000) Notice of Intent (NOI) requesting permit coverage. The Operator received the NOV on May 20, 2019. On December 3, 2019, the Department received an eNOI requesting coverage under the Small Mining General Permit

9. During an inspection of the Facility on July 24, 2019, the Department documented that the Operator was conducting regulated disturbance activities which could discharge pollutants to a water of the state without NPDES permit coverage, in violation of Part

II.A.2 of the General Permit, ADEM Admin. Code r. 335-6-12-.05(1), and ADEM Admin. Code r. 335-6-12-.11(1).

10. Pursuant to ADEM Admin. Code r. 335-6-12-.21(5)(f), the Operator shall ensure that "(p)roper management and disposal of solid, toxic, or hazardous wastes resulting from activities authorized by this chapter are performed as required by Departmental rules"

11. During the inspection of the Facility on July 24, 2019, the Department documented that containers, debris, trash, garbage, etc. and other solid waste materials were not managed as required by the regulations to prevent potential discharge of such materials and associated pollutants into a water of the State. The Department observed that the Operator failed to properly manage and dispose of solid waste, in violation of ADEM Admin. Code r. 335-6-12-.21(5)(f).

12. Pursuant to ADEM Admin. Code r. 335-6-12-.30(2), an Operator shall properly prepare, implement and maintain a Spill Prevention, Control and Countermeasures (SPCC) Plan in accordance with 40 CFR Part 112 and ADEM Admin Code r. 335-6-6-.12(r). The Operator shall immediately clean up, remediate, or remove and dispose of any soil contaminated by hazardous substances, paints, fuels or chemical spills.

13. During the inspection of the Facility on July 24, 2019, the Department documented that empty chemical containers and soil contaminated by chemical/fuel spills were not managed as required by the Permit to prevent potential discharge of such materials and associated pollutants into a water of the State. The Department observed that the Operator failed to properly implement and regularly maintain a SPCC Plan for the prevention and minimization of the discharge of pollutants, in violation of ADEM Admin. Code r. 335-6-12-.30(2).

14. Pursuant to ADEM Admin. Code r. 335-6-12-.21(1), activity may not commence or continue without implementation and maintenance of BMPs specified in the site BMP Plan certified by a QCP. The BMP Plan 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").

15. During the inspection of the Facility on July 24, 2019, the Department observed that the Operator had not properly implemented and regularly maintained effective BMPs, in violation of ADEM Admin. Code r. 335-6-12-.21(1).

16. Pursuant to ADEM Admin. Codes r. 335-6-12-.21(5), the operator shall ensure that "(a) BMPs shall be fully implemented and regularly maintained in accordance with the Alabama Handbook, recognized practices, effective industry standard pollution control practices, requirements of the CBMPP, the requirements of this Chapter, and consistent with the requirements of the AWPCA and regulations promulgated pursuant thereto; [and] (b) Effective BMPs shall be implemented to the maximum extent practicable to prevent offsite sedimentation and deposition of construction site wastes."

17. During an inspection of the Facility on July 24, 2019, the Department observed that sediment accumulation in the on-site ditch was excessive, resulting in the significant potential for noncompliant discharges in violation of ADEM Admin. Code r. 335-6-12-.21(5).

18. Pursuant to ADEM Admin. Code r. 335-6-12-.05(5), the Operator is required to clearly post and maintain signs at the entrance or other easily accessible location(s) to adequately identify the site, prior to commencement of and during NPDES mining activity until the permit is properly terminated. Such sign shall display the name of the Permittee, the entire NPDES permit number, the facility or site name, and other descriptive information deemed appropriate by the Permittee at the entrance or other easily accessible location(s) to adequately identify the site, unless approved otherwise in writing by the Department.

19. During the inspection of the Facility on July 24, 2019, the Department observed that the facility ID was not posted, in violation of ADEM Admin. Code r. 335-6-12-.05(5).

20. Pursuant to ADEM Admin. Code r. 33-6-12-.05(5), "[p]recipitation shall be measured and recorded in tenths of an inch by the operator or an individual under the direction of the operator, using continuous recorders, daily readings of an onsite precipitation



gauge, or daily readings of an offsite precipitation gauge located adjacent to or in close proximity to the facility.”

21. During the inspection of the Facility on July 24, 2019, the Department did not observe a rain gauge at the Facility, adjacent to the Facility or near the Facility that could be used to measure and record precipitation, in violation of ADEM Admin. Code r.335-6-12-.26(4).

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

#### **PENALTY**

23. 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 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: The Department noted that failure to obtain permit coverage prior to commencement of regulated activities and the failure to submit timely responses to enforcement were non-technical and easily avoidable violations. In consideration of the standard of care manifested by the Operator, the Department has enhanced the penalty.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has considered that the Operator received an economic benefit by avoiding and delaying certain costs associated with obtaining valid NPDES permit coverage and enhanced the penalty accordingly.

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 may have had upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Operator has a history of previous violations. The Department issued a WL to the Operator for the Munford Borrow Pit, ALG890500, on September 18, 2008, for operating without valid NPDES permit coverage. The Department issued a further NOV for the site on February 25, 2019, after an inspection showed the site operating without valid NPDES permit coverage. The Department has enhanced the penalty due to these previous violations.

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

G. The civil penalty is summarized in Attachment 1.

H. 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.

#### **OPERATOR'S CONTENTIONS**

24. The Operator neither admits nor denies the Department's contentions.
25. The Operator consents to abide by the terms of this Consent Order.

#### **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 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 Operator (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 Operator agrees to pay the Department a civil penalty in the amount of \$12,385.00. 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. 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

C. Immediately upon the effective date of this Order, the Operator shall cease all mining and related activity at the Facility other than BMP implementation / maintenance, and sediment removal / remediation. Mining and related activity other than BMP implementation / maintenance, and sediment removal / remediation is not authorized to resume until approved in writing by the Department.

D. Immediately upon the effective date of this Order, the Operator shall take 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.

E. Within **ten days** of the effective date of this Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

F. Within **fifteen days** of the effective date of this 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 BMP Plan, and ADEM Admin. Code chap. 335-6-12, and shall correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation, if applicable.

G. Within **thirty days** of the effective date of this Order, the Operator shall submit to the Department a certification signed by a QCP that effective BMPs that meet or exceed the technical standards outlined in the Alabama Handbook, the site BMP 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.

H. Within **thirty days** of the effective date of this Order, the Operator shall prepare and submit to the Department a complete application including fees for coverage under the ADEM Small Mining General Permit, ALG890000. If the Department determines through its review of the submitted application package for permit issuance that the submittal is deficient, then the Operator shall modify the application so that it is complete and correct. Modifications to the application package, if required, shall be submitted to the Department so that they are received no later than seven days after the Operator's receipt of the Department's comments.

I. After the effective date of this Order, the Operator shall pay stipulated penalties for each day it fails to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by Paragraphs G. and H. contained herein or any other requirement date, except for *Force Majeure* acts as hereinafter defined, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1 <sup>st</sup> to 30 <sup>th</sup> day	\$100
31 <sup>st</sup> to 60 <sup>th</sup> day	\$200
After 60 days	\$300



If the Operator fails to meet any milestone or any assigned date for a period of ninety days after any required date described in Paragraphs G. and H., then the Department reserves the right to file a new action against the Operator.

J. The cumulative stipulated penalties described in Paragraph I. above shall under no circumstances exceed \$12,000.00. Once stipulated penalties of \$12,000.00 are due to the Department and violation(s) continue to occur, then the Department shall be free to issue additional orders or to file suit against the Operator in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Order.

K. The Operator shall submit payment of stipulated penalties, as described in Paragraph I, to the Department so that they are received by the Department no later than **thirty days** following the completion of the milestone or requirement. Notification to the Operator by the Department of the assessment of any stipulated penalty is not required.

L. 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.

M. 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.

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

O. 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 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 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 shall be accompanied by the reasons (including documentation) for each extension and the proposed extension time. The Operator 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 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 it is not obligated to do so.

P. 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 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 Operator 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.

Q. 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.

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

S. 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.

T. 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.

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

V. 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 its obligation to comply in the future with any permit.

Executed in duplicate, with each part being an original.

WAITES CONSTRUCTION

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

EXECUTED AND ISSUED:

By: JE WAITES

By: \_\_\_\_\_

Its: Vice President

Its: \_\_\_\_\_

Date: 2/25/2020

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

# Attachment 1

## Waites Construction - Turner 280 Borrow Pit - Expired ALG890550 Shelby County Expired ALG890550

Violation*	Number of Violations*	(A)	(B)	(C)
		Seriousness of Violation*	Standard of Care*	History of Previous Violations*
Failure to implement/maintain adequate BMPs	1	\$ 2,500.00	\$ -	\$ -
Operating without a Permit/Appropriate Permit	1	\$ 3,000.00	\$ 1,500.00	\$ -
Failure to adequately respond to enforcement	1	\$ 3,000.00	\$ 1,500.00	\$ -
Failure to monitor in accordance with the rules	1	\$ 500.00	\$ -	\$ -
Failure to operate in accordance with the rules	1	\$ 1,000.00	\$ 500.00	\$ -
Failure to implement/maintain adequate SPCC	1	\$ 2,500.00	\$ -	\$ -
		\$12,500.00	\$3,500.00	\$0.00
		Total (A)	Total (B)	Total (C)
<b>Additional Adjustments due to negotiations, receipt of additional information, or public comment</b>  <div> Mitigating Factors (-) <input type="text"/>  Economic Benefit (+) <input type="text"/>  Ability to Pay (-) <input type="text"/>  Other Factors (+/-) <input type="text" value="-5,000.00"/>  Total Adjustments (+/-) <input type="text" value="-5,000.00"/> </div>		<b>Base Penalty Total</b> [Total (A) + Total (B) + Total (C)]		\$16,000.00
		<b>Mitigating Factors (-)</b>		<input type="text"/>
		<b>Economic Benefit (+)</b>		\$1,385.00
		<b>Ability to Pay (-)</b>		<input type="text"/>
		<b>Other Factors (+/-)</b>		<input type="text"/>
		<b>INITIAL PENALTY</b>		\$17,385.00
		<b>Total Adjustments (+/-)</b>		-\$5,000.00
		<b>FINAL PENALTY</b>		\$12,385.00

### Footnotes

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