

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:)
)
MS Industries II, LLC)
)
MSI Preparation Site)
NPDES Notice of Registration No. ALR10AT61)
Town Creek, Lawrence County, Alabama)
)
Masterson Site)
Draft NPDES Permit No. AL0082759 (Pending))
Town Creek, Lawrence County, Alabama)

ORDER NO. XX-XXX-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter “the Department”) and MS Industries II, LLC (hereinafter “the Permittee”), pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter “AWPCA”), Ala. Code §§ 22-22-1 through 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 Permittee is a domestic limited liability company constructing a site known as the MSI Preparation Site (hereinafter “the Site”). The Site is located on County Road 135 near the town of Town Creek, Lawrence County, Alabama.

2. The Permittee is also the owner of a mining site known as the Masterson Site (hereinafter “the Mine”) located adjacent to the Site at 2228 County Road 135 near the town of Town Creek, Lawrence County, Alabama.

3. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

4. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), 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. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.).

5. On March 30, 2012, pursuant to ADEM Admin. Code r. 335-6-6-.23, the Department issued National Pollutant Discharge Elimination System (hereinafter “NPDES”) General Permit ALG850000 for non-coal, non-metallic construction aggregate, construction sand and gravel, chert, or dirt mining activities. The General Permit ALG850000 became effective April 1, 2012.

6. On April 1, 2011, pursuant to ADEM Admin. Code r. 335-6-6-.23, the Department issued National Pollutant Discharge Elimination System (hereinafter “NPDES”) General Permit ALR100000 for discharges from construction activities that result in a total land disturbance of one acre or greater. The General Permit ALR100000 became effective April 1, 2011.

7. On January 9, 2015, the Department granted authorization ALR10AT61 registration for the Site under (hereinafter “the Registration”) to the Permittee for coverage under NPDES General Permit ALR100000 for the Site. NPDES General Permit ALR100000 is scheduled to expire on March 31, 2016.

DEPARTMENT’S CONTENTIONS

8. Pursuant to ADEM Admin. Code r. 335-6-9-.05(1), “[a]ll surface mining operations must have an NPDES permit issued by the Department....” ADEM Admin. Code r. 335-6-9-.02(j) states that “surface mining’ shall not be interpreted to include...advance prospecting.”

9. Pursuant to ADEM Admin. Code r. 335-6-9-.02(a), “[a]dvance prospecting’ shall mean the removal of overburden for the purpose of determining the location, quality or quantity of a natural deposit in an area not to exceed two acres per forty acre tract.”

10. On or about August 15, 2014, the Department received a letter from the Permittee notifying the Department of its plans to advance prospect an area not to exceed one acre in size within a forty-five acre tract. Upon information and belief, the area referenced in the letter coincides with the location of the Mine.

11. On September 8, 2014, the Department received a Notice of Intent (hereinafter “NOI”) submitted by the Permittee requesting NPDES coverage under General Permit ALG850000, for regulated mining activities and discharges of treated stormwater from the Mine.

12. After receipt of the NOI, the Department notified the Permittee that the activities proposed at the Mine were not eligible for coverage under General Permit ALG850000 due, in part, to the proposed mining of clay materials.

13. On November 5, 2014, the Department received an application for initial issuance of an NPDES individual permit for the Mine. The application indicated that the Permittee proposed to extract dirt and/or chert, sand and/or gravel, shale and/or common clay, non-asphaltic sandstone, bauxitic clay, slate, and iron compounds. The proposed permit based on the application was assigned the NPDES Permit Number of AL0082759 (hereinafter “the Draft Permit”).

14. On February 11, 2015, after making a preliminary determination that compliance by the Permittee with the terms and conditions of the Draft Permit would not result in violations of applicable State water quality standards designed to protect human health and the environment, the Department placed the Draft Permit on public notice. The thirty-day comment period associated with the public notice which was scheduled to expire on March 13, 2015, was extended to April 3, 2015.

15. To date, the Department has not made a determination regarding issuance of

the Draft Permit.

16. On April 1, 2015, the Department conducted a Compliance Evaluation Inspection (hereinafter “the Inspection”) at the Site and at the Mine.

17. During the Inspection, the Department observed that the Permittee had at the Mine disturbed an area greater than two acres per forty acre tract for what appeared to be the purpose of determining the location, quality, or quantity of the natural deposits. The area of disturbance exceeded that allowed as “advance prospecting;” therefore, the Permittee was conducting surface mining without coverage under a valid NPDES Permit at the Mine, in violation of ADEM Admin. Code r. 335-6-9-.05(1).

18. During the Inspection, the Department further observed that the Permittee conducted surface mining activities in areas both within and outside of the proposed permit boundary provided in the application for the Draft Permit for the Mine.

19. ADEM Admin. Code r. 335-6-9-.02(k) states that “Surface Mining Operation’ shall mean all of the premises, facilities, roads and equipment used for the process of surface mining in a designated area.”

20. During the Inspection, the Department noted that the Permittee improved an existing farm road connecting the Site and the Mine. The Department also noted that the Site and the improved farm road were used in support of surface mining, thereby incorporating the Site and the farm road into the unpermitted surface mining operation at the Mine.

21. ADEM Admin. Code r. 335-6-12-.21(1) provides that commencement and/or continuation of NPDES construction activity is prohibited unless effective Best Management Practices (hereinafter “BMPs”) are implemented and maintained.

22. During the Inspection, the Department noted that the Permittee had installed silt fences along the improved farm road as BMPs; however, the BMPs were improperly implemented and maintained, in violation of ADEM Admin. Code r. 335-6-12-.21(1).

23. The Department neither admits nor denies the Permittee’s contentions, which are set forth below. 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.

PERMITTEE'S CONTENTIONS

24. The Permittee received no comments, questions or feedback from the Department in response to the Permittee's letter of August 14, 2014 notifying the Department of its intention to engage in advance prospecting.

25. Pursuant to ADEM Admin. Code r. 335-6-9-.02(a), advance prospecting is defined as "**the removal of overburden** for the purpose of determining the location, quality or quantity of a natural deposit in an area **not to exceed 2 acres per 40 acre tract.**" (Emphasis added). The removal of up to 2 acres of overburden necessarily requires a temporary stockpile area of substantially the same size, which is not contemplated by, or addressed in, ADEM Admin. Code r. 335-6-9-.02(a).

26. There is no mention of, or reference to, a "total disturbance area" of 2 acres in ADEM Admin. Code r. 335-6-9-.02(a). To the contrary, this Regulation speaks only to "the removal of overburden", i.e., up to 2 acres per 40 acre tract. The need to temporarily store or stockpile 2 acres of overburden would clearly result in an allowable land disturbance area of greater than 2 acres.

27. The disturbed areas on and around the Mine and made the basis of the violations alleged by the Department are located on two separate tracts of land owned by the Permittee, one tract comprised of 45 acres and an adjoining tract comprised of 40 acres.

28. Pursuant to ADEM Admin. Code r. 335-6-9-.02(a), the Permittee was entitled to advance prospect both tracts of land by removing up to 2 acres of overburden from each (a total of 4 acres) because both tracts are at least 40 acres in size. The disturbed areas noted in the Department's Inspection were the natural result of removing and stockpiling approximately 4 acres of overburden as allowed under ADEM Admin. Code r. 335-6-9-.02(a), and the

Permittee denies that it conducted or engaged in inappropriate advance prospecting or unpermitted surface mining (as alleged by the Department).

29. On April 30, 2015, the Permittee and the Department met in Montgomery, Alabama and held an informal conference (hereinafter "the Conference") for the purpose of discussing the Inspection and the Department's observations. The Conference was requested by the Permittee. Following the Conference, the Permittee implemented and constructed numerous, additional BMP's throughout the Mine and the Site, and generally further stabilized the disturbed areas noted in the Inspection. The Permittee voluntarily provided evidence of these improvements and enhanced BMP's to the Department by letter dated June 3, 2015.

30. The Permittee neither admits nor denies the Department's contentions. After careful consideration, however, and in the spirit of good faith and compromise, the Permittee has agreed to resolve the violations alleged by the Department so as to avoid and eliminate the unnecessary expenditure of additional time and resources (on the parts of both the Permittee and the Department) that would accompany further proceedings involving the alleged violations. The Permittee has concluded that agreeing to this Consent Order is in its best interests, and therefore it consents to abide by the terms of this Consent Order.

PENALTY FACTORS

31. 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 that delayed compliance may have conferred 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 \$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:** In arriving at the civil penalty, the Department considered the general nature of the violations and their effects, if any, on impaired waters, and any available evidence of irreparable harm to the environment or threat to public.

B. **THE STANDARD OF CARE:** The Department noted that the violations of conducting a surface mining operation without a valid NPDES permit and adequately implementing BMPs were easily avoidable.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Permittee has delayed certain costs associated with obtaining valid NPDES permit coverage prior to initiating a surface mining operation. The Department is unaware of any other avoided costs not otherwise addressed by compliance with this order. Based on the Department's estimates of these delayed costs and the timeframe of noncompliance, the Department believes that the Permittee derived no economic benefit from these violations.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT:** The Department has been made aware of efforts by the Permittee since the Conference to enhance existing BMP's, construct additional BMP's and generally stabilize the disturbed areas in and around the Site and the Mine.

E. **HISTORY OF PREVIOUS VIOLATIONS:** The Permittee has no history of violations prior to those noted herein.

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

G. **OTHER FACTORS:** It should be noted that this Consent Order is a negotiated settlement and, therefore, the Department has compromised on 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 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 six 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 “the Parties”) agree to enter into this CONSENT ORDER with the following terms and conditions:

A. The Permittee shall, within forty-five days after issuance of this Order, pay to the Department a civil penalty in the amount of \$6,000.00 for the violations stated herein.

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
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. The Permittee shall take immediate action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Mine and the Site.

D. The Permittee shall not conduct surface mining at the Mine until coverage under an NPDES permit is obtained for the operation. For the purposes of this Order, activities solely for the purpose of BMP implementation and/or maintenance are not considered “surface mining.”

E. The Permittee shall submit an updated application for the Draft NPDES Permit Number AL0082759 to include all areas of the surface mining operation, including the area currently addressed by NPDES Registration ALR10AT61 and the connecting farm road. The updated application shall be submitted to the Department so that it is received not later than thirty days after issuance of this Order. If the Department determines through its review of the application that the submittal is not complete, then the Permittee shall modify the submittal so that it is complete. Any such modification(s) to the application shall be submitted to the Department so that it is received no later than thirty days after receipt of the Department's comments.

F. This Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

G. 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 the 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 the Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

H. 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.

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

J. 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 that are beyond the

reasonable control of the Permittee, including its contractors and consultants, that could not be overcome by due diligence (i.e., causes that 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 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 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.

K. 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 Mine and/or Site that would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed by 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, and the Permittee 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.

L. 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.

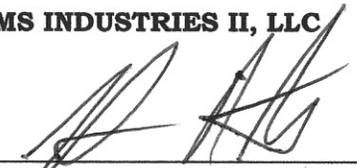
M. Should any provision of this Consent Order be declared by a court of competent

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.

N. Any modifications of this Consent Order must be agreed to in writing and signed by both Parties.

O. 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 obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

MS INDUSTRIES II, LLC	ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
By:  _____	By: _____
Its: <u>Chief Executive Officer</u> _____	Its: _____
Date: <u>6-26-15</u> _____	Date: _____

Attachment 1

**MS Industries II, LLC – MSI Preparation Site and Masterson Site
Town Creek, Lawrence County
ALR10AT61 and AL0082759 (Pending)**

Violation*	Number of Violations*	(A)	(B)	(C)
		Seriousness of Violation*	Standard of Care*	History of Previous Violations*
Operating a surface mining operation without a valid NPDES Permit	1	\$ 3,000.00	\$ 3,000.00	\$0.00
Improperly implementing BMPs	1	\$500.00	\$500.00	\$0.00

Additional Adjustments due to negotiations, receipt of additional information, or public comment	
Mitigating Factors (-)	
Economic Benefit (+)	
Ability to Pay (-)	
Other Factors (+/-)	-\$1,000.00
Total Adjustments (+/-)	-\$1,000.00

\$3,500.00	\$3,500.00	\$0.00
Total (A)	Total (B)	Total (C)
Base Penalty Total [Total(A) + Total(B) + Total(C)]		\$7,000.00
Mitigating Factors (-)		
Economic Benefit (+)		
Ability to Pay (-)		
Other Factors (+/-)		
INITIAL PENALTY		\$7,000.00
Total Adjustments (+/-)		-\$1,000.00
FINAL PENALTY		\$6,000.00

