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DIRECTOR



KAY IVEY  
GOVERNOR

Alabama Department of Environmental Management  
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Montgomery, Alabama 36130-1463  
(334) 271-7700 ■ FAX (334) 271-7950

August 24, 2018

CERTIFIED MAIL NO:

91 7199 9991 7034 1853 5613  
1007 1033 3013

CITY OF OPELIKA  
ATTN MAYOR FULLER  
PO BOX 390  
OPELIKA AL 36803-0390

Re: Consent Order No. 18-102-CAP

Dear Mayor Fuller:

Please find enclosed ADEM Consent Order No. 18-102-CAP which requires certain actions to be taken regarding violations of the Alabama Air Pollution Control Act. This Order has been issued with the consent of the City of Opelika and the Department. Please refer to Order Item A that requires the submittal of a monetary penalty. This penalty should be received by the Department no later than forty-five (45) days from the date of this letter.

If you have any questions concerning this matter, please contact Don Barron by email at [drb@adem.alabama.gov](mailto:drb@adem.alabama.gov) or by phone at (334) 271-7879.

Sincerely,

Ronald W. Gore, Chief  
Air Division

RWG/dwb/mcn

Enclosure

cc: Tom Johnston, Office of General Counsel

Executed: 08-24-2018

Mailed: 08-24-2018

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  
3664 Dauphin Street, Suite B  
Mobile, AL 36608  
(251) 304-1176  
(251) 304-1189 (FAX)

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:	)	
	)	
City of Opelika	)	
	)	CONSENT ORDER No. 18-102-CAP
Demolition by fire	)	
Opelika, Lee County, Alabama	)	
	)	

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 the City of Opelika (hereinafter, “Opelika”) 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.

1. City of Opelika, is the responsible party that conducted a demolition by fire on an abandoned house located at 2718 Anderson Road in Opelika, Lee County, Alabama (hereinafter, the “Site”).

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") 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. 40 C.F.R. § 61.145(c)(B)(10) requires if a facility is demolished by intentional burning, all RACM including Category I and Category II nonfriable ACM must be removed in accordance with the NESHAP before burning.

10. 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.

11. ADEM Admin. Code r. 335-3-3-.01(1)(e) states "No person shall ignite,...or maintain any open fire except as follows: Fires for training personnel in the methods of fighting fires, provided that all requirements of ADEM Admin. Code r. 335-3-11-.02(12) are met.

#### DEPARTMENT'S CONTENTIONS

12. On March 19, 2018, the Department learned through a news article that the Site had been demolished by fire without the Department having received the required notification, in violation of ADEM Admin. Code r. 335-3-11-.02(12). This is also considered to be illegal open burning, in violation of ADEM Admin. Code r. 335-3-3-.01(1)(e).

13. On March 26, 2018, the Department issued a letter of inquiry to Opelika based upon the news article.

14. On April 10, 2018, the Department received a response from Opelika. The response stated that an Opelika building inspector did a visual inspection of the property for asbestos before it was burned. This does not meet the requirements for an asbestos inspection.

15. 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: Opelika failed to submit the required notification to the Department and failed to perform, or have performed, the required certified asbestos inspection of the Site before initiating the demolition. Also, Opelika conducted prohibited open burning at the Site and the Department considers these violations to be serious.

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

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: Opelika made a showing that it was not the owner of the realty and as a result did not derive any economic benefits by illegal open burning during the demolition by fire of the Site.

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

E. HISTORY OF PREVIOUS VIOLATIONS: Opelika has no known prior history with the Department for violating demolition, asbestos, or open burning regulations.

F. THE ABILITY TO PAY: Opelika has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: 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 has concluded that a civil penalty herein is appropriate (*See* "Attachment A" which is hereby made a part of these Findings).

16. The Department neither admits nor denies Opelika'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.

#### OPELIKA'S CONTENTIONS

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

#### ORDER

THEREFORE, Opelika, 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 Opelika agree to enter into this Consent Order with the following terms and conditions:

A. Opelika agrees to pay to the Department a civil penalty in the amount of \$1,000.00 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. Opelika 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. Opelika agrees, that immediately upon receipt of this Order and continuing thereafter, to comply with 40 C.F.R. Part 61, Subpart M, as adopted by ADEM Admin. Code r. 335-3-11-.02, particularly as it applies to renovation and demolition operations, and ADEM Admin. Code rs. 335-3-3-.01(2)(b)1 and 335-3-3-.01(2)(b)4, as applied to open burning.

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

G. For purposes of this Consent Order only, Opelika 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. Opelika also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, Opelika 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 Opelika, 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 Opelika) 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 Opelika, 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 Opelika 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 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 Opelika 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 Opelika 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 Opelika does hereby waive any hearing on the terms and conditions of the same.

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

K. The Department and Opelika 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 Opelika 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.

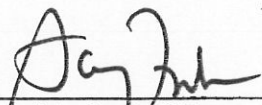
M. The Department and Opelika agree that any modifications of this Order must be agreed to in writing signed by both parties.

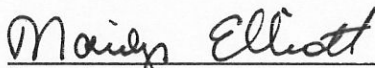
N. The Department and Opelika agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State, or local law, and shall not be construed to waive or relieve Opelika of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

CITY OF OPELIKA

ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT

  
(Signature of Authorized Representative)

  
Lance R. LeFleur  
Director

Gary Fuller  
(Printed Name)

MAYOR  
(Printed Title)

7-3-18  
(Date)

08/24/2018  
(Date Executed)

# ATTACHMENT A

## City of Opelika

### Demolition by fire Opelika, Lee County

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Failure to notify the Department and have Site inspected before demolition	1	\$250	\$250	\$0	
Illegal open burning	1	\$250	\$250		<b>Total of Three Factors</b>
<b>TOTAL PER FACTOR</b>		<b>\$500</b>	<b>\$500</b>	<b>\$0</b>	<b>\$1,000</b>

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

Economic Benefit (+)	\$500
Amount of Initial Penalty	\$1,500
Total Adjustments (+/-)	<\$500>
<b>FINAL PENALTY</b>	<b>\$1,000</b>

#### Footnotes

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