

ADEM



ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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July 20, 2006

CERTIFIED MAIL

7005 0390 0000 9282 1952

CHAIRMAN BUFORD ROLIN

PCI GAMING OF THE CREEK INDIANS ENTERPRISES

5811 JACK SPRINGS ROAD

ATMORE ALABAMA 36502

RE: CONSENT ORDER 06-076-CMNPS

Riverside Entertainment Center

Elmore County (051)

NPDES ALR166363

US Highway 231 in Wetumpka, Alabama

Dear Chairman Rolin:

Please find enclosed the above-referenced Consent Order which requires certain actions to be taken regarding alleged violations of applicable environmental laws and regulations. This Consent Order has been issued with the consent of the Operator and the Department.

Should you have any questions concerning this matter, please contact **Gerald Martin, Construction Unit, Mining & Nonpoint Source Section**, by email at gfm@adem.state.al.us or by phone at (334) 394-4317.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Jenkins", is written over the typed name and title.

Steven O. Jenkins, Chief
Field Operations Division

soj/gfm File:ECO/25989

c: Water Management Division, EPA Region IV
Office of Public Affairs, ADEM

Enclosure: Signed Original Consent Order



ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF)

PCI GAMING OF THE CREEK INDIANS)
ENTERPRISES)

RIVERSIDE ENTERTAINMENT CENTER)

WETUMPKA, T18N, R18E, S24)

ELMORE COUNTY, ALABAMA)

NPDES ALR166363)
_____)

CONSENT ORDER 06-076-CMNPS

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and PCI Gaming of the Creek Indians Enterprises (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Code of Alabama, 1975, §§ 22-22A-1 through 22-22A-16, as amended, the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Code of Alabama, 1975, §§ 22-22-1 through 22-22-14, as amended, 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 a sovereign entity which is constructing Riverside Entertainment Center, a portion of which is located on non-reservation sovereign land of the State of Alabama which is owned by the Operator (hereinafter "Facility"). The Facility is a commercial development located on US Highway 231 at Township 18 North, Range 18 East, Section 24, in the City of Wetumpka, Elmore 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 the Coosa River, and the Coosa River, waters of the State of Alabama (hereinafter "State"), classified for Fish & Wildlife.

2. The Operator is responsible for ensuring compliance with applicable State environmental laws and regulations for regulated activities on State sovereign land and for discharges of pollutants to State waters. The Operator is responsible for ensuring compliance with applicable federal law and Environmental Protection Agency regulations for regulated activities on sovereign reservation land.

3. The Operator contracted with Reese & Howell, Inc., an Alabama corporation, to construct a crossing over an unnamed tributary to the Coosa River at the Facility.

4. The following acronyms are used in this Consent 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
NTUs	Nephelometric Units
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
PE	Professional Engineer licensed to practice in the State of Alabama
QCI	ADEM-recognized Qualified Credentialed Inspector
QCP	ADEM-recognized Qualified Credentialed Professional

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

6. Pursuant to ADEM Admin. Code R. 335-6-12-.05(2), all NPDES construction sites/activities conducted on Alabama sovereign land are required to fully implement and regularly maintain effective BMPs to the maximum extent practicable, and in accordance with the Operator's CBMPP that has been prepared by a PE or QCP.

7. Pursuant to ADEM Admin. Code Rs. 335-6-12-.05(3) and 335-6-12-.28, the Operator is required to ensure that comprehensive inspections of the Facility, offsite areas, stormwater conveyances, and associated receiving water(s) are conducted according to a prescribed schedule, after significant precipitation, and as often as needed by a QCI, QCP, or a qualified person under the direct supervision of a QCP, to ensure that effective BMPs have been properly designed, implemented, and maintained. Each day there is activity at the Facility, the Operator or other qualified person is required to observe that portion of the Facility where construction disturbance has occurred and report any apparent BMP deficiencies to the Operator or QCP.

8. On November 29, 2004, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code Ch. 335-6-12 for regulated disturbance activities and discharges of treated stormwater from the Facility. The Department granted registration ALR166363 to the Operator on December 17, 2004. Registration ALR166363 is scheduled to expire December 16, 2005.

9. During inspections of the Facility on July 1, 2005; August 5, 2005; September 21, 2005; and October 14, 2005, the Department documented that the Operator had unregistered discharged points, and had not properly implemented and

maintained effective BMPs resulting in discharges of sediment and other pollutants in stormwater runoff to an unnamed tributary to the Coosa River, and the Coosa River.

10. Pursuant to ADEM Admin. Code Rs. 335-6-12-.26(5) and 335-6-10-.09, discharges from the Facility shall not cause turbidity downstream of the Facility to exceed upstream turbidity by 50 NTUs, nor shall discharges from the Facility cause substantial visible contrast in instream turbidity.

11. Analyses of water samples collected by the Department on July 1, 2005, from an unnamed tributary to the Coosa River which receives stormwater discharges from the Facility, indicated an upstream turbidity of 6.75 NTUs and a downstream turbidity of 300 NTUs, resulting in an increase of 293.25 NTUs. In addition, stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity downstream of the Facility.

12. Analyses of water samples collected by the Department on September 21, 2005, from an unnamed tributary to the Coosa River which receives stormwater discharges from the Facility, indicated an upstream turbidity of 2.31 NTUs and a downstream turbidity of 302 NTUs, resulting in an increase of 299.69 NTUs. In addition, stormwater discharges from the Facility were causing substantial visible contrast in instream turbidity downstream of the Facility.

13. Pursuant to ADEM Admin. Code R. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite or in any State water.

14. During the July 1, 2005; August 5, 2005; September 21, 2005; and October 14, 2005, inspections by the Department, significant accumulations of sediment resulting from discharges at the Facility were observed offsite and in an unnamed tributary to the Coosa River.

15. On July 15, 2005, a NOV was sent to the Operator by the Department as a result of the July 1, 2005, inspection. The NOV notified the Operator of deficiencies documented at the Facility and requested the Operator to submit to the Department a copy of the CBMPP for the Facility within seven (7) days of receipt of the NOV. On August 5, 2005, the Operator submitted to the Department a CBMPP for the Facility.

16. The July 15, 2005, NOV requested the Operator to submit to the Department certification by a QCP that all deficiencies at the Facility had been corrected within ten (10) days of receipt of the NOV. On August 9, 2005, the Operator submitted to the Department certification that all deficiencies at the Facility had been corrected.

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

18. The Department has agreed to the terms of this Consent Order in an effort to resolve the violation(s) cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violation(s) on Alabama sovereign land. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

19. Pursuant to Code of Alabama, 1975, § 22-22A-5(18)c., in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation(s), 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 violation(s) upon the environment; such person's history of previous violation(s); and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100 or exceed \$25,000 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000. 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:** The Operator did not ensure that effective BMPs were fully implemented and maintained resulting in the discharge of sediment and pollutants to State waters that could otherwise have been prevented and/or minimized. While the noted violation(s) caused harm, the noted violation(s) did not appear to cause irreparable harm to the environment. There is no evidence that the noted violation(s) were a threat to the health or safety of the public.

B. **THE STANDARD OF CARE:** The Operator did not implement and fully maintain effective BMPs at the Facility until notified by the Department. The Operator

did not exhibit a standard of care commensurate with applicable regulatory requirements until notified by the Department.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Operator realized an economic benefit as a result of the failure to implement BMPs and the delayed response to the noted violation(s) by avoiding the costs and time it would have taken to implement the BMPs.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION(S) UPON THE ENVIRONMENT: The Operator took little or no action to minimize or mitigate the effects of the noted violation(s) upon the environment until notified by the Department.

E. HISTORY OF PREVIOUS VIOLATIONS: The Operator does not have a history of previous violation(s).

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

G. OTHER FACTORS: 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 Code of Alabama, 1975, § 22-22A-5(18)c., as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violation(s) 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 Twelve-Thousand Five-Hundred Dollars (\$12,500) in settlement of the violation(s) alleged herein within forty-five (45) days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five (45) 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, immediately upon the effective date of this Consent Order and continuing thereafter, to ensure immediate and future compliance with the AWPCA, applicable ADEM regulations, and all NPDES registration limitations, terms, and conditions for all ADEM NPDES regulated sites/facilities/activities disturbed, operated, owned, and/or controlled by the Operator or responsible officials of the Operator on

Alabama sovereign land, except as may be provided otherwise by an ADEM approved compliance schedule contained in this Consent Order.

D. The Operator agrees, immediately upon the effective date of this Consent Order and continuing thereafter, to fully implement and maintain temporary BMPs to prevent/minimize to the maximum extent practicable noncompliant and/or unpermitted discharges of pollutants to waters of the State.

E. The Operator agrees, unless relieved of this requirement in writing by the Department, that:

1. all inspections/evaluations shall be performed by a PE, a QCP, a qualified person under the direct supervision of a PE/QCP, or by a QCI;
2. BMP implementation and maintenance, and other corrective/remediation activities, shall be performed under the direct supervision of, and shall be certified by, a PE/QCP;
3. all applications, plans, and information shall be certified by a PE/QCP;
4. all submittals to the Department shall comply with applicable ADEM regulations and shall be signed by the Operator and certified by a PE/QCP; and
5. all applications, plans, reports, and other submittals to the Department shall indicate who prepared the submittal, who conducted and/or supervised the inspection/work including his or her PE, QCP, or QCI designation, how the inspection/work was conducted, and the results of the inspection/work.

The Operator agrees, within seven (7) days of the receipt of any written comments from the Department, to modify any application, plan, information, report, or other submittal, or submit additional information/clarification to the Department to address any comments made by the Department in writing.

F. The Operator agrees, within five (5) days after the effective date of this Consent Order, to have a comprehensive inspection performed of the Facility, offsite conveyances, and affected State waters.

G. The Operator agrees, within ten (10) days after the effective date of this Consent Order, to submit to the Department a CBMPP detailing effective BMPs to be implemented to prevent/minimize to the maximum extent practicable sediment and other pollutants in stormwater from leaving the Facility, and to ensure full compliance with the requirements of ADEM Admin. Code Ch. 335-6-12.

H. The Operator agrees, within ten (10) days after the effective date of this Consent Order, to submit to the Department a detailed plan for the remediation and/or removal of any sediment and other pollutants from the Facility deposited offsite and in State waters.

I. The Operator agrees, within twenty (20) days after the effective date of this Consent Order, to fully implement and maintain effective BMPs, implement all plan(s) required by this Consent Order, and correct all deficiencies at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

J. The Operator agrees, within twenty-five (25) days after the effective date of this Consent Order, to submit to the Department a certification that effective BMPs have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin. Code Ch. 335-6-12 has been achieved at the Facility, offsite conveyances, and affected State waters, including sediment removal/remediation in a manner acceptable to the Department.

K. 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.

L. 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 violation(s) which are cited in this Consent Order.

M. 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.

N. For purposes of this Consent Order only, the Operator agrees to waive any claim of sovereign immunity or tribal immunity and 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 (10) 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.

O. The Department and the Operator 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.

P. The Department and the Operator 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.

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

R. The Department and the Operator 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 (30) days within which to comment on the Consent Order.

S. The Department and the Operator 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 hereof shall remain in full force and effect.

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

U. The Department and the Operator 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.

PCI GAMING OF THE CREEK
INDIANS ENTERPRISES

Fred L. McGehee
(Signature of Authorized Representative)

Fred L. McGehee
(Print Name of Authorized Representative)

Tribal Chairman
Title

Date Signed: 3-29-06

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Onis "Trey" Glenn, III
Director

Date Signed: 7/20/06