

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:)
)
THE CITY OF ANNISTON)
Anniston, Calhoun County, Alabama)
Facility ID No. 301-0075-X001)
)

CONSENT ORDER

No. - _____ -CAP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (the “Department” or “ADEM”) and the City of Anniston (the “Permittee”) 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 Permittee owns and operates an Air Curtain Incinerator (“ACI”) located at 1508 Charles A. Daugherty Drive in Anniston, Calhoun County, Alabama. The Permittee is authorized to operate the ACI pursuant to ADEM Permit No. 301-0075-X001, issued on December 9, 2002 (the “Permit”).

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. ADEM Admin. Code r. 335-3-3-.01(1) states in part that “No person shall ignite, cause to be ignited, permit to be ignited, or maintain any open fire....”

5. Permit Proviso No. 18 states, “Open burning of any material at this facility, except in the air curtain burner, is prohibited.”

DEPARTMENT'S CONTENTIONS

6. On May 10, 2021, the Department received a complaint concerning unauthorized open burning being conducted at a site located on Old Gadsden Highway in Anniston. The complainant stated that unknown items were being dumped and burned on a regular basis at the site.

7. On May 26, 2021, the Department conducted an unannounced inspection of the site. The inspector observed a pile of smoldering and smoking wood waste and noted that the City of Anniston was responsible for this action.

8. On May 26, 2021, the Permittee called the Department stating that it spoke with the inspector about the complaint and that it did not know there were restrictions on open burning. The Permittee further stated that had it known open burning was prohibited under certain circumstances, it would not have conducted unauthorized open burning.

9. On May 27, 2021, the Department received a detailed explanation for the unauthorized open burning via an email message from the Permittee. The Permittee explained that it was only using the site to open burn storm debris collected from Hurricane Zeta in October 2020 and provided photos of the open burning of the debris.

10. On May 28, 2021, the Department conducted an internal file review/consultation and discovered that the Permittee had been observed on two separate occasions open burning and was warned on each occasion. The Permittee admitted to the inspector on the second occasion that the site was used for open burning frequently.

11. On June 22, 2021, the Department issued a Notice of Violation (NOV) to the Permittee for conducting prohibited open burning at the site, in violation of the Permit and ADEM Admin. Code r. 335-3-3-.01. The NOV requested a response from the Permittee detailing why open burning of a waste pile was being conducted at an unauthorized site.

12. On July 27, 2021, the Permittee responded in writing to the NOV reiterating the explanation provided to the Department during the telephone conversation on May 26, 2021, while admitting that it was aware that conducting open burning outside of the ACI is prohibited.

13. 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. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: Open burning of waste was conducted at an unauthorized site by the Permittee. The Department considers this violation to be serious.

B. THE STANDARD OF CARE: By continuing open burning in such a manner in violation of the Permit, the Permittee did not exhibit a standard of care consistent with the requirements of the ADEM Admin. Code R.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department is not aware of any economic benefits that the Permittee received by conducting open burning in violation of the ADEM Admin. Code R.

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

E. HISTORY OF PREVIOUS VIOLATIONS:

1) The Department issued the Permittee a Notice of Violation on April 5, 2007, for the burning of unauthorized material.

2) The Department issued a Notice of Violation on April 28, 2010, for leaving the site unattended.

3) The Department issued the Permittee a Warning Letter on August 5, 2016, for leaving unauthorized burned waste inside of the ACI burn chamber, having hole in the back wall of the chamber, and having a high ash level within the chamber (> one-third distance to the top of the pit).

F. THE ABILITY TO PAY: The Permittee 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.

14. 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 and consistent with the historical penalty range imposed by the Department for similar violations (*See* Attachment A, which is made a part of Department's Contentions).

15. The Department neither admits nor denies the Permittee'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.

THE PERMITTEE'S CONTENTIONS

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

ORDER

THEREFORE, the Permittee, 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 Permittee agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of \$5,000.00 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. The Permittee 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 Permittee agrees to comply with the terms, limitations, and conditions of the Permit, every day hereafter.

D. The Permittee agrees to comply with the terms, limitations, and conditions of ADEM Admin. Code r. 335-3-3-.01(1).

E. 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.

F. 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.

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

H. 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 the Circuit Court of Montgomery County. 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 have been beyond the reasonable control of the Permittee) 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 Permittee, 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.

I. The Department and the Permittee 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 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.

J. The Department and the Permittee 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 Permittee does hereby waive any hearing on the terms and conditions of same.

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

L. The Department and the Permittee 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.

M. The Department and the Permittee 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.

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

O. The Department and the Permittee 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 Permittee of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

CITY OF ANNISTON

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT



(Signature of Authorized Representative)

Lance R. LeFleur
Director

Steven D Folks

(Printed Name)

City Manager

(Printed Title)

Date Signed: 8-25-2021

Date Executed: _____

Attachment A

**CITY OF ANNISTON
Anniston, Calhoun County
Facility ID No. 301-0075-X001**

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Open Burning	3	\$2,500	\$1,500	\$1,000	
					Total of Three Factors
TOTAL PER FACTOR		\$2,500	\$1,500	\$1,000	\$5,000

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (+/-)	
Total Adjustments (+/-) Enter at Right	

Economic Benefit (+)	
Amount of Initial Penalty	\$5,000
Total Adjustments (+/-)	\$0
FINAL PENALTY	\$5,000

Footnotes

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