

ONIS "TREY" GLENN, III
DIRECTOR



Alabama Department of Environmental Management
adem.alabama.gov

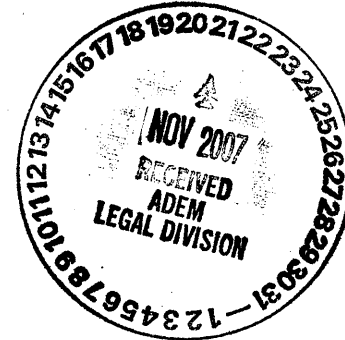
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(334) 271-7700
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BOB RILEY
GOVERNOR

November 20, 2007

CERTIFIED MAIL 7005 1820 0003 1879 4643
RETURN RECEIPT REQUESTED

MR RICHARD WHEATON
INDUSTRIAL CHEMICALS INC
1125 ROBERTS INDUSTRIAL DRIVE
BIRMINGHAM AL 35216



RE: Final Administrative Order No. 08-048-CWP
Industrial Chemicals, Inc.
1125 Roberts Industrial Drive
Birmingham, AL

Dear Mr. Wheaton:

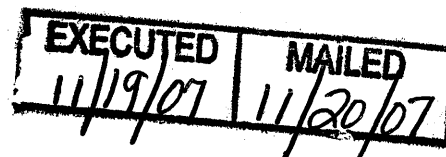
Please find enclosed Administrative Order No. 08-048-CWP which requires Industrial Chemicals, Inc. to take certain actions in regard to violations of the Alabama Water Pollution Control Act. This Consent Order has been issued with the consent of Industrial Chemicals, Inc. Please note that the assessed civil penalty is due within 45 days of the date of this letter.

If you have any questions, please contact Samantha Sims at (334) 394-4364.

Sincerely,

James E. McIndoe, Chief
Water Division

Enclosure



Copy to: Olivia Rowell - Office of General Counsel
Samantha Sims, ADEM - Water Division (e-mail)
Glenda Dean, ADEM - Water Division (e-mail)
ADEM-Public Affairs Office (e-mail)
Cesar Zapata, US EPA Region IV

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:)

Industrial Chemicals, Inc.)
1125 Roberts Industrial Drive)
Birmingham, Jefferson County, AL)

Consent Order No. : 08-048-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter “the Department”) and Industrial Chemicals, Inc. 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, 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. Industrial Chemicals operates a bulk storage facility located on 1125 Roberts Industrial Drive in the city of Birmingham, Jefferson County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to §§ 22-22A-1 to 22-22A-16, Ala. Code (2006 Rplc. Vol.).

3. Pursuant to § 22-22A-4(n), Ala. Code (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, §§ 22-22-1 to 22-22-14, Ala. Code (2006 Rplc. Vol.).

4. Ala. Code §22-22-9(i)(3) (2006 Rplc. Vol.) and ADEM Admin. Code r. 335-6-6-.03 state that no person shall discharge pollutants into waters of the state without first having obtained a valid National Pollutant Discharge Elimination System (hereinafter “NPDES”) permit or coverage under a valid General NPDES permit. Industrial Chemicals has not been required to obtain an NPDES permit because storm water from process areas has either been collected and sent offsite for treatment or collected and evaporated.

5. Industrial Chemicals violated Ala. Code §22-22-9(i)(3) (2006 Rplc. Vol.) and ADEM Admin. Code r. 335-6-6-.03 by the unpermitted discharge of Sodium Hypochlorite to Village Creek, a water of the State. The aforementioned discharge occurred at approximately 11:00 am on Friday, January 26, 2007.

6. On January 26, 2007, the Department was notified of a chemical spill (12% Sodium Hypochlorite) at Industrial Chemicals. The initial report was fifty gallons of spilled solution, of which a portion escaped into a storm drain system leading to Village Creek. On January 29, 2007, a report was received by the Department from American Environmental Ecology, Inc. stating that a fish kill had occurred as a result of the spill. The Department responded and made note of a fish kill, consisting of approximately 12,174 fish, downstream of the discharge point. The Department mobilized to the site for assessment and made note

that the fish kill in Village Creek extended approximately 200 yards downstream of the Minor Parkway Bridge. Also, at this time the Department was informed that the Sodium Hypochlorite solution lost from the facility was approximately 3,000 to 4,000 gallons. Furthermore, an Industrial Chemicals representative informed the Department that the spill resulted due to the bottom deterioration of the secondary containment system for the chemical tank. The discharge from the deteriorated section of the secondary containment system eventually drained to Village Creek via the facility's and municipality's storm drains.

7. Industrial Chemicals consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

8. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations alleged 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

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 violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by Industrial Chemicals; the economic benefit which delayed compliance may confer upon Industrial Chemicals; the nature, extent and degree of success of Industrial Chemicals' efforts to minimize or mitigate the effects of such violation upon the environment; Industrial Chemicals' history of previous violations; and the ability of Industrial Chemicals 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 be a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS: Violations consisted of a failure to provide adequate secondary containment, which resulted in an unpermitted discharge and subsequent in-stream water quality violation. The unpermitted discharge of sodium hypochlorite solution led to a fish kill of approximately 12,174 fish. Industrial Chemicals contends that the unpermitted discharge was accidental.

B. THE STANDARD OF CARE: The Department contends that Industrial Chemicals failed to maintain in good working order all systems used to prevent unpermitted discharges to a water of the state; specifically, that Industrial Chemicals did not provide adequate secondary containment for potential pollutants. Industrial Chemicals contends that the bottom deterioration of the secondary containment system was unknown.

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.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: Industrial Chemicals hired a clean-up/remediation contractor. Approximately 12,174 dead fish were collected to be speciated, measured, and counted. Mitigation measures included utilizing alum, sodium thiosulfate, bagged charcoal, and charcoal socks. Thereafter, the hole in the bottom of the secondary containment system was repaired, and a new packaging area was constructed. In its letter

dated August 13, 2007, Industrial Chemicals informed the Department that it has made significant capital improvements, personnel adjustments, and procedural changes, and performed additional training, to prevent a similar event from occurring in the future.

E. HISTORY OF PREVIOUS VIOLATIONS: Industrial Chemicals has not been operating under a permit issued by the Department; therefore, there is no knowledge of previous violations.

F. THE ABILITY TO PAY: Industrial Chemicals 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 it 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, Industrial Chemicals, 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.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations cited herein. Therefore, the Department and Industrial Chemicals agree to enter into this ORDER with the following terms and conditions:

A. Industrial Chemicals agrees to pay to the Department a civil penalty in the amount of \$24,000.00 in settlement of the violations alleged herein within forty-five days

from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five 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. Industrial Chemicals may elect to submit a plan to the Department to implement a Supplemental Environmental Project (hereinafter "SEP"). If Industrial Chemicals elects to implement this SEP, Industrial Chemicals agrees to submit to the Department for review and acceptance, no later than thirty days after the effective date of this Consent Order, unless extended in writing by the Department, a letter proposing the SEP, as well as an implementation plan and schedule not to exceed forty-five days after the effective date of this Consent Order, which must be accepted by the Department to be acceptable as a SEP which offsets the penalty assessed above. This SEP may, at the sole discretion of the Department, offset a portion of the penalty at a ratio of \$1.00 of penalty for every \$3.00 spent on the SEP, but in no event shall the penalty be offset below \$8,000.00. Adequate documentation of all such expenses shall be submitted to the Department for review and concurrence in determining the amount of the penalty offset no later than thirty days after the approved completion date of the SEP or the completion of the SEP, whichever is earlier. Should Industrial Chemicals not offset the total amount of the penalty to the extent allowed above, Industrial Chemicals agrees that the remaining amount of the penalty shall be due and payable within thirty days of the Department's notifying Industrial Chemicals of the amount of penalty due to be paid. If the SEP is not acceptable to the Department, the total amount of the penalty shall be due within thirty days of the Industrial Chemicals' receipt of the Department's notification that the SEP is not acceptable. Furthermore, in the event the SEP is not fully implemented within the timeframe accepted by the Department the total amount of

the penalty shall be due within thirty days of Industrial Chemicals' receipt of the Department's notification that the SEP is not acceptable.

C. Industrial Chemicals 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
P.O. Box 301463
Montgomery, Alabama 36130-1463

D. Industrial Chemicals agrees to prepare and submit to the Department, not later than thirty days after the effective date of this Consent Order, an Engineering Report that identifies the potential causes of noncompliance and investigates the need for changes necessary for Industrial Chemicals to achieve compliance with the terms and conditions of Ala. Code §22-22-9(i)(3) (2006 Rplc. Vol.). The Engineering Report shall include a schedule for implementation (i.e., a Compliance Plan). At a minimum, Industrial Chemicals' Engineering Report shall address the following: details of actions that have been or will be taken to ensure all contaminated material is removed from the impacted area to the extent practicable; assessment of whether further remediation is necessary to prevent adverse impacts to waters of the state, including groundwater; the need for changes in maintenance and operating procedures to prevent the re-occurrence of unpermitted discharges; the need for upgrades to secondary containment structures. The Engineering Report shall 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 submitted report is not sufficient to accomplish compliance with terms and conditions of Ala. Code §22-22-

9(i)(3) (2006 Rplc. Vol.), Industrial Chemicals shall modify the Engineering Report so that it does accomplish compliance. Modifications to the Engineering Report, if required, shall be submitted to ADEM no later than thirty days after receipt of the Department's comments. Industrial Chemicals agrees to complete implementation of the recommendations made in the Engineering Report within ninety days after the effective date of this Consent Order.

E. That for every day after the effective date of this Consent Order in which an action required by this Consent Order is not fully implemented as required by the terms of this Consent Order, Industrial Chemicals agrees to pay to the Department a stipulated penalty of \$100.00 per day for the first thirty days. Thereafter, the penalty shall increase to \$200.00 per day for the 31st through the 60th day inclusive, \$300.00 per day for the 61st through the 90th day inclusive in which violations occur. Payment of any stipulated penalty due under this Consent Order shall be due not later than forty-five days after the due date of the action and every forty-five days thereafter, if necessary. Notification to Industrial Chemicals by the Department of the assessment of any stipulated penalty is not required, and the stipulated penalty is due and payable to the Department within forty-five days after the due date of the action and each forty-five days thereafter, if necessary, regardless of whether demand for the stipulated penalty has been received by Industrial Chemicals.

F. 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.

G. 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.

H. Industrial Chemicals agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

I. For purposes of this Consent Order only, Industrial Chemicals 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. Industrial Chemicals also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Industrial Chemicals 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 Industrial Chemicals, 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 have been beyond the reasonable control of Industrial Chemicals) 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 Industrial Chemicals, 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.

J. The Department and Industrial Chemicals 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 Industrial Chemicals 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.

K. The Department and Industrial Chemicals 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 Industrial Chemicals does hereby waive any hearing on the terms and conditions of same.

L. The Department and Industrial Chemicals agree that this Consent Order shall not affect Industrial Chemicals' obligation to comply with any federal, State, or local laws or regulations.

M. The Department and Industrial Chemicals agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of

proposed Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

N. The Department and Industrial Chemicals 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.

O. The Department and Industrial Chemicals agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

P. The Department and Industrial Chemicals 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 Industrial Chemicals of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

Industrial Chemicals, Inc.

By: W. W. W. W. W.

Its: Secretary/Treasurer

Date: 9-4-07

**Alabama Department of
Environmental Management**

Onis "Trey" Glenn, III
Director

Date: 11/19/07

Subscribed and sworn to before me in my
Presence, this 4th day of September
2007, a Notary Public in and for the
County of St. Louis State of Alabama
Mary M. Green
(Signature) Notary Public
My commission expires June 10, 2011