

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

In The Matter Of:

McCartney Construction Company, Inc.

Air Facility ID No. 309-0041

Eastaboga, Talladega County, Alabama

CONSENT ORDER NO. 03-026-CAP

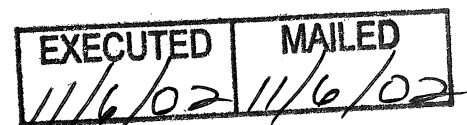
FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, §§22-22A-1 through 22-22A-16, Code of Alabama (1975), as amended, the Alabama Air Pollution Control Act, §§22-28-1 through 22-28-23, Code of Alabama (1975), as amended, and the ADEM Administrative Code of Regulations ("ADEM Admin. Code R.") promulgated pursuant thereto, and without the adjudication of any issues of fact or law and upon the consent of the parties concerned hereto, the Alabama Department of Environmental Management (hereinafter, "the Department") makes the following FINDINGS:

1. McCartney Construction Company, Inc. (hereinafter, "McCartney") operates an asphalt plant located in Eastaboga, Talladega County, Alabama under the authority of ADEM Air Permit 309-0041-X007 (issued March 22, 1994). This permit authorizes the production of asphalt, subject to certain limitations and conditions.

2. The Department is a duly constituted agency of the State of Alabama pursuant to §§22-22A-1 through 22-22A-16, Code of Alabama 1975, as amended.

3. Pursuant to § 22-22A-4(n), Code of Alabama 1975, as amended, the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 through 7671q, as amended. In addition, the Department is authorized to administer and



enforce the provisions of the Alabama Air Pollution Control Act, §§ 22-28-1 through 22-28-23, Code of Alabama 1975, as amended.

4. ADEM Admin. Code R. 335-3-3-.01 states:
No person shall ignite, cause to be ignited, permit to be ignited, or maintain any open fire not expressly excepted by regulation or permitted by the Director.
5. On September 12, 2000, Department personnel observed the open burning of materials on McCartney's property.
6. On October 18, 2000, the Department issued a warning letter to McCartney.
7. On December 2, 2000, a response to the Department's warning letter was received from McCartney committing to cease open burning.
8. On January 23, 2002, Department personnel observed evidence of open burning at McCartney. During this inspection, McCartney's representatives, agreed that open burning had occurred.
9. On March 21, 2002, the Department issued a Notice of Violation to McCartney.
10. On April 9, 2002, the Department received a response from McCartney again committing to cease open burning.
11. On August 19, 2002, during a meeting with the Department, McCartney documented that provisions to emphasize open burning prohibition had been made on January 24, 2002 at all McCartney plant sites including the display of signs prohibiting open burning, education of staff, the replacement of all metal trash cans with plastic trash cans, and stringent disciplinary action against any staff member conducting open burning.
12. McCartney neither agrees nor disagrees with the Findings presented in this Consent Order, but, in an effort to cooperate with the Department and to comply with the provisions of the Alabama Air Pollution Control Act, McCartney has consented to the terms of this Consent Order.
13. The Department has agreed to the terms of this Consent Order in order to resolve the violations cited in this Consent Order, and the Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

ORDER

Based upon the foregoing FINDINGS and pursuant to §§22-22A-5(10), 22-22A-5(12), 22-22A-5(18), 22-28-10(2) and 22-28-18, Code of Alabama (1975), as amended, and with the consent of McCartney, it is hereby ORDERED:

A. That, not later than thirty (30) days after the effective date of this Consent Order, McCartney shall pay to the Department a civil penalty in the amount of Two Thousand Dollars (\$2,000.00) for the violations cited herein.

B. That, immediately upon the effective date of this Consent Order and continuing each and every day thereafter, McCartney shall no longer open burn or allow open burning to occur at its asphalt facility located in Eastaboga, Talladega County, Alabama.

C. That, should open burning be observed at McCartney, all feasible attempts shall be made to extinguish the fire, and the event shall be reported to the Air Division by 9:00 AM of the following work day.

D. 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 on behalf of the party represented and to legally bind such party.

E. That, subject to the terms contained herein and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the alleged violations cited in this Order.

F. That McCartney is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. That, for purposes of this Consent Order only, McCartney agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in a court of competent jurisdiction, including, but not limited to, Montgomery County Circuit Court. McCartney also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, McCartney 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 McCartney, 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

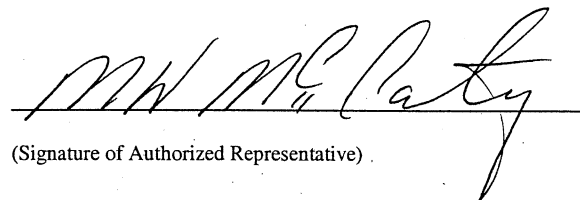
exercise of due diligence will not be considered to be beyond the reasonable control of McCartney) and which delays or prevents performances by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state or local permits shall not constitute *Force Majeure*.

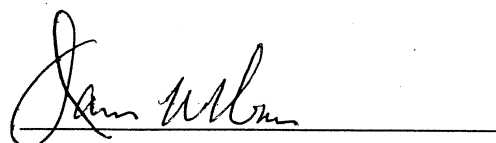
H. That the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility which would constitute possible violations not addressed in this Consent Order, then such future violations shall 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 McCartney 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.

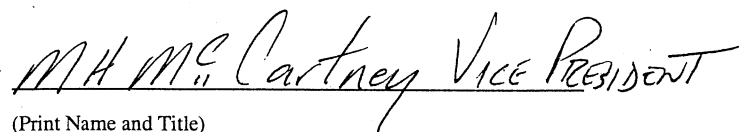
I. That, by agreement of the parties, this Consent Order shall be considered final and effective immediately upon signatures by all parties. This Consent Order shall not be appealable, and McCartney does hereby waive any hearing on the terms and conditions of same.

McCartney Construction Company, Inc.

**Alabama Department of
Environmental Management**


(Signature of Authorized Representative)


James W. Warr
Director


(Print Name and Title)

Date Signed: 10/29/02

Date Signed: 6 Nov 2002