

# IOWA DEPARTMENT OF NATURAL RESOURCES

## ADMINISTRATIVE ORDER

<b>IN THE MATTER OF:</b>  Jerry Wernimont 809 ½ North Carroll Street Carroll, IA 51401	<b>ADMINISTRATIVE ORDER</b>  2010-SW-08 2010-AQ-08
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### I. SUMMARY

This administrative order (order) requires Mr. Jerry Wernimont to pay an administrative penalty of \$2,000 to the order of the Iowa Department of Natural Resources. See Sections IV and V for more details.

Any questions regarding this Order should be directed to:

**Relating to technical requirements:**

Keith Wilken  
Iowa Dept. of Natural Resources, FO#4  
1401 Sunnyside Lane  
Atlantic, Iowa 50022  
Ph: 712/243-1934

**Relating to legal requirements:**

Tamara Mullen, Attorney  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: 515/281-8934

### II. JURISDICTION

This Order is issued pursuant to Iowa Code section 455B.307 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 pursuant to that part; Iowa Code sections 455B.134(9) and 455B.138(1) which authorize the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division II (air quality) and the rules promulgated or permits issued pursuant to that part; and Iowa Code section 455B.109 and Department rules in Chapter 567 Iowa Administrative Code (I.A.C.) 10 which authorize the Director to assess administrative penalties up to \$10,000.

### III. STATEMENT OF FACTS

1. On December 18, 2007, Field Office #4 (FO#4) received a complaint alleging a house was being demolished at 226 East 11<sup>th</sup> Street in Carroll, Iowa, and hauled into the country and burned at 23563 170<sup>th</sup> Street in rural Carroll County.

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2. FO#4 investigated the complaint by visiting the site on 11<sup>th</sup> Street on December 19, 2007, where a demolished structure site was observed. Also present on site was construction equipment and a truck with license plate number 988LEW, registered to Wernimont Construction, Inc.
3. On December 20, 2007, FO#4 visited 23563 170<sup>th</sup> Street, the alleged location of the open burning. FO#4 personnel walked behind the white residence located at this address and observed a large smoldering burn pile containing demolition debris. No one was present at the residence at the time of this investigation.
4. On December 26, 2007, FO#4 returned to 23563 170<sup>th</sup> Street. Mr. Wernimont was present on site at the time of this visit. The burn pile was still smoldering. The complaint and investigation were discussed with Mr. Wernimont, including the fact that the demolition at 11<sup>th</sup> Street appeared to have been performed by Wernimont Construction, Inc. Mr. Wernimont claimed that he personally owned 226 East 11<sup>th</sup> Street, and that the demolition project was undertaken in a personal capacity. He also stated that only the building's shell was hauled and burned at 170<sup>th</sup> street, with the majority of the demolition being taken to the Carroll County landfill. He stated he could verify this with deposit receipts.
5. On December 31, 2007, FO#4 staff contacted the Carroll County Assessors Office via telephone and also obtained information from its website showing that 226 East 11<sup>th</sup> Street is deeded to Kane Corp., LP on contract to Wernimont Construction, Inc. The property is classified as commercial as it has been used as a fabric store, a grocery store, and previous to demolition, a 3-Unit Apartment building.
6. On January 2, 2008, Mr. Wernimont returned FO#4's phone call from December 31, 2007. FO#4 informed Mr. Wernimont that because the 11<sup>th</sup> Street property is currently owned by Wernimont Construction, Inc. and classified as commercial it is subject to NESHAP asbestos regulations. When asked if mandatory notification and asbestos sampling had been conducted on the building prior to demolition, Mr. Wernimont stated it had not. FO#4 informed Mr. Wernimont that an asbestos abatement contractor would have to be hired to supervise the cleanup of both properties (11<sup>th</sup> Street and 170<sup>th</sup> Street). Mr. Wernimont was also encouraged to attend one of the Iowa Environmental Regulatory Workshops for the Construction and Demolition Industry. Finally, Mr. Wernimont was informed that a Notice of Violation (NOV) would be forthcoming and the matter would be referred to the Department's Legal Services Bureau for enforcement action.
7. Mr. Wernimont was sent an NOV on January 8, 2008 for violating the Department's solid waste and open burning rules, as well as failing to comply with federal NESHAPS asbestos regulations. This NOV required that all materials at both locations, including the soil, be disposed of as asbestos containing materials at the nearest sanitary landfill by February 15, 2008. Accordingly, Mr. Wernimont hired

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August Enterprises, L.L.C., to do so. Cleanup was completed, with receipts submitted to the Department for verification, by May 2008.

8. Subsequently, the Department issued Mr. Wernimont several consent orders requiring payment of a \$500 administrative penalty. Over the phone, Mr. Wernimont agreed to pay this amount, yet failed to ever sign and return a consent order. Other follow-up attempts by the Department were unsuccessful. As such, this unilateral order has been issued to resolve the unpaid penalty warranted for this violation.

#### IV. CONCLUSIONS OF LAW

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 I.A.C. 100 through 121. Iowa Code section 455B.307(1) and 567 I.A.C. 100.4 prohibit dumping or depositing or permitting the dumping or depositing of any solid waste at any place other than a facility permitted by the Department, unless otherwise specified by rule.
2. Solid waste includes "garbage, refuse, rubbish and other similar discarded solid or semisolid materials, including but not limited to such materials resulting from industrial, commercial, agricultural, and domestic activities . . ." Iowa Code 455B.301(20).
3. Rubbish is defined as "nonputrescible solid waste consisting of combustible . . . wastes, such as ashes, paper, cardboard . . . yard clippings, wood, [and] glass . . ." 567 I.A.C.100.2.
4. The above facts show Mr. Wernimont violated this provision by dumping solid waste and rubble consisting of combustible waste, including wood, roofing materials, insulation, tar paper, and other miscellaneous structural materials.
5. Iowa Code section 455B.133 provides that the Commission shall establish rules governing the quality of air and emission standards. The Commission has adopted 567 I.A.C. 20 through 34 relating to air quality.
6. Pursuant to Iowa Code section 455B.133, 567 I.A.C. 23.1(3) was established, which adopts by reference the federal regulations regarding asbestos removal. The United States Environmental Protection Agency has delegated to the State of Iowa the authority to implement and enforce the demolition and renovation portions of the asbestos NESHAP, found at 40 C.F.R. part 61, subpart M.

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7. 567 I.A.C. 23.2(1) prohibits any person from allowing, causing, or permitting the open burning of combustible materials, except as provided in 567 I.A.C. 23.2(2) (variances) and 23.2(3) (exemptions).
8. Mr. Wernimont's open burning of a demolished building does not qualify for either a variance or an exception, as pursuant to 567 I.A.C. 23.2(3)"j", the "controlled burning of a demolished building" is limited to "a city as defined in Iowa Code section 362.2(4)," which in turn states that a "city" only refers to "a municipal corporation . . ." Since "a city is the only party that may conduct such a burn," Mr. Wernimont has violated this provision. 567 I.A.C. 23.2(3)"j."
9. Additionally, pursuant to 567 I.A.C. 23.2(3)"j"(3), "[a]ll asbestos-containing materials [ACMs] shall be removed before the building to be burned is demolished." Additionally, "proof that any applicable . . . removal, and demolition occurred . . . in accordance with 40 C.F.R. section 61.145, "Standard for Demolition and Renovation," of the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAPS), as amended through January 16, 1991" must be available for Department inspection and review. Mr. Wernimont did not remove ACMs from the structure before it was demolished and burned – a clear violation of this provision.
10. Federal NESHAP asbestos regulations (contained at 40 C.F.R. part 61, subpart M) apply to all commercial structures, even if the structure is eventually used for residential purposes. See 40 C.F.R. § 61.141 ("Facility means any . . . commercial . . . structure, installation, or building . . . [as well as] any structure, installation or building that was previously subject to this subpart . . . , regardless of its current use or function"). The structure at 226 East 11<sup>th</sup> Street has previously been operated as a fabric store and a grocery store, although it had been converted into a three-unit apartment building immediately prior to Mr. Wernimont's purchase.
11. Finally, to ascertain which specific asbestos-handling regulations are applicable to the structure, in-depth testing must be performed prior to demolition. See 40 C.F.R. § 61.145(a) ("To determine which requirements . . . of this section apply to the owner . . . of a demolition activity and prior to the commencement of the demolition . . . , [the owner must] thoroughly inspect the affected facility . . . for the presence of asbestos . . .").
12. Mr. Wernimont failed to comply with these federal NESHAPS regulations.

**V. ORDER**

THEREFORE, the Department hereby orders Mr. Wernimont to:

1. Mr. Wernimont shall pay a penalty of \$2,000 to the order of the Iowa Department of Natural Resources 30 days after issuance of this Order.

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**VI. PENALTY**

1. Iowa Code section 455B.307 authorizes the assessment of civil penalties in Iowa District Court of up to \$5,000 per day of violation for solid waste violations involved in this matter. Additionally, Iowa Code 455B.146 authorizes the assessment of civil penalties up to \$10,000 per day of violation for the air quality violations involved in this matter. More serious criminal sanctions are also available pursuant to that provision.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties. See 567 I.A.C. 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 a penalty. The administrative penalty assessed by this Order is determined as follows:

**a. ECONOMIC BENEFIT:** The economic benefit for not complying with the Iowa Code and Department rules can be estimated by calculating the costs saved by avoiding labor, hauling, and tipping fee costs associated with proper disposal. However, as Mr. Wernimont has not only accumulated the costs of removing the waste (to include the soil) at both the 11<sup>th</sup> Street and 170<sup>th</sup> Street properties but also that of hiring a trained asbestos removal contractor, the Department is deferring an economic benefit penalty assessment at this time.

**b. GRAVITY:** Failure to properly deposit solid waste and properly abate ACMs degrades air and water quality, contributes contaminations to both land and water resources, threatens public health, and jeopardizes the integrity of the regulatory program. Additionally, tax dollars were expended to investigate, document, and respond to this violation. Therefore, \$1,000 is assessed for this factor.

**c. CULPABILITY:** Mr. Wernimont has a duty to be aware of all applicable regulations and abide by them. Mr. Wernimont is required to comply with these regulations by providing proper notifications, conducting appropriate asbestos testing, and demolishing and depositing of his structure in the manner proscribed in Iowa law and Department rules. His failure to do so warrants a penalty of \$1,000.

**VII. APPEAL RIGHTS**

A written Notice of Appeal may be filed with the Director within 30 days of your receipt of this Order. A contested case hearing will then be commenced pursuant to Iowa Code Chapter 17A and 561 I.A.C. 7. You may contact Tamara Mullen, attorney for the Department, at (515) 281-8934 for more information regarding appeal procedures and resolution of this Order.

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**VIII. NONCOMPLIANCE**

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code sections 455B.146 and 455B.307.

  
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RICHARD A LEOPOLD, DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 19 day of Feb., 2010

**Jerry Wernimont:** Field Office 4; Dan Stipe; Keith Wilken; VI.C; VII.C(1) and (4)