

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:)
)
Kirkpatrick Concrete, Incorporated)
Rainsville, DeKalb County, Alabama)
Facility ID Nos. -Unpermitted)
_____)

CONSENT ORDER

No. 21- _____-CAP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” or “ADEM”) and Kirkpatrick Concrete, Inc. (hereinafter, “Facility”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-17, *as amended*, and the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 through 22-28-23, *as amended*, and the regulations promulgated pursuant thereto.

STIPULATIONS

1. The Facility is the owner and/or operator of a concrete batch plant (hereinafter, “Concrete Plant”) operating at 150 Lofton Avenue, Rainsville, DeKalb County, Alabama. The Concrete Plant is operated under the authority of ADEM Admin. Code r. 335-3-4-.01. This regulation limits particulate emissions of an opacity no greater than 20% opacity, as determined by a six minute average, or no greater than 40% opacity for a six minute period in any one sixty minute period.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§22-22A-1 through 22-22A-17, *as amended*.

3. Pursuant to Ala. Code §22-22A-4(n), *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, Ala. Code §§22-28-1 through 22-28-23, *as amended*.

4. Pursuant to ADEM Admin. Code r. 335-3-1-.07(2), in the event that any emission source, air pollution control equipment, or related facility fails or breaks down in such a manner as to cause the emission of air contaminants in violation of these rules and regulations, the person responsible for such source, equipment, or facility shall notify the Director within twenty-four (24) hours of such failure or breakdown and provide a statement giving all pertinent facts, including the estimated duration of the breakdown. The Director shall be notified when the condition causing the failure or breakdown has been corrected and such source, equipment, or facility is again in operation.

DEPARTMENT'S CONTENTIONS

5. On May 20, 2013, a complaint of excessive visible emissions was reported to the Air Division. The complainant stated that excessive emissions were observed emanating from the Concrete Plant.

6. On July 26, 2016, a complaint of excessive visible emissions was reported to the Air Division. Photographs showing excessive emissions from the Concrete Plant's storage silo were obtained and reviewed by ADEM.

7. On August 2, 2016, during a phone conversation with the Department, Mr. Michael Hunt, Plant Manager of the Concrete Plant acknowledged that he was aware of the excessive emissions at the time of the complaint.

8. On August 10, 2016, the Department issued a Warning Letter to the Facility for excessive visible emissions.

9. On August 22, 2016, the Department received a response to the Warning Letter from the Facility.

10. On July 31, 2019, a complaint of excessive visible emissions was reported to the Air Division. Video showing excessive emissions from one of the Concrete Plant's storage silos was obtained and reviewed by ADEM.

11. On August 2, 2019, during a phone conversation with the Department, Mr. Clay Boggs, Plant Operator of the Concrete Plant acknowledged that he was aware of the excessive emissions at the time of the complaint.

12. On May 28, 2020, a complaint of excessive visible emissions was reported to the Air Division. Photographs showing excessive emissions from the Concrete Plant's fly-ash silo were obtained and reviewed by ADEM. .

13. On September 11, 2020, a complaint of excessive visible emissions was reported to the Air Division. Video showing excessive emissions from the Concrete Plant's fly-ash silo was obtained and reviewed by ADEM.

14. On November 6, 2020, a complaint of excessive visible emissions was reported to the Air Division. Video showing excessive emissions from the Concrete Plant's fly-ash silo was obtained and reviewed by ADEM.

15. On November 10, 2020, during a phone conversation with the Department, Mr. Clay Boggs, Plant Operator of the Concrete Plant acknowledged that he was aware of the excessive emissions at the time of the complaint.

16. Pursuant to Ala. Code §22-22A-5(18)c., *as amended*, 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 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 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 that 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 Department considers these violations to be serious. The Department is not aware of any evidence of irreparable harm to human health or the environment due to these violations.

B. **THE STANDARD OF CARE:** By not maintaining and operating the Concrete Plant in such a manner as to comply with the Regulations, the Facility did not exhibit the requisite standard of care.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Department is not aware of any significant economic benefit as a result of the violations referenced herein.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT:** The Department is not aware of any lasting efforts made by the Facility to minimize or mitigate the effects upon the environment due to its non-compliance.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department previously issued a warning letter to the Facility on August 10, 2016, for excessive emissions.

F. THE ABILITY TO PAY: The Facility 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.

17. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code §22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement and, based upon the foregoing and attached contentions, has concluded that the civil penalty herein is appropriate (*See Attachment A, which is hereby made a part of the Department's Contentions*).

18. The Department neither admits nor denies the Facility's contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

FACILITY'S CONTENTIONS

19. The Facility neither admits nor denies the Department's contentions. The Facility consents to abide by the terms of this Consent Order and to pay the civil penalty assessed herein.

ORDER

THEREFORE, the Facility, 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., *as amended*, as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Facility agree to enter into this ORDER with the following terms and conditions:

A. The Facility agrees to pay to the Department a civil penalty in the amount of \$17,500.00 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. The Facility 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

C. 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.

D. 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.

E. The Facility agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

F. For purposes of this Consent Order only, the Facility 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 Facility also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Facility 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 Facility, 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 the Facility) 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 Facility, 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.

G. The Department and the Facility 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 Facility 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.

H. The Department and the Facility 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 Facility does hereby waive any hearing on the terms and conditions of same.

I. The Department and the Facility agree that this Order shall not affect the Facility's obligation to comply with any Federal, State, or local laws or regulations.

J. The Department and the Facility agree that final approval and entry into this 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 Order.

K. The Department and the Facility agree that, should any provision of this 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.

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

M. The Department and the Facility agree that, except as otherwise set forth herein, this 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 Facility of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

KIRKPATRICK CONCRETE, INC.

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

(Signature of Authorized Representative)

Lance R. LeFleur
Director

(Printed Name)

(Printed Title)

Date Signed: _____

Date Executed: _____

Attachment A

KIRKPATRICK CONCRETE, INC.

Rainsville, DeKalb County

Facility ID: Unpermitted

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Failure to control visible emissions from aggregate silo(s)	4	\$15,000	\$5,000	\$5,000	Total of Three Factors
<i>TOTAL PER FACTOR</i>		<i>\$15,000</i>	<i>\$5,000</i>	<i>\$5,000</i>	<i>\$25,000</i>

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (+/-)	\$7,500
Total Adjustments (+/-) <i>Enter at Right</i>	\$7,500

Economic Benefit (+)	
Amount of Initial Penalty	\$25,000
Total Adjustments (+/-)	\$7,500
FINAL PENALTY	\$17,500

Footnotes

* See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.