

ONIS "TREY" GLENN, III  
DIRECTOR



Alabama Department of Environmental Management  
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Montgomery, Alabama 36130-1463  
(334) 271-7700  
FAX (334) 271-7950

BOB RILEY  
GOVERNOR

SEP - 2 2009

CERTIFIED MAIL 91 7108 2133 3936 6586 7723  
RETURN RECEIPT REQUESTED

Mr. Ronald Davis  
Davis Sand & Gravel  
Bama Concrete Products Company, Inc.  
P.O. Box 1099  
Tuscaloosa, AL 35403

RE: Final Consent Order  
NPDES Permit No. AL0061328  
Cypress Pit  
Hale County (065)

Dear Mr. Gardner:

Please find the enclosed Consent Order which requires you to take certain actions at the Cypress Pit in regard to alleged violations of the Alabama Water Pollution Control Act. This Consent Order has been issued with the consent of Bama Concrete Products Company, Inc. Please note that the assessed civil penalty is due in full within 365 days.

Sincerely,

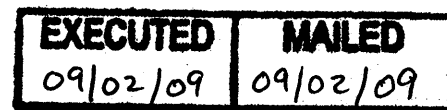
James E. McIndoe, Chief  
Water Division

JEM/sps

File: ECO/1413

Enclosure

cc: Olivia Rowell, ADEM Office of General Counsel  
Vernon H. Crockett, ADEM NPDES Enforcement Branch  
Samantha P. Sims, ADEM NPDES Enforcement Branch



Birmingham Branch  
110 Vulcan Road  
Birmingham, AL 35209-4702  
(205) 942-6168  
(205) 941-1603 (Fax)

Decatur Branch  
2715 Sandlin Road, S.W.  
Decatur, AL 35603-1333  
(256) 353-1713  
(256) 340-9359 (Fax)



Mobile Branch  
2204 Perimeter Road  
Mobile, AL 36615-1131  
(251) 450-3400  
(251) 479-2593 (Fax)

Mobile - Coastal  
4171 Commanders Drive  
Mobile, AL 36615-1421  
(251) 432-6533  
(251) 432-6598 (Fax)

**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF: )

Davis Sand & Gravel )

Bama Concrete Products Company, Inc. )

Cypress Pit )

Hale County, AL )

NPDES PERMIT AL0061328 )

ORDER NO. 09-098-CWP

**PREAMBLE**

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Davis Sand & Gravel, Bama Concrete Products Company, Incorporated (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, 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 operates the Cypress Pit (hereinafter the "Pit") located in Hale County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 through 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 22-22-14 (2006 Rplc. Vol.).

4. The Department issued National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number AL0061328 (hereinafter "Permit") to the Permittee on January 31, 2003, establishing limitations on the discharge of pollutants from such point source, designated therein as outfall number 001 to an Unnamed Tributary (hereinafter "UT") into Millian Creek and the groundwater, both a water of the State. The Permit requires that the Permittee monitor its discharges and submit periodic Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. The Permit also requires that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permit.

5. ADEM Admin. Code r. 335-6-9-.05 states that all surface mining operations must have an NPDES permit issued by the Department. Furthermore, Part II. B. 10. of the Permit states that if the Permittee intends to continue to discharge beyond the expiration date of the Permit, the Permittee shall file with the Department a complete permit application for reissuance of the Permit at least 180 days prior to its expiration.

6. The Department sent a Need to Reapply letter to the Permittee on February 28, 2007 and May 29, 2007. The Department received an application from the Permittee for permit renewal on November 10, 2008; however, the Permit had expired on February 1, 2008. The Permittee has been operating without a valid NPDES permit since February 1, 2008.

7. The Permittee failed to submit the third and fourth quarter 2007 DMRs to the Department by the date required in the Permit.

8. The Department conducted an inspection at the Pit on September 5, 2007, and found the following deficiencies and violations:

- Existing pollution control structures and implementation of management practices did not appear to be consistent with the approved Pollution Abatement/Prevention plan on file with the Department, as required by the Permit;
- An acceptable method for sub-surface withdrawal of discharges has not been

implemented at outfall 001-E as required by the Permit;

- Old equipment, containers, debris, trash, garbage, etc. and other solid waste materials have not been managed as required by the Permit to prevent potential discharge of such materials and associated pollutants into the waters of the State;
- Open burning of materials has occurred onsite leaving residue behind, which could result in a significant potential for unpermitted discharges of pollutants into waters of the State.
- Spill Prevention Control and Countermeasures (hereinafter "SPCC") for onsite fuel tanks, chemical tanks, or containers have not been fully implemented or maintained according to Permit requirements or the certified SPCC plan submitted by the Permittee to the Department;
- Soil and material contaminated by diesel fuel and used waste oil spills have not been properly remediated resulting in the potential for uncontrolled discharges of hydrocarbons and other pollutants into waters of the State;
- The NPDES Permit number was not displayed on the Pit sign.

9. The Department conducted an inspection at the Pit on January 31, 2008, and found the following deficiencies and violations:

- The Permittee allowed the Permit to expire without submitting a timely application for permit reissuance, or failed to fully reclaim the Pit;
- The pH from the effluent from outfall 001-E, 5.8 s.u., did not meet Permit limits;
- Existing pollution control structures and implementation of management practices did not appear to be consistent with the approved Pollution Abatement/Prevention plan on file with the Department, as required by the Permit;
- An acceptable method for sub-surface withdrawal of discharges has not been implemented at outfall 001-E as required by the Permit;
- Old equipment, containers, debris, trash, garbage, etc. and other solid waste materials have not been managed as required by the Permit to prevent potential discharge of such

materials and associated pollutants into waters of the State;

- Open burning of materials has occurred onsite leaving residue behind, which could result in a significant potential for unpermitted discharges of pollutants into waters of the State.
- Spill Prevention Control and Countermeasures for onsite fuel tanks, chemical tanks, or containers have not been fully implemented and/or maintained according to Permit requirements and/or the certified SPCC plan submitted to the Department;
- Soil and material contaminated by diesel fuel and used waste oil spills have not been properly remediated resulting in the potential for uncontrolled discharges of hydrocarbons and other pollutants into waters of the State;
- The NPDES Permit number was not displayed on the Pit's facility sign.

10. The Permittee has a significant history of past enforcement. Notices of Violations (hereinafter "NOVs") were issued to the Permittee on September 5, 2007 (for failing to reapply for the Permit); September 27, 2007 (for the September 5, 2007 inspection noted above); December 14, 2007 (for failing to respond to the September 27, 2007 NOV); December 31, 2007 (for failure to submit third quarter 2007 DMRs); February 22, 2008 (for the January 31, 2008 inspection noted above); and March 31, 2008 (for failing to submit the fourth quarter 2007 DMRs). The NOVs have been unsuccessful at resolving permit violations.

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

12. 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.

#### **CONTENTIONS**

13. 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 the Permittee; the economic benefit which delayed compliance may confer upon the Permittee; the nature, extent and degree of success of the Permittee's efforts to minimize or mitigate the effects of such violations upon the environment; the Permittee's history of previous violations; and the ability of the Permittee 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 VIOLATION:** Violations consist of the Permittee failing to reapply for re-issuance of the Permit; having unpermitted discharges to a water of the state since February 1, 2008; failing to submit DMRs by the required date; and recurring violations noted during inspections conducted by the Department (see Paragraphs 8 and 9 above).

B. **THE STANDARD OF CARE:** The Permittee has been notified on numerous occasions of the need to reapply for the Permit. The Permittee also failed to respond to the September 27, 2007 NOV issued by the Department and failed to correct violations noted during compliance evaluation inspections.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department has been unable to ascertain if there has been a significant economic benefit conferred by the delay of compliance with the Permit limitations.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT:** There are no known environmental effects as a result of the violations cited in this Order.

E. **HISTORY OF PREVIOUS VIOLATIONS:** The Permittee has a history of violations and enforcement in the period prior to the two year period addressed by this Order. The Department issued NOVs on March 26, 2001 (for failing to submit DMRs); November 9, 2001 (for not monitoring properly); December 20, 2001 (for not submitting a permit application by

the required date and violations noted during an inspection conducted by the Department); February 26, 2002 (for not monitoring properly); February 18, 2003 (for failing to submit DMRs); June 24, 2003 (for incomplete DMRs); July 22, 2005 (for failure to submit DMRs); November 14, 2005 (for not monitoring properly); April 21, 2006 (for not monitoring properly); September 29, 2006 (for exceeding permit limits and not monitoring properly); and December 29, 2006 (for not monitoring properly). The Department also issued warning letters to the Permittee on August 31, 2001 (for failing to reapply for the Permit); September 16, 2002 (for not monitoring properly and exceeding permit limitations); November 27, 2002 (for effluent violations); December 23, 2003 (for not monitoring properly); March 19, 2004 (for submitting late DMRs); September 29, 2004 (for exceeding permit limitations); and February 28, 2006 (for submitting DMRs late). The prior warning letters and NOVs have been unsuccessful at resolving the ongoing permit violations.

F. THE ABILITY TO PAY: The Permittee has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: Generally, the violations fell into four broad categories of 1) failure to reapply for the Permit by the required date, 2) discharging without a permit, 3) failure to implement and maintain effective Best Management Practices, 4) failure to respond to an enforcement action issued by the Department, and 5) failure to submit DMRs by the required date, which have historically received penalty amounts of 1) \$500.00 to \$1,000.00; 2) \$250.00 to \$2,000.00; 3) \$500.00 to \$2,500.00; 4) \$1,000.00; 5) \$500.00, respectively.

### **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 (2006 Rplc. Vol.), including previous penalty amounts assessed for similar violations, 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 agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of \$76,000.00 to settle the violations alleged herein within 365 days from the effective date of this Consent Order. Failure to pay the civil penalty within 365 days from the effective date may result in the Department filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that 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 agrees to submit an Engineering Report that identifies the potential causes of noncompliance and that summarizes an investigation of the changes necessary for the Permittee to implement to achieve compliance with the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.) and ADEM Admin. Code R. 335-6-9. The Engineering Report shall be submitted so that it is received by the Department not later than 90 days after the effective date of this Order. The Engineering Report must include a schedule for implementation (i.e., a Compliance Plan). At a minimum, the Permittee's Engineering Report must address the need for changes in maintenance and operating procedures, the need for modification of existing treatment works and collection system components, and the need for new or additional treatment works and collection system components. The Engineering Report must be prepared by a professional engineer licensed to practice in the State of Alabama. If the Department determines through its review of the submitted Engineering Report that the submittal is not sufficient to accomplish compliance with the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.), ADEM Admin. Code R. 335-6-6, and ADEM Admin. Code R. 335-6-9, then the



Permittee must modify the Engineering Report so that it does accomplish compliance. The Permittee shall submit modifications to the Engineering Report, if required, so that they are received by the Department no later than 30 days after receipt of the Department's comments.

D. The Permittee agrees to complete implementation of the recommendations made in the Engineering Report within 180 days from the date of issuance of this Order.

E. The Permittee agrees that, not later than 180 days from the date of issuance of this Order, it shall submit to the Department a certification letter stating that all recommendations made in the Engineering Report required by this Order have been implemented, and that compliance with the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.), ADEM Admin. Code R. 335-6-6, and ADEM Admin. Code R. 335-6-9 has been achieved.

F. The Permittee agrees to prepare and submit to the Department a complete application for enrollment in the Department's Electronic Environmental DMR Reporting System Program (hereinafter, "E2 Program"), so that it is received by the Department not later than thirty days after the effective date of this Consent Order. If the Department determines through its review of the submitted application that the submittal is not sufficient for the Permittee to participate in the E2 Program, then the Permittee must modify the application so that it is sufficient. The Permittee shall submit modifications to the application, if required, so that they are received by the Department no later than fourteen days after receipt of the Department's comments. Upon acceptance by the Department into the E2 Program, the Permittee agrees to begin the electronic submittals of DMRs through the E2 Program no later than the 28th day of the month following the first complete monitoring period. The Permittee agrees to fully implement all aspects of the E2 Program including the cessation of federal paper DMR submittals, if applicable, no later than 180 days after acceptance into the E2 Program, unless an extension is granted in writing by the Department. The Permittee further agrees to abide by all terms, conditions, and limitations of the E2 Program immediately upon acceptance into the E2 Program.

G. The Permittee agrees that, after the effective date of this Consent Order, it will

pay stipulated civil 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 A, C, D, E, and F contained herein. The stipulated civil penalties for failure to meet each milestone outlined herein or for failure to meet any milestone date presented in the accepted Compliance Plan or any other requirement date, except for *Force Majeure* acts hereinafter defined as acts that occur beyond the Permittee's control, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1st to 30th day	\$ 100.00
31st to 60th day	\$ 200.00
After 60 days	\$ 300.00

If the Permittee fails to meet any milestone or any assigned date for a period of ninety days after any required date described in paragraphs A, C, D, E, and F, then the Department reserves the right to file a new action against the Permittee.

H. The parties agree that the cumulative stipulated penalties described in paragraphs F and H above shall under no circumstances exceed \$24,000.00. Once stipulated penalties of \$24,000.00 are due to the Department and violations continue to occur, or, should violations continue to occur 365 days after the effective date of this Consent Order, as stated in paragraph E above, then the Department shall be free to issue additional orders or to file suit against the Permittee in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Consent Order.

I. The Permittee agrees to submit to the Department payment of stipulated penalties due for failure to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by paragraphs A, C, D, E, and F contained herein. Furthermore, the Permittee agrees to submit payment of stipulated penalties 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 Permittee by the Department of the assessment of any stipulated penalty is not required.

J. 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.

K. 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.

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

M. For purposes of this Consent Order only, the Permittee 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 Permittee also agrees that 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.

N. The Department and the Permittee 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 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.

O. The Department and the Permittee 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 Permittee does hereby waive any hearing on the terms and conditions of same.

P. The Department and the Permittee agree that this Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

Q. The Department and the Permittee agree that final approval and entry into this Consent Order is subject to the requirement 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 Consent Order.

R. The Department and the Permittee agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or by 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.

S. The Department and the Permittee agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

T. The Department and the Permittee 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 Permittee of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

BAMA CONCRETE PRODUCTS COMPANY INC.  
DAVIS SAND AND GRAVEL

By: Rancho H. Davis  
Its: Mgr. & Pres.  
Date: 7-6-09

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

By: Mandy Hunt  
Its: Deputy Director  
Date: 9/2/09

# **CERTIFICATE OF SERVICE**

I, Ashlee Nichols, hereby certify that I have this date served the foregoing Administrative Order on Ronald Davis by regular United States Mail, properly addressed and postage prepaid to:

**Mr. Ronald Davis  
Davis Sand & Gravel  
Bama Concrete Products Company, Inc.  
P.O. Box 1099  
Tuscaloosa, AL 35403**

Done this 2nd day of September, 2009.

Ashlee Nichols

Name