

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463
Montgomery, Alabama 36130-1463
(334) 271-7700 ■ FAX (334) 271-7950

February 6, 2012

CERTIFIED MAIL

DEWAYNE OAKLEY
OAKLEY EXCAVATING, INC
4980 HWY 157
FLORENCE AL 35057

RE: Final Consent Order No 12-065-CWP
Tract 1 of Crosspoint Estates
Registration ALR16E243
Lauderdale County (077)

Dear Mr. Oakley:

Please find the enclosed Special Order by Consent Order which requires you to take certain actions in regard to alleged violations of the Alabama Water Pollution Control Act.

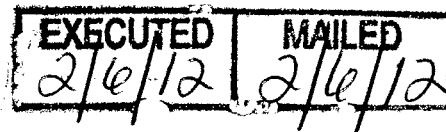
The draft order was made available for public review for a period of 30 days beginning on December 14, 2011. No public comments were received.

The enclosed Special Order by Consent is effective immediately. Please note that the assessed civil penalty is due in full on or before March 5, 2012.

Should you have any questions concerning this matter, please contact Heather Byars at hbyars@adem.state.al.us or (256) 353-1713.

Sincerely,

Steven O. Jenkins, Chief
Field Operations Division



SOJ/hbb

Enclosure

cc: Thomas L. Johnston, ADEM
Valerie Jackson, ADEM
Scott Huges, ADEM
Edward Poolos, ADEM



ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

OAKLEY EXCAVATING, INC
CROSSPOINT ESTATES – TRACT 1
T2S, R11W, S33
FLORENCE, LAUDERDALE COUNTY, ALABAMA
NPDES REGISTRATION NO. ALR168243

ORDER 12-065-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and Oakley Excavating, Inc. (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 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 Operator is an Alabama corporation which is constructing the residential subdivision, Tract 1 of Crosspoint Estates (hereinafter "Facility") located in T2S, R11W, S33 near the intersection of Hwy 133, Cox Creek Parkway, and County Road 41 in Florence, Lauderdale 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 Cox 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 (2006 Rplc. Vol.).

3. 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

Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22A-14 (2006 Rplc. Vol.).

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
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional
UT	Unnamed Tributary
WL	Warning Letter

5. The Operator has indicated on the NOR that the Permittee is Oakley Excavation. Information obtained from the Secretary of State indicates the Operator's Business Entity name is actually Oakley Excavating, Inc.

6. 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.

7. During an inspection of the Facility on August 25, 2011, the Department documented that the Operator had not re-registered for and obtained NPDES coverage, although regulated disturbance activities and/or discharges were continuing.

8. 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").

9. During the inspections of the Facility on July 19th, August 25th, and September 27, 2011, the Department documented that, although NPDES construction activity had commenced and was continuing, the Operator had not properly implemented and maintained effective BMPs in violation of ADEM Admin. Code r. 335-6-12-.21(1).

10. On August 1, 2011 a WL was sent to the Operator by the Department as a result of the July 19, 2011 inspection. The WL notified the Operator of areas of concern noted during the inspection and requested confirmation detailing how and when corrective action was taken to address these specified areas. The required information has not been received by the Department.

11. On August 29, 2011 a NOV was sent to the Operator by the Department as a result of the August 25, 2011 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 fifteen days of receipt of the NOV. The required report has not been received by the Department.

12. Ala. Code § 22-22-9(e) 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) by failing to respond to the NOV.

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

14. 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

15. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), 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 be less than \$100.00 or 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 violation, their effects, if any on impaired waters, and any available evidence of irreparable harm to the environment or threat to the public.

B. **THE STANDARD OF CARE:** In considering the standard of care manifested by the Operator, the Department noted that violations continued to be observed at the Facility after issuing less formal enforcement.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Operator has avoided and/or delayed certain costs associated with maintaining a valid NPDES registration and proper implementation and maintenance of BMP's.

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 violation upon the environment.

E. **HISTORY OF PREVIOUS VIOLATIONS:** On August 29, 2011 a NOV was sent to the Operator by the Department as a result of the August 25, 2011 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 fifteen days of receipt of the NOV. The required report has not been received by the Department.

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 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.

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. (2006 Rplc. Vol.), 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 \$15,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five 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. The Operator agrees 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. The Operator agrees to 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. The Operator agrees that, within five days of receipt of this Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. The Operator agrees that, within thirty days of receipt 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 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.

F. The Operator agrees that, within seven days of the completion of the activities required in paragraph E 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.

G. The Parties agree 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.

H. The Parties agree 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.

I. The Operator agrees that the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

J. 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 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.

K. The Parties agree 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.

L. The Parties agree 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 same.

M. The Parties agree that this Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

N. The Parties agree 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.

O. The Parties agree 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.

P. The Parties agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

Q. The Parties agree 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.

OAKLEY EXCAVATING, INC

Dewayne Oakley
(Signature of Authorized Representative)

Dewayne Oakley
(Print Name of Authorized Representative)

President
Title

Date Signed: 12/6/2011

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Lance R. LeFleur
Lance R. LeFleur
Director

Date Signed: 2/6/2012

Penalty Synopsis - Crosspoint Estates

Violation	Number of Violations	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
Operating an NPDES construction site without NPDES coverage	1	\$5,000		
Commencing and continuing NPDES construction activity without having implemented effective BMPs...	3	\$5,175		
Failure to respond to a Notice of Violation	1	\$2,500	\$625	
Totals:	8	\$12,675	\$625	\$0
Economic Benefit*:				\$1,700
Mitigating Factors:				\$0
Ability to Pay*:				\$0
Other Factors*:				\$0
Final Penalty:				\$15,000.00


*Refer to the "Findings" of the Order for a description of each penalty factor.

ADMINISTRATIVE ORDER CERTIFICATE OF SERVICE

I, Steven O. Jenkins, do hereby certify that I have served the executed Administrative Order Number 12-065-CWP upon the person listed below by sending the same, postage paid, through the United States Mail, Certified Mail Receipt # **91 7108 2133 3935 0334 4331**, with instruction to forward and return receipt, to:

MR DEWAYNE OAKLEY
OAKLEY EXCAVATING, INC
4980 HIGHWAY 157
FLORENCE AL 35057

Done this 6th day of February, 2012



Steven O. Jenkins, Chief
Field Operations Division
Alabama Dept. of Environmental Management