



## ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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**JAMES W. WARR**

DIRECTOR

**BOB RILEY**

GOVERNOR

July 23, 2004

Mr. Robert A. Lewis  
Birmingham Coal & Coke Company, Inc.  
2477 Valleydale Road – Suite B3  
Birmingham, AL 35244

RE: Birmingham Coal & Coke Company, Inc. (Lehigh Mine)  
Consent Order 04-085-CMNPS

Dear Mr. Lewis:

Please find enclosed ADEM Consent Order No. 04-085-CMNPS which requires Birmingham Coal & Coke Company, Inc. to take certain actions at Lehigh Mine in regard to alleged violations of the Alabama Water Pollution Control Act. This Order has been issued with the consent of Birmingham Coal & Coke Company, Inc. and the Department. Please note that the assessed civil penalty is due within 45 days.

If you have any questions, please do not hesitate to contact me at (334) 271-7855.

Sincerely,

Olivia H. Rowell  
General Counsel

OHR/df:BirminghamCoal&CokeCOLtr

Enclosure

CC: Steve Jenkins, ADEM-Field Operations Division  
Richard Hulcher, ADEM- Field Operations Division (e-mail)  
Clifton McRoy, ADEM- Field Operations Division (e-mail)  
Dale Mapp, ADEM- Field Operations Division (e-mail)  
ADEM-Public Affairs Office  
Ken Kwan, US EPA Region IV



ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

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IN THE MATTER OF )

BIRMINGHAM COAL & COKE CO., INC. )  
LEHIGH MINE )

T13S,R1W,S30,31, and T13S,R2W,S25,36 )  
HAYDEN, BLOUNT COUNTY, ALABAMA )  
NPDES # AL0075904 )

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CONSENT ORDER NO. 04-085-CMNPS

FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, Code of Alabama (1975), §§ 22-22A-1 through 22-22A-16, as amended, and the Alabama Water Pollution Control Act (AWPCA), Code of Alabama (1975), §§ 22-22-1 through 22-22-14, as amended, the ADEM Administrative Code of Regulations (ADEM Admin. Code R.) promulgated pursuant thereto, and the National Pollutant Discharge Elimination System (NPDES) administered by the Alabama Department of Environmental Management ("the Department" or "ADEM") and approved by the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to the Federal Water Pollution Control Act (FWPCA) §402, 33 U.S.C. § 1342, as amended, and without the adjudication of any issues of fact or law and upon the consent of the parties concerned hereto, the Department makes the following FINDINGS:

1. Birmingham Coal and Coke Company, Inc., ("Permittee") is an Alabama corporation operating the Lehigh Mine ("the facility"), a surface clay mine with

incidental coal and crushed stone operations, located east of Hayden, Blount County, Alabama, T13S,R1W,S30,31, and T13S,R2W,S25,36.

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

3. Pursuant to Code of Alabama (1975), § 22-22A-4(n), as amended, the Department is the State agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the FWPCA. In addition, the Department is authorized to administer and enforce the provisions of the AWPCA.

4. Pursuant to ADEM Admin. Code R. 335-6-9-.05(1), all surface mining operations must have an NPDES permit issued by the Department that conforms with, and is issued in accordance with NPDES Rules. ADEM Admin. Code R. 335-6-9-.08 requires compliance with applicable ADEM rules prior to commencing operations.

5. Pursuant to ADEM Admin. Code R. 335-6-9-.05(2) the Pollution Abatement and/or Prevention (PAP) plan and accompanying data submitted by an applicant must be adequate to provide for protection of water quality in and adjacent to the area of operations, and the PAP plan, and any amendments or modifications to the PAP plan, become requirements of the permit.

6. The ADIR issued a permit to the Permittee on June 20, 2002, to engage in surface mining of clay.

7. The Permittee submitted to the Department an NPDES permit application on September 30, 2002.

8. On June 30, 2003, the Permittee was issued NPDES permit AL0075904 ("the permit") by the Department for discharges of treated effluent from the facility. The

permit authorizes treated discharges from the facility of effluent from thirty-one (31) permitted outfalls to the Locust Fork of the Black Warrior River, unnamed tributaries to the Locust Fork of the Black Warrior River, Kelly Creek, unnamed tributaries to Kelly Creek, Whites Creek, and unnamed tributaries to Whites Creek, all waters of the State, classified as suitable for Fish and Wildlife, subject to certain terms, limitations, and conditions.

9. The Permittee's application for NPDES permit AL0075094 indicated:

- a) that commencement of mining would be in the year 2003;
- b) that an ADIR mining permit had not been issued to the Permittee for this facility; and
- c) that this facility was a proposed operation.

10. Part II,A.,8. of NPDES permit AL0075094 requires the Permittee to submit a report, certified by a professional engineer (PE) registered in Alabama, whenever a sedimentation pond and related structures have been constructed. It also prohibits the Permittee from commencing operations and discharging from the facility until such time as the PE certification is received by the Department.

11. Discharge point 001E was certified by the PE on November 28, 2003.

12. On September 24, 2003, Department personnel conducted an inspection of the facility and documented that the Pollution Abatement and/or Prevention (PAP) plan had not been fully implemented prior to or concurrent with surface mining or other operations as required by the permit. A review of the Permittee's records and other information available to the Department indicates that the Permittee had commenced

mining and associated disturbance activities prior to obtaining valid NPDES permit coverage.

13. A Notice of Violation (NOV) was issued on November 3, 2003, to the Permittee as a result of deficiencies noted during the September 24, 2003, inspection.

14. The Permittee 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 AWPCA, the Permittee has consented to the terms of this Consent Order.

15. 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 on the foregoing FINDINGS and pursuant to Code of Alabama (1975), §§ 22-22A-5(10), 22-22A-5(12), 22-22A-5(18), and 22-22-9(i), as amended, and with the consent of the Permittee it is hereby ORDERED:

A. That, not later than forty-five (45) days after the effective date of this Consent Order, the Permittee shall pay to the Department a civil penalty in the amount of Four-Thousand Dollars (\$4,000) for the violations cited herein. In determining the penalty amount set forth herein, the Department considered the statutorily prescribed factors set forth at Code of Alabama (1975), § 22-22A-5(18)(c), as amended.

B. 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  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

C. That the Permittee shall, immediately upon the effective date of this Consent Order and continuing thereafter, ensure immediate and future compliance with the AWPCA, ADEM rules, and all NPDES permit limitations, terms, and conditions for all sites/facilities disturbed, operated, owned, and/or controlled by the Permittee or responsible corporate official(s) of the Permittee, except as may be provided otherwise by an ADEM approved compliance schedule contained in this Consent Order.

D. That, not later than seven (7) days after the effective date of this Consent Order, the Permittee shall have performed and submitted the results to the Department of a comprehensive evaluation of the facility, prepared by a PE. The purpose of this evaluation is to determine the facility's compliance status with ADEM NPDES rules and permit requirements.

E. That, not later than ten (10) days after the effective date of this Consent Order, the Permittee shall submit to the Department for review and comment a plan, including a compliance schedule, to accomplish corrective actions and/or improvements identified by the comprehensive evaluation of the facility. The plan must meet applicable requirements of the Department's NPDES rules and the permit. Within seven (7) days of receipt of any comments from the Department, the Permittee shall modify the plan to address any comments made by the Department in writing.

F. That, not later than twenty (20) days after the effective date of this Consent Order, the Permittee shall implement corrective actions and/or improvements identified by the comprehensive evaluation of the facility that do not require modification to the permit to implement corrective actions and/or improvements to ensure compliance with ADEM NPDES rules and the permit.

G. That, if a modification to the permit is determined to be necessary to implement corrective actions to ensure compliance with the NPDES rules and permit, the Permittee shall submit a complete and correct application for major modification of the NPDES permit AL0075094, including the appropriate fee, no later than twenty (20) days after the effective date of this Consent Order. The Permittee shall correct any deficiencies in the application within seven (7) days of being notified in writing by the Department.

H. That, not later than thirty (30) days after the effective date of this Consent Order, the Permittee shall submit certification by a PE that all deficiencies identified by the comprehensive evaluation have been corrected and full compliance with the requirements of the individual NPDES permit has been achieved, except for any corrective actions that must be authorized by a major modification to the NPDES permit.

I. 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.

J. 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.

K. That the Permittee is not relieved from any liability if the Permittee fails to comply with any provision of this Consent Order.

L. That, 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 a court of competent jurisdiction, including, but not limited to, Montgomery County Circuit Court. 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 are beyond the reasonable control of the Permittee, 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 the Permittee) 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*. 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) 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 specific circumstances.

M. 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 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.

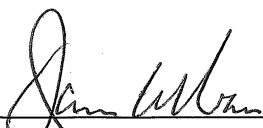
N. That, by agreement of the parties, this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

Executed in duplicate with each part being an original.

BIRMINGHAM COAL AND COKE  
COMPANY, INC.

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

  
(Signature of Authorized Representative)

  
James W. Warr  
Director

PRESIDENT  
Title

Date Signed: 4/16/04

Date Signed: 21 July 2004