

LANCE R. LEFLEUR
DIRECTOR



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

ROBERT J. BENTLEY
GOVERNOR

October 3, 2011

CERTIFIED MAIL

JOHN WISDA
NEW CASTLE DEVELOPMENT, INC
PO BOX 100
MADISON AL 35758

RE: Final Consent Order No 12-002-CWP
The Villages of Wheeler Phase 1
Registration ALR16ECWV
Madison County (089)

Dear Mr. Wisda:

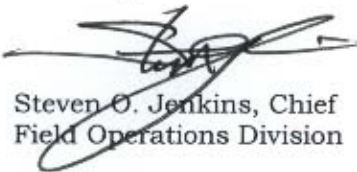
Please find the enclosed Special Order by Consent Order which requires you to take certain actions in regard to alleged violations of the Alabama Water Pollution Control Act.

The draft order was made available for public review for a period of 30 days beginning on August 17th, 2011. One public comment was received and the Department's letter replying to this comment is enclosed.

The enclosed Special Order by Consent is effective immediately. Please note that the Special Order by Consent includes a payment schedule that must be followed with the final payment due on or before August 10, 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

Enclosures: Consent Order and Response to Comments

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



ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

NEW CASTLE DEVELOPMENT, INC.
THE VILLAGES OF WHEELER PHASE 1
MADISON, T5S, R2W, S16,
MADISON COUNTY, ALABAMA
NPDES REGISTRATION NO. ALR16ECWV

ORDER 12-002-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and New Castle Development, 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 constructing a residential subdivision at the Villages of Wheeler Phase 1 (hereinafter "Facility") located in T5S, R2W, S16 between Wall Triana Hwy SW and Zierdt Road SW, near Triana, Madison County, Alabama.

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
NOI	Notice of Intent
NPDES	National Pollutant Discharge Elimination System
QCP	ADEM-recognized Qualified Credentialed Professional

5. 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 NOI in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities.

6. The Operator violated ADEM Admin. Code r. 335-6-12-.11 by operating an NPDES construction site without having submitted a complete and correct NOI to the Department.

7. The Department, during an inspection of the Facility on June 8th, 2011, documented that the Operator had not registered for and obtained NPDES coverage prior to commencing regulated disturbance activities. Therefore, the Operator violated ADEM Admin. Code r. 335-6-12-.11 by operating an NPDES construction site without having submitted a complete and correct NOI to the Department.

8. During an inspection of the Facility on June 8, 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.

9. 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").

10. During the inspection of the Facility on June 8, 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).

11. The Operator 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 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

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 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 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:** Considering the general nature of the violation, the magnitude and duration of the violation, its effects, if any on impaired waters, and any available evidence of irreparable harm to the environment or threat to the public, the Department determined the base penalty to be \$7,625.00.

B. **THE STANDARD OF CARE:** In considering this factor, the Department noted the violation of operating without a permit was a non-technical requirement and easily avoided. In

consideration of the standard of care by the owner/operator, the Department enhanced the penalty by an additional \$1,525.00.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The owner/operator has delayed certain costs associated with obtaining/maintaining a valid NPDES permit. In consideration of the economic benefit to the owner/operator, the Department enhanced the penalty by an additional \$100.00.

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 upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department has documented previous violations by the owner/operator resulting in significant formal enforcement action(s). In consideration of the history of previous violations, the Department has enhanced the penalty by an additional \$3,050.00.

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. 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 \$12,300.00 in settlement of the violations alleged herein. The \$12,300.00 civil penalty agreed to by the parties shall be paid by the Defendant to the Department in the following manner: due within thirty (30) days of the date of execution of this Consent Decree a \$2,300.00 lump sum payment, followed by ten (10) equal monthly installments of \$1,000.00: each shall be due as follows on or before November 10, 2011, December 10, 2011, January 10, 2012, February 10, 2012, March 10, 2012, April 10, 2012, May 10, 2012, June 10, 2012, July 10, 2012, August 10, 2012.

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. That as long as said payments are received when due, the Department shall take no action to collect said penalty.

D. That the failure to deliver any payment before midnight on the due date, as described in paragraph A above, when said payment is due shall constitute default by the Defendant. In such event, all remaining payments shall be accelerated and the entire outstanding balance shall immediately be due and payable in full. The Department's forbearance in enforcing the provision for acceleration of payment shall not constitute waiver of the right, nor shall the Department be estopped from subsequent exercise of the right of acceleration.

E. That in the event of default by the Defendant, the Department is free to file suit to compel compliance with this Agreement. It shall be proper for the Department to file any action to enforce the terms of this Agreement in the Circuit Court for Montgomery County, Alabama, and said court shall have exclusive jurisdiction and venue over such action. The Defendant

hereby waives any objections it may have to such jurisdiction and venue for collection of any funds due under this Agreement.

F. The Operator agrees that, within ten days of receipt of this Order, the Operator shall obtain NPDES permit coverage for this and all other regulated facilities that are owned, operated, or controlled by the Operator.

G. 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.

H. 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.

I. The Operator agrees that, after the effective date of this Consent Order, it 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 A, C and E contained herein or any other requirement date, except for *Force Majure* acts as hereinafter defined, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1 st to 30 th day	\$100
31 st to 60 th 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 A, F and H then the Department reserves the right to file a new action against the Operator.

J. The Department and the Operator (hereinafter collectively "the Parties") agree that the cumulative stipulated penalties described in Paragraph F 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 Consent Order.

K. The Operator agrees to submit payment of stipulated penalties, as described in Paragraph E, 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. 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.

M. 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.

N. 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.

O. 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.

P. 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.

Q. 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.

R. 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.

S. 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.

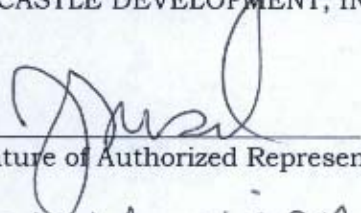
T. The Parties agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions herein shall remain in full force and effect.

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

V. 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.

NEW CASTLE DEVELOPMENT, INC.


(Signature of Authorized Representative)

JOHN S. WISDA.
(Print Name of Authorized Representative)

President
Title

Date Signed: 8/5/11

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT


Lance R. LeFleur
Director

Date Signed: 10/3/2011

New Castle Development, Inc - Villages of Wheeler Phase 1

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	\$7,625	\$1,525	\$3,050
Totals:	1	\$7,625	\$1,525	\$3,050
Economic Benefit*:				\$100.00
Mitigating Factors:				\$0
Ability to Pay*:				\$0
Other Factors*:				\$0
Final Penalty:				\$12,300.00

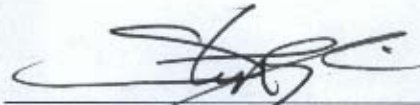
*Refer to the "Findings" of the Order for a description of each penalty factor.

ADMINISTRATIVE ORDER CERTIFICATE OF SERVICE

I, Steven O. Jenkins, do hereby certify that I have served the executed Administrative Order Number 12-002-WP upon the person listed below by sending the same, postage paid, through the United States Mail, Certified Mail Receipt # **91 7108 2133 3936 5816 4341**, with instruction to forward and return receipt, to:

**MR JOHN WISDA
NEW CASTLE DEVELOPMENT INC
P O BOX 100
MADISON AL 35758**

Done this 3rd day of October, 2011



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

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

October 3, 2011

David A. Ludder
9150 McDougal Ct.
Tallahassee, Florida 32312-4208

RE: Response to Public Comments
New Castle Development, Inc
Villages at Wheeler Phase 1
Madison County (089)

Dear Mr. Ludder:

The Alabama Department of Environmental Management (ADEM) has made a final decision to enter into a Special Order by Consent with New Castle Development, Inc, in order to resolve alleged violations of the Alabama Water Pollution Control Act and its attendant regulations. The proposed consent order was made available for public review and comment for a period of 30 days beginning on August 17, 2011 and the order was issued on October 3, 2011.

You asked for an explanation of how the economic benefit was calculated. Ala. Code §22-22A-5(18)c. provides that the Department shall give "consideration" to the economic benefit which delayed compliance may confer upon the violator in determining the penalty amount. In this case, the economic benefit was the time value of money associated with the delayed permit fee. In this regard, the Department has considered all information available to it and has concluded that the economic benefit amount of \$100 is appropriate.

After reviewing your comments on the draft Order, the Department has determined that no changes to the draft Order are necessary. Enclosed is a copy of the final Order. Procedures for appeal of this action can be found in ADEM Admin. Code Chapter 3355-2-1 which can be found on ADEM's website at www.adem.alabama.gov Please note that Ala. Code §22-22A-5 allows thirty days after the effective date of the Order for an appeal to be made.

If you have questions regarding this matter, please contact Heather Byars at (256) 353-1713.

Sincerely,

Steven O. Jenkins, Chief
Field Operations Division

SOJ/jc

Enclosure: Copy of Final Order

Cc: Heather Byars, ADEM

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)



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(251) 479-2593 (FAX)

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(251) 432-6533
(251) 432-6598 (FAX)