

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF: )  
 )  
Jimmy Whitehead, d/b/a )  
Whitehead Consulting )  
5060 Paige Hill Road )  
Elmore, Alabama 36025 )  
 )  
Demolition – Knights Inn Hotel )  
1657 Highway 31 North )  
Prattville, Autauga County, Alabama )  
 )

CONSENT ORDER NO. 16-\_\_\_-CAP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” and/or “ADEM”) and Jimmy Whitehead, d/b/a Whitehead Consulting (hereinafter, “Whitehead”) pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code, §§22-22A-1 through 22-22A-16, (2006 Rplc. Vol.), the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto.

STIPULATIONS

1. Whitehead is a project managing consultant operating from 5060 Paige Hill Road, Elmore, Alabama and was contracted by Knights Inn Hotel (hereinafter, the “Hotel”) owner Rahima Visram (hereinafter, “Visram”) to manage and oversee the demolition of the Hotel, located at 1657 Highway 31 North, Prattville, Autauga County,

Alabama. Quality Erosion Control, LLC (hereinafter, "Quality") was sub-contracted by Whitehead to perform the demolition of the Hotel.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 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 to 22-28-23 (2006 Rplc. Vol.).

4. The U.S. Environmental Protection Agency's National Emission Standard for Hazardous Air Pollutants (NESHAP), found at 40 C.F.R. Part 61, Subpart M, is incorporated by reference in ADEM Admin. Code r. 335-3-11-.02(12).

5. 40 C.F.R. § 61.141 defines Regulated asbestos-containing material (RACM) as (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

6. 40 C.F.R. § 61.145(a)(1) states that in a facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is at least 260 linear feet on pipes, at least 160 square feet on other facility components, or at least 35 cubic feet off facility components where the length or area could not be measured previously.

7. 40 C.F.R. § 61.145(b)(3)(i) requires the owner or operator of a demolition or renovation activity for a subject facility to provide written Notice of Intention to Demolish or Renovate (hereinafter, "Notice of Demolition") at least ten workdays before demolition, asbestos stripping or removal work, or any other activity which disturbs the asbestos.

8. 40 C.F.R. § 61.145(c)(1) requires the removal of all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

9. ADEM Admin. Code r. 335-3-11-.05(1) states that any person, firm, organization, or corporation who is the owner or operator of any asbestos removal project for which notification is required pursuant to the requirements of rule 335-3-11-.02(12) shall ensure that the parties executing the asbestos removal project are certified by the Department.

#### DEPARTMENT'S CONTENTIONS

10. On March 23, 2016, the Department conducted an inspection of Hotel site and noted that it was being demolished without having received the required notification of demolition, in violation of ADEM. Admin. Code r. 335-3-11-.02(12).

11. On March 28, 2016, the Department issued a Notice of Violation (NOV) to Visram.

12. On June 16, 2016, Visram responded to the NOV stating that Whitehead was contracted to be the managing consultant for the demolition project. Visram explained that Whitehead bid on the project in early March 2015 and Whitehead subcontracted Quality to perform the demolition, which began in early September 2015. Visram also

indicated that the required asbestos inspection and abatement were not performed, which is in violation of ADEM. Admin. Code r. 335-3-11-.02(12).

13. Quality is not currently certified by the Department as an Asbestos Removal Contractor. Removal or disturbance of RACM performed by a contractor not certified by the Department is a violation of ADEM Admin. Code r. 335-3-11-.05(1).

14. 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 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: Whitehead failed to submit the required notification of demolition and/or asbestos removal and the Department was not made aware if an asbestos inspection was performed at the Hotel. Additionally, the Department was not made aware if the required abatement of asbestos-containing materials was performed before demolishing the Hotel, which could have exposed workers and others nearby to elevated levels of asbestos fibers. Whitehead failed to utilize a contractor

certified by the Department for asbestos removal. The Department considers these violations to be serious.

B. THE STANDARD OF CARE: There appeared to be no care taken by Whitehead to comply with the applicable requirements of the ADEM Admin. Code R.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: Whitehead likely derived economic benefit by not properly removing asbestos containing materials before demolishing the Hotel.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: There were no efforts by Whitehead to mitigate possible effects of these violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: Whitehead has no known prior history with the Department for violating demolition/asbestos regulations.

F. THE ABILITY TO PAY: Whitehead 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 to resolve this matter amicably without incurring the unwarranted expense of litigation.

15. 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 is appropriate (*See* "Attachment A", which is hereby made a part of the Department's Contentions).

16. The Department neither admits nor denies Whitehead'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 unwarranted expenditure of State resources in 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.

WHITEHEAD'S CONTENTIONS

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

ORDER

THEREFORE, Whitehead, 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 has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and Whitehead agree to enter into this Consent Order with the following terms and conditions:

A. Whitehead agrees to pay to the Department a civil penalty in the amount of \$3,000.00 in settlement of the violations alleged herein in six monthly installment payments. The first payment of \$500.00 shall be paid in full within forty-five days from the date of issuance of this Consent Order. The remaining five installment payments of

\$500.00 shall be paid in full by the fifteenth day of each month thereafter. Failure to pay the civil penalty within the specified timeframe after the issuance of this Consent Order may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the unpaid civil penalty.

B. Whitehead 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. Whitehead agrees that he, immediately upon the effective date of this Consent Order and continuing thereafter, shall ensure immediate and future compliance with 40 C.F.R. Part 61, Subpart M as adopted in ADEM Admin. Code r. 335-3-11-.02, particularly as it applies to renovation and demolition operations.

D. 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.

E. 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 alleged violations and/or deviations which are cited in this Consent Order.

F. Whitehead agrees that it is not relieved from any liability if he fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, Whitehead 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. Whitehead also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Whitehead 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 Whitehead, including his 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 Whitehead) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increase 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 Whitehead, 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.

H. The Department and Whitehead 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 reference herein. Should additional facts and circumstances be discovered in the future concerning illegal open burning 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 Whitehead 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 addresses new matters not raised in this Consent Order.

I. The Department and Whitehead 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 Whitehead does hereby waive any hearing on the terms and conditions of the same.

J. The Department and Whitehead agree that this Order shall not affect his obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and Whitehead 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.

L. The Department and Whitehead 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.

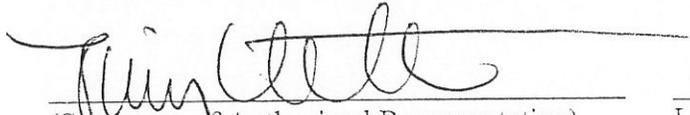
M. The Department and Whitehead agree that any modifications of this Order must be agreed to in writing signed by both parties.

N. The Department and Whitehead 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 Whitehead of his obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

JIMMY WHITEHEAD, D/B/A  
WHITEHEAD CONSULTING

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

  
\_\_\_\_\_  
(Signature of Authorized Representative)

\_\_\_\_\_  
Lance R. LeFleur  
Director

JIMMY WHITEHEAD  
\_\_\_\_\_  
(Printed Name)

PROJECT MANAGER  
\_\_\_\_\_  
(Printed Title)

9-30-16  
\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date Executed)

**ATTACHMENT A**

**Jimmy Whitehead,  
d/b/a Whitehead Consulting**

**Demolition - Knight's Inn Hotel  
1657 Highway 31 North, Prattville, Autauga County**

<b>Violation*</b>	<b>Number of Violations*</b>	<b>Seriousness of Violation*</b>	<b>Standard of Care*</b>	<b>History of Previous Violations*</b>	
Failure to comply with the Department's requirements for asbestos removal and demolition	1	\$2,500	\$1,500	\$0	
					<b>Total of Three Factors</b>
<b>TOTAL PER FACTOR</b>		<b>\$2,500</b>	<b>\$1,500</b>	<b>\$0</b>	<b>\$4,000</b>

<b>Adjustments to Amount of Initial Penalty</b>	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (-)	\$2,000
<b>Total Adjustments (-) <i>Enter at Right</i></b>	<b>\$2,000</b>

<b>Economic Benefit (+)</b>	\$1,000
<b>Amount of Initial Penalty</b>	\$5,000
<b>Total Adjustments (-)</b>	\$2,000
<b>FINAL PENALTY</b>	<b>\$3,000.00</b>

Footnotes

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