

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE ORDER**

<b>IN THE MATTER OF:</b>  <b>ENVIRONMENTAL RECLAMATION &amp; RECYCLING LLC; Polk County, Iowa.</b>	<b>CONSENT AMENDMENT TO ADMINISTRATIVE ORDER</b>  <b>NO. 2008-SW-06-A1</b>
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**TO: Joel Huston**  
**Hogan Law Office**  
**3101 Ingersoll Ave.**  
**Des Moines IA 50312**

**I. SUMMARY**

This Consent Amendment (Amendment) is intended to resolve the pending contested case arising from the issuance of Administrative Order No. 2008-SW-06 (Order) issued to Environmental Reclamation & Recycling LLC (ERR) by the Iowa Department of Natural Resources (Department) on April 7, 2008. This Amendment is intended to facilitate the removal of solid waste from the property at 6003 NE 72<sup>nd</sup> Street, Bondurant, Iowa. This Amendment sets forth a compliance schedule for the clean-up of the subject site and establishes stipulated penalties. This Amendment supersedes the Order and the provision of the Amendment replace all provisions of the Order.

Any questions regarding this Amendment should be directed to:

**Relating to technical requirements:**  
Chad Stobbe  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
515-242-5851

**Payment of penalty to:**  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

This Amendment is issued pursuant to Iowa Code section 455B.307(2) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division IV, Part 1 (solid waste), and the rules adopted

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pursuant to that part; and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) 10, which authorize the Director to assess administrative penalties.

**III. STATEMENT OF FACTS**

1. ERR is engaged in the business of recycling construction and demolition (C & D) waste. C & D waste is received by ERR at its facility in Des Moines, Iowa. Recyclable materials are removed from the waste. The recycling process generates residual materials. These residuals were originally accepted by Metro Waste Authority, the landfill agency for Polk County and portions of Dallas County, at no charge for use as alternative cover material at the landfill operated by Metro Waste Authority.

2. Subsequent to the initiation of operations by ERR, Metro Waste Authority began requiring the payment of a tipping fee for the acceptance of the residual material from ERR at the Metro Waste Authority landfill. ERR therefore began a search for alternative uses for the residual material. During this period, processed C & D material was improperly stockpiled at 6003 NE 72<sup>nd</sup> Street, Bondurant, Iowa. The Department became aware of the stockpiled material and directed that it be removed from the site. ERR was given until November 1, 2006 to remove all material from the site.

3. On October 12, 2006, ERR submitted a written request for additional time to remove the stockpiled material from the subject site and submitted a request to the Department for a beneficial use determination (BUD) to use processed C & D materials as fill at the subject site.

4. On November 7, 2006, BUD #77-SDP-59-06X was issued to ERR for the period of November 7, 2006 to November 1, 2007 and was not subject to renewal. The BUD included the following requirements:

- The existing stockpile of processed C & D material being stored at the project location be screened to an acceptable size of 1 ½ inch or less and used as beneficial fill or removed from the site by January 1, 2007.
- The majority of the fill material shall consist of soil, sand, rubble and may contain minimal amounts (less than 1 ½ inch in size) of other organic and inorganic materials normally received at the ERR C & D processing facility.
- Access onto the property shall be controlled (fencing, signage, etc.) to discourage illegal dumping of solid waste at the site by unauthorized persons.
- The screened C & D material must be mixed with clean soil in a 2:1 ratio (screened material:clean soil) before final disposition or placed in alternating layers of not more than twelve inches deep of screened material then applicable ratio of clean dirt. A daily log should be kept of the amounts of fill material and soil used at the site.

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- Adequate clean soil must be available at all times and a stockpile must be established on-site for use during inclement weather and when the ground freezes.
- Record keeping and reporting shall be followed in accordance with Iowa Administrative Code (IAC) 567 Chapter 108.7. This includes submittal of an annual Solid By-Product Management Plan pursuant to subrule 108.6(2). Analytical results, including the synthetic precipitation leaching procedure (SPLP) and RCRA Total Metals, including Thallium, of the material that is beneficially used as fill shall be submitted with the annual Solid By-Product Management Plan within 60 days of the end of each calendar year. The annual reporting requirements shall be submitted to the Department's Main Office in Des Moines, IA and Field Office #5 in Des Moines, IA.

On November 7, 2006, the Department also issued a letter to ERR in regard to the storage of processed C & D materials at the subject site. This letter provided a deadline of January 1, 2007 to use the stockpile materials pursuant to the BUD, return the material to the ERR processing facility, or properly dispose of the material. This letter further stated that the Department did not anticipate extending the BUD beyond a one year time period due to multiple concerns regarding beneficial use fill projects.

5. ERR did not remove the stockpiled processed C & D materials or use those materials pursuant to the BUD by January 1, 2007. This stockpile constitutes the illegal storage or disposal of solid waste at a location other than a permitted sanitary disposal project. On January 23, 2007, the Department sent a letter to ERR notifying ERR of the noncompliance.

6. On February 23, 2007, the Department inspected the subject site. Significant piles of noncompliant materials were observed. These piles included unscreened and partially screened ground wood containing plastic and other debris. West of these stockpiles, a stockpile measuring approximately 50 yards wide by 15 feet tall was observed to extend over the entire north to south length of the site. This stockpile contained screened or partially screened material. None of the material had been mixed with soil. Photographs were taken.

7. On February 27, 2007, ERR contacted the Department and indicated that all stockpiled material would be removed within the following few weeks.

8. On March 2, 2007, the Department issued a letter to ERR. The letter noted that the material being used as beneficial fill at the Bondurant site did not conform to the requirements of the BUD.

9. On April 20, 2007 ERR submitted a permit compliance response to the Department. With regard to the Bondurant site, ERR requested 60 days to develop a plan to address the ongoing noncompliance and promised to have all stockpiles removed by May 11, 2007.

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10. On April 24, 2007, the Department issued Notice of Intent to Rescind BUD #77-SDP-59-06X. The rescission was based upon the failure to correct continuing noncompliance with the BUD including:

- Fill material not meeting approval specifications.
- Failure to comply with the January 1, 2007 project timeframe.
- Fill material not being mixed or layered with clean soil prior to disposition.
- No clean soil stockpiled onsite to facilitate mixing or layering.
- Site access not being restricted.
- Excessive litter migrating off-site.
- Delinquent Annual Solid Waste By-Product Management Plan.
- The lack of suitability of the material being deposited in relation to the end use proposed to justify the BUD.

On this date, the Department also issued a letter approving the ERR proposed May 11, 2007 deadline for removing stockpiles, completing fencing, and addressing litter issues.

11. On May 24, 2007, ERR filed a timely Notice of Appeal of the rescission of the BUD. This Order is intended to resolve the pending contested case.

12. The BUD expired on November 1, 2007 and was not renewed.

13. As of March 24, 2008, ERR had failed to remove the unauthorized materials dumped at the Bondurant site.

14. On April, 2008, the Department issued the Order establishing compliance deadlines and stipulated penalties.

15. ERR filed a timely appeal of the Order. ERR asserts that it has not remedied the alleged violations due to financial hardship and not due to an unwillingness or lack of intent.

#### **IV. CONCLUSIONS OF LAW**

The Department and ERR agree that the following Conclusions of Law are applicable to this matter:

1. Iowa Code section 455B.304 provides that the Environmental Protection Commission (Commission) shall establish rules governing the handling and disposal of solid waste. The Commission has adopted such rules at 567 IAC Chapters 100-121.

2. Iowa Code section 455B.301(20) provides, in part, that "solid waste" means garbage, refuse, rubbish, and other similar discarded solid or semisolid materials, including

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but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities.

3. Iowa Code section 455B.307(1) and 567 IAC 100.4 prohibit dumping or depositing or permitting dumping or depositing of any solid waste at any place other than a facility permitted by the Department, unless otherwise provided by rule. The above facts disclose violations of these provisions.

4. The Commission has adopted 567 IAC Chapter 108 for the purpose of establishing rules for determining when a solid by-product is a resource and not a solid waste. Pursuant to 567 IAC 108.1, solid by-products determined by the Department not to be a solid waste through a beneficial use determination may not be subject to all sanitary disposal project permitting requirements.

5. Pursuant to 567 IAC 108.3, the following definitions are applicable to this Order :

“Beneficial use” means a specific utilization of a solid by-product as a resource, that constitutes reuse rather than disposal, does not adversely affect human health or the environment, and is approved by the Department.

“Beneficial use determination” means a written formal decision or rule issued by the Department as approval for a solid by-product to be utilized in a specific manner as a beneficial use.

“Resource” means a solid by-product that can provide greater benefit to the environment or human welfare in its beneficial use as a safe and effective substitute for a raw material, fuel or energy source, or natural resource, rather than being disposed of as solid waste in a sanitary landfill.

“Solid by-product” means a secondary material or residual, produced or created by an industrial, commercial or institutional process or activity, that has been source separated by the generating entity and that would otherwise be disposed of as solid waste. Solid by-products are composed of materials suitable for disposal as solid waste in a sanitary landfill.

6. Rule 567 IAC 108.5 establishes a procedure for application for a BUD for the use of a solid by-product when said by-product or the specific use of said by-product is not universally approved by rule pursuant to 567 IAC 108.4. Pursuant to 108.5(3), the application for BUD must provide the chemical and physical characteristics of the solid by-product under review and of each type of proposed product.

7. Rule 567 IAC 108.6(1) establishes criteria for the use of a solid by-product as fill material pursuant to a BUD. The requirements of rule 108.6(1) include the testing of the material by the synthetic precipitation leaching procedure (SPLP) to determine toxicity, metals analysis, pH limits, limits on proximity to water, and restrictions on putrescibility.

8. Rule 567 IAC 108.6(2) requires all recipients of BUDs issued pursuant to 108.5 to develop and maintain a solid by-product management plan and provides requirements for

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the contents of said plan.

9. Rule 567 IAC 108.7 establishes record keeping and reporting requirements for BUDs other than BUDs issued for alternative cover materials. Pursuant to Rule 108.7, the generator of the solid waste by-product must submit a copy of the solid by-product management plan whenever that plan is revised or within 60 days of the end of the calendar year, whichever is earlier. Generators whose solid by-products are being beneficially used as fill material shall submit to the Department within 60 days of the end of the calendar year the following information for each beneficial use project or activity: The location of the project and the tons of solid by-product utilized for the project.

**V. ORDER**

The Department orders and ERR hereby agrees to:

1. By November 1, 2008, ERR shall remove all stockpiled material from 6003 NE 72<sup>nd</sup> Street, Bondurant, Iowa and either properly dispose of said material or deliver said material to a third party for a lawful use. The stockpiled material shall not be returned to the ERR processing facility.
2. By November 15, 2008, ERR shall submit appropriate records to the Department to verify the final disposition of all removed material.
3. By December 31, 2008, ERR shall exhume all materials previously deposited by ERR at 6003 NE 72<sup>nd</sup> Street, Bondurant, Iowa and either properly dispose of said material or deliver said material to a third party for a lawful use. The material shall not be returned to the ERR processing facility.
4. By January 15, 2009, ERR shall submit appropriate records to the Department to verify the final disposition of all removed material.
5. ERR shall pay a stipulated penalty in the amount of \$1,000 for each month or part thereof in which ERR fails to comply with the deadlines contained in paragraphs #1 and #3, above. Said penalties are hereby assessed by this Order and shall become payable immediately upon the violation of the provisions of the applicable deadline.

**VI. PENALTY**

1. Iowa Code section 455B.307(3) provides for civil penalties of up to \$5,000 per day for solid waste violations.
2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a

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schedule of civil penalties up to \$10,000 that may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties at 567 IAC Chapter 10. Pursuant to this chapter, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an order with stipulated penalties. The administrative penalty assessed by this Amendment is determined as follows:

a. Economic Benefit. ERR has achieved a substantial economic benefit from its illegal conduct. Costs avoided include testing costs, disposal fees, labor, and hauling costs. For the sole purpose of facilitating the removal of the material the Department is declining to assess an immediate penalty for this factor. The stipulated penalties contained herein incorporate the economic benefit realized by ERR.

b. Gravity of the Violation. One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for the type of violation. The illegal open dumping of solid waste threatens the groundwater of the state. For the sole purpose of facilitating the removal of the material, no initial penalty shall be assessed. The stipulated penalties contained herein further incorporate the penalties justified by this factor.

c. Culpability. ERR has been has been informed of the applicable regulations and given the opportunity to achieve compliance without the necessity of an enforcement action or penalty. ERR has made repeated promises of compliance but has made only minimal efforts to fulfill those promises. ERR is engaged in the business of the recycling of C & D waste. This business necessarily generates residual materials. The proper disposition of these is a routine part of C & D recycling and ERR must maintain a viable and lawful disposition option. ERR asserts that it has been financially unable to remedy the alleged violations. For the sole purpose of facilitating the removal of the material, no initial penalty shall be assessed. The stipulated penalties contained herein further incorporate the penalties justified by this factor.

## **VII. WAIVER OF APPEAL**

Iowa Code sections 455B.138, 455B.175(1) and 455B.308 and 561 IAC 7.5(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This Amendment is entered into knowingly by and with the consent of ERR. By signature to this Amendment, all rights to appeal this Amendment or the Order are waived.

## **VIII. NONCOMPLIANCE**

Failure to comply with this Amendment may result in the imposition of administrative penalties or referral to the Attorney General to obtain appropriate relief pursuant to Iowa

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Code section 455B.307. Compliance with provisions 1 through 4 of part "V. Order" of this Amendment constitutes full satisfaction of all requirements pertaining to the violations described in Divisions III and IV of this Order. The Department reserves the right to bring enforcement action or to request that the Attorney General initiate legal action to address other violations not described in this Amendment but which may arise from the facts summarized in Division III of this Amendment.

  
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RICHARD A. LEOPOLD, DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 26 day of  
August, 2008

  
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ENVIRONMENTAL RECLAMATION & RECYCLING LLC

Dated this 18 day of  
AUGUST, 2008

Field Office #5; Jon Tack; VI.C.